RENDERED: DECEMBER 7, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001108-MR

ROBERT M. MCMULLAN, SR. — APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE JOHN DAVID SEAY, JUDGE
ACTION NO. 10-CI-00570

FLAGET MEMORIAL HOSPITAL,
D/B/A FLAGET HEALTHCARE, INC.;
AND MICKEY ANDERSON, M.D. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: Robert M. McMullan, Sr., brings this *pro se* appeal from two summary judgments of the Nelson Circuit Court entered June 9, 2011, dismissing McMullan's medical negligence claims against Flaget Memorial Hospital, d/b/a

Flaget Healthcare, Inc., and Mickey Anderson, M.D. (collectively referred to as appellees). We affirm.

In June of 2009, McMullan sought medical services at Flaget Immediate Care Clinic and then Flaget Memorial Hospital with complaints of a recent insect bite, nausea, vomiting, diarrhea, fever, and abdominal pain. McMullan was diagnosed as suffering from a spider bite and "acute cholecystitis" (inflammation of the gallbladder). Eventually, Anderson surgically removed McMullan's gallbladder. Despite these efforts, McMullan's condition deteriorated, and he became gravely ill.

McMullan was transfered to Jewish Hospital in Louisville, Kentucky, and McMullan tested positive for a tick-borne infection – Ehrlichia Chaffeensis. McMullan received proper treatment and survived.

Eventually, McMullan filed a medical malpractice action against Flaget Immediate Care Clinic, Flaget Memorial Hospital (collectively referenced to as Flaget Healthcare) and Anderson. Therein, McMullan claimed that Flaget Healthcare and Anderson deviated from the standard of care by misdiagnosing his condition, and by failing to properly treat him. In particular, McMullan claimed that appellees failed to properly diagnosis and treat the tick-borne infection and needlessly removed McMullan's gallbladder. Also, McMullan asserted that appellees were negligent as he acquired MRSA[1] infection after surgery.

[1] MRSA is an acronym for Methicillin-Resistant Staphylococcus Aureus.

McMullan, Flaget Healthcare, and Anderson filed motions for summary judgment. Ultimately, the circuit court denied McMullan's motion for summary judgment but granted both Flaget Healthcare and Anderson's motions for summary judgments. By summary judgments entered on June 9, 2011, the circuit court dismissed all medical negligence claims against Flaget Healthcare and Anderson. This appeal follows.

We begin by noting that appellees argue this appeal should be dismissed. They contend that McMullan improperly appealed from the June 9, 2011, order denying his motion for summary judgment. Initially, it must be pointed out that McMullan is proceeding *pro se* before this Court. In his notice of appeal and brief, McMullan identifies the June 9, 2011, order denying his motion for summary judgment and argues that the circuit court erred by rendering this order. A review of the record reveals that the action below was fully adjudicated by entry of the June 9, 2011, summary judgments dismissing all medical negligence claims against appellees. As a result, McMullan's appeal of the circuit court's dismissal was proper; moreover, an appellant's failure to list the final order in the notice of appeal is not fatal if the Court is able to determine same with reasonable certainty. *See Ready v. Jamison*, 705 S.W.2d 479 (Ky. 1986). McMullan's notice of appeal was timely filed, and although he misidentified the specific order appealed from, such error is not fatal. *See id.* We, thus, proceed to the merits of this appeal.

McMullan contends that the circuit court erred by rendering summary judgments dismissing his medical negligence claims against appellees.[2] For the reasons set forth, we disagree.

Summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). And, the evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. *Id.*

To prevail upon a claim of medical negligence, a plaintiff must demonstrate the standard of care, breach of standard of care, and that such breach caused injury. *Andrew v. Begley*, 203 S.W.3d 165 (Ky. App. 2006). Generally, the negligence of a physician must be established by expert medical testimony. *Johnson v. Vaughn*, 370 S.W.2d 591 (Ky. 1963). Thus, expert medical testimony must be introduced setting forth: "(1) the standard of skill expected of a reasonably competent medical practitioner and (2) that the alleged negligence proximately caused the injury." *Andrew v. Begley*, 203 S.W.3d at 170.

Our case law has recognized two exceptions to the general rule that expert medical testimony is required to establish medical negligence. Under the first exception, it is generally accepted that expert medical testimony is not required where a layperson with general knowledge would have no difficulty

[2] Although Robert M. McMullan, Sr., argues that the circuit court erred by denying his motion for summary judgment, McMullan is proceeding *pro se*, and we interpret his argument as the circuit court erred by rendering summary judgment dismissing his medical negligence claims.

recognizing the medical negligence. *Nalley v. Banis*, 240 S.W.3d 659 (Ky. App. 2007). With this exception, the medical negligence is within the knowledge and understanding of an individual with no specialized medical training. *Andrew*, 203 S.W.3d 165. Under the second exception, medical testimony or other medical evidence "provide a sufficient foundation for *res ipsa loquitur*." *Andrew*, 203 S.W.3d at 170. Under this exception, a physician may make an admission "of a technical character from which one could infer that he or she acted negligently." *Id.* at 171.

After discovery was conducted, it is undisputed that McMullan did not offer expert medical testimony to establish the medical negligence of appellees. Instead, McMullan argues that a layperson could easily recognize the negligence of appellees and that certain documents raised an inference of negligence. Essentially, McMullan believes that his case falls within the two exceptions to the general rule requiring expert medical testimony to prove medical negligence.

The record reflects that McMullan's medical negligence claims were not the type a layperson with general knowledge could recognize as required under the first exception. McMullan claims that he was misdiagnosed as suffering from a spider bite and that his gallbladder was improperly removed. From the record, it is apparent that McMullan's medical course of treatment was complex. It is simply not within a layperson's general knowledge that a deviation from the standard of care occurred when McMullan was misdiagnosed as suffering from a spider bite when in fact he suffered from a systemic infection caused by a tick bite.

Additionally, it is not within a layperson's general knowledge that Anderson's surgical removal of McMullan's gallbladder deviated from the standard of care.

Moreover, there are no facts or other circumstances from which medical negligence and causation could be inferred under the second exception. McMullan references several documents from which he alleges medical negligence could be inferred. These documents include his medical records, Center for Disease Control material on diagnosis and treatment of tick-borne infection, and a letter from senior division counsel at the American Medical Association. However, these documents neither prove medical negligence nor raise an inference thereof.

In sum, while we certainly empathize with McMullan's medical difficulties, it was incumbent upon him to submit expert medical testimony proving appellees' medical negligence. The record reflects that McMullan had ample time and opportunity to obtain an expert medical opinion. As he failed to do so, we are compelled to conclude that the circuit court properly rendered summary judgments on all medical negligence claims advanced against appellees.

For the foregoing reasons, the summary judgments of the Nelson Circuit Court are affirmed.

ALL CONCUR.

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