

RENDERED: JULY 22, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001216-MR

RUBEN R. SALINAS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 15-CI-00187

KENTUCKY DEPARTMENT OF CORRECTIONS AND
UNIVERSITY OF KENTUCKY MEDICAL CENTER

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, COMBS AND STUMBO, JUDGES.

STUMBO, JUDGE: Ruben Salinas appeals from an order of the Franklin Circuit Court which dismissed his claims of negligence against the Kentucky Department of Corrections (hereinafter referred to as “DOC”) and the University of Kentucky Medical Center (hereinafter referred to as “UK”). We find no error and affirm.

Salinas is an inmate at the Kentucky State Penitentiary and has been for some time. During his years of incarceration, he has undergone numerous medical procedures. In 2014, Salinas asserted a claim in the Board of Claims in which he alleged UK caused him to contract hepatitis C during multiple blood transfusions and operations that took place from 1990 through 2005. He also claimed that UK continued to be involved in his subsequent treatment through the DOC. He sought damages for pain and suffering and injunctive relief from both parties for an alleged failure to properly treat his hepatitis.

After approximately 9 months of discovery, the DOC and UK moved for summary judgment. On September 29, 2014, a hearing officer with the Board of Claims issued a judgment. The hearing officer held that the case should be dismissed because Salinas was not going to present medical expert testimony. It also found that the Board of Claims cannot award damages based on pain and suffering and that it does not have the ability to order injunctive relief. This judgment was adopted by the Board of Claims and entered as a final order on November 20, 2014.

Salinas then appealed to the Franklin Circuit Court. The court dismissed the appeal because it was time barred. Pursuant to Kentucky Revised Statute (KRS) 44.140(1), Salinas had 45 days to file an appeal from the judgment of the Board of Clams. Salinas did not mail his appeal until February 13, 2015. This appeal followed.

It is the intention of the General Assembly to provide the means to enable a person negligently injured by the Commonwealth, any of its cabinets, departments, bureaus or agencies, or any of its officers, agents or employees while acting within the scope of their employment by the Commonwealth or any of its cabinets, departments, bureaus or agencies to be able to assert their just claims as herein provided. The Commonwealth thereby waives the sovereign immunity defense only in the limited situations as herein set forth. It is further the intention of the General Assembly to otherwise expressly preserve the sovereign immunity of the Commonwealth, any of its cabinets, departments, bureaus or agencies or any of its officers, agents or employees while acting in the scope of their employment by the Commonwealth or any of its cabinets, departments, bureaus or agencies in all other situations except where sovereign immunity is specifically and expressly waived as set forth by statute. The Board of Claims shall have exclusive jurisdiction to hear claims for damages, except as otherwise specifically set forth by statute, against the Commonwealth, its cabinets, departments, bureaus, agencies or any of its officers, agents or employees while acting within the scope of their employment by the Commonwealth, its cabinets, departments, bureaus or agencies. (Emphasis added).

KRS 44.072.

A Board of Claims, composed of the members of the Crime Victims Compensation Board as hereinafter provided, is created and vested with full power and authority to investigate, hear proof, and to compensate persons for damages sustained to either person or property as a proximate result of negligence on the part of the Commonwealth, any of its cabinets, departments, bureaus, or agencies, or any of its officers, agents, or employees while acting within the scope of their employment by the Commonwealth or any of its cabinets, departments, bureaus, or agencies; provided, however, regardless of any provision of law to the contrary, the Commonwealth, its cabinets, departments, bureaus, and agencies, and its officers, agents, and

employees, while acting within the scope of their employment by the Commonwealth or any of its cabinets, departments, bureaus, or agencies, shall not be liable for collateral or dependent claims which are dependent on loss to another and not the claimant, damages for mental distress or pain or suffering, and compensation shall not be allowed, awarded, or paid for said claims for damages. (Emphasis added).

KRS 44.070(1).

The trial court correctly dismissed Salinas' appeal because he did not meet the 45-day appeal time limit. *Arguendo*, even if the case was not time barred, we believe this cause of action should still be dismissed. The Board of Claims has exclusive jurisdiction to hear claims for damages against the Commonwealth and its agents. KRS 44.072. It is undisputed that the DOC and UK are agents of the Commonwealth. The Commonwealth, however, is not liable for damages for pain and suffering. KRS 44.070(1). Also, the statutes governing the Board of Claims do not give it authority to grant injunctive relief.

Furthermore, Salinas stated during the discovery phase of the Board of Claims action that he was not going to present expert medical proof. This was specifically mentioned by the hearing officer as one reason the case should be dismissed.

It is well established that in a medical malpractice case, the burden of proof is upon the plaintiff to establish the negligence of a physician by medical or expert testimony. Kentucky recognizes two exceptions to this requirement, both of which permit the inference of negligence even in the absence of expert testimony. Expert testimony is not required if any layman is competent to pass judgment and conclude from common

experience that such things do not happen if there has been proper skill and care. Regarding the second exception, if the defendant physician makes admissions of a technical character from which the jury can infer that he acted negligently, a plaintiff would not have to present expert testimony. A trial court's ruling with regard to the necessity of an expert witness [is] within the court's sound discretion. (Internal citations and quotation marks omitted).

Nalley v. Banis, 240 S.W.3d 658, 660-61 (Ky. App. 2007). Here, Salinas was not going to provide expert medical proof. He believed a layman could conclude he was a victim of medical negligence. The hearing officer and Board of Claims disagreed. We concur with the hearing officer and Board of Claims. How Salinas contracted hepatitis and whether or not he was receiving adequate treatment would require the opinion of a medical expert. Without this expert proof, Salinas could not prevail.

For the foregoing reasons, we affirm the judgment of the trial court.

CLAYTON, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS WITH SEPARATE OPINION.

COMBS, JUDGE, CONCURRING: The Franklin Circuit Court properly dismissed this appeal on the limited ground of timeliness. It did not discuss the merits of Salinas's argument – and it properly refrained from doing so.

I am concerned with our inclusion of a discussion of the issue of whether Salinas was required to present testimony from a medical expert, one of

the substantive issues upon which the hearing officer for the Board of Claims dismissed.

The Board of Claims is quite a different forum from a court. While expert medical testimony most often is required by a court trying a medical negligence claim, I hesitate to engraft such a requirement summarily upon a proceeding before the Board of Claims. Whether Salinas had contracted hepatitis before or after his medical treatment is an issue that arguably might have been established by recourse to -- and review of -- medical records. The necessity that an inmate incur the substantial cost of producing a medical expert is indeed an onerous hurdle, one that I would not impose as a matter of course in this context.

BRIEFS FOR APPELLANT:

Ruben Rios Salinas, *pro se*
Eddyville, Kentucky

**BRIEF FOR APPELLEE
KENTUCKY DEPARTMENT OF
CORRECTIONS:**

Linda M. Keeton
Frankfort, Kentucky

**BRIEF FOR APPELLEE
UNIVERSITY OF KENTUCKY
MEDICAL CENTER:**

Andrew DeSimone
Jamie Wilhite Dittert
Lexington, Kentucky