Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-176

SEPTEMBER TERM, 2018

Albert J. Gionet* v. Rutland Regional Medical Center and Dr. John Louras	}	APPEALED FROM:
	}	
	}	Superior Court, Rutland Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 180-3-18 Rdcv
		Trial Judge: Samuel Hoar, Jr.

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals the trial court's dismissal of his medical-malpractice complaint against defendants for failure to file the certificate of merit required by 12 V.S.A. § 1042. We affirm.

In May 2016, plaintiff filed a complaint against Dr. John Louras and his employer, Rutland Regional Medical Center, seeking damages for personal injury.[1] Plaintiff alleged that on March 19, 2015, Dr. Louras negligently performed surgery to repair plaintiff's abdominal hernia, causing him pain and emotional distress.

Defendants moved to dismiss plaintiff's complaint because it did not include a certificate of merit. Section 1042 of Title 12 mandates that in all medical malpractice actions for personal injury or wrongful death occurring on or after February 1, 2013, the attorney or party filing the action must "file[] a certificate of merit simultaneously with the filing of the complaint." 12 V.S.A. § 1042(a). The certificate must certify that the attorney or party filing the action has consulted with a qualified expert who, based on reasonably available information, has described the applicable standard of care and indicated that there is "a reasonable likelihood that the plaintiff will be able to show that the defendant failed to meet that standard of care," causing the plaintiff's injury. Id. § 1042(a)(2). Section 1042(e) provides that "[t]he failure to file the certificate of merit as required by this section shall be grounds for dismissal of the action without prejudice, except in the rare instances in which a court determines that expert testimony is not required to establish a case for medical malpractice." Id. § 1042(e).

[1] Plaintiff also named another doctor who allegedly provided negligent care while plaintiff was at a rehabilitation facility. That claim, like the claims against defendants, was eventually dismissed for failure to include a certificate of merit. The second doctor was not named as a defendant in this action.

The court agreed that a certificate of merit was required in plaintiff's case because expert testimony would be necessary to prove his medical malpractice claims. It therefore dismissed the action without prejudice. Plaintiff did not appeal the dismissal.

On March 16, 2018, plaintiff filed a second, nearly identical medical-malpractice complaint against defendants for the injuries he allegedly sustained from the March 2015 surgery. Plaintiff did not include a certificate of merit with his second complaint, asserting that no expert testimony was necessary to establish his claims for medical malpractice. Defendants moved to dismiss. In an April 19, 2018 decision, the trial court granted the motion to dismiss, concluding that expert testimony was necessary to prove the standard of care, breach, and causation in plaintiff's case, and therefore a certificate of merit was required to proceed. The trial court stated that the dismissal was with prejudice because the statute of limitations for plaintiff's action had run.[2]

On appeal, plaintiff argues that no certificate of merit was necessary because his claims could be proven without expert testimony. For the reasons set forth below, we reject plaintiff's argument.

The plaintiff in a medical-malpractice action has the burden of proving that the defendant's negligent conduct proximately caused the plaintiff's injuries. Senesac v. Assocs. in Obstetrics & Gynecology, 141 Vt. 310, 313 (1982). "Normally this burden is only satisfied when the plaintiff produces expert medical testimony setting forth: (1) the proper standard of medical skill and care; (2) that the defendant's conduct departed from that standard; and (3) that this conduct was the proximate cause of the harm complained of." Id. The reason for requiring expert testimony is that "the human body and its treatment are extraordinarily complex subjects requiring a level of education, training and skill not generally within our common understanding." Taylor v. Fletcher Allen Health Care, 2012 VT 86, ¶ 9, 192 Vt. 418 (quotation omitted). We have, however, recognized an exception "where the violation of the standard of medical care is so apparent to be comprehensible to the lay trier of fact." Senesac, 141 Vt. at 313 (quotation omitted).

This case does not fall within the exception to the general rule requiring expert testimony. Plaintiff alleged that Dr. Louras "did not meet the standard of care by negligence to perform a leakproof Anastomosis" and "apparently did not prevent leakage" when he performed the surgery to repair plaintiff's abdominal hernia." Plaintiff's claim involves a complicated surgical procedure, "which is not easily evaluated by a lay person." Id. (holding that expert testimony was required to prove malpractice in case where plaintiff's uterus was perforated during therapeutic abortion). Expert testimony would be necessary for a jury to understand the applicable standard of care, the risks of complication inherent in the procedure, and whether defendant's alleged negligence proximately caused his injuries. Taylor, 2012 VT 86, ¶ 13. "Although there is an understandable tendency to conclude that an undesired result following a surgical procedure necessarily implies negligent conduct, that is not the reality or the law." Id. (quotation omitted).

Because expert testimony was necessary to prove his allegations, plaintiff was required to file a certificate of merit with his complaint. 12 V.S.A. § 1042(e). He failed to do so, and his case

[2] Although plaintiff appeals the dismissal, he does not on appeal argue that the trial court erred in dismissing with prejudice as opposed to without prejudice, and we do not reach the issue.

was properly dismissed. See Quinlan v. Five-Town Health All., Inc., 2018 VT 53, ¶ 15 (affirming dismissal of medical-malpractice complaint where plaintiff failed to file certificate of merit with initial complaint); McClellan v. Haddock, 2017 VT 13, ¶ 25, 204 Vt. 252 (same).

Affirmed.

BY THE COURT:

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice