Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-311

FEBRUARY TERM, 2008

Carroll D. Noyes	}	APPEALED FROM:
	}	
	}	
v.	}	Caledonia Superior Court
	}	
	}	
Richard W. Gagnon, M.D.	}	DOCKET NO. 184-9-06 Cacv
		Trial Judge: Thomas A. Zonay

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

Plaintiff in this medical malpractice action appeals pro se from a summary judgment in favor of defendant physician. Plaintiff contends the court erred in concluding that expert medical testimony was an essential element of the claims. We affirm.

The undisputed material facts may briefly summarized. On September 22, 2003, plaintiff sought medical treatment for a lacerated left middle finger at the Northeastern Vermont Regional Hospital in St. Johnsbury. In a subsequent pro se complaint filed in September 2006, plaintiff alleged that defendant had negligently failed to "fully disclose the nature of the procedure he intended to perform to repair" the injury, negligently performed the procedure, and negligently ignored plaintiff's concerns about pain and swelling after the procedure. Plaintiff alleged that defendant's negligence led to the amputation of his finger, for which he sought damages in excess of $650,000.

Defendant moved for summary judgment, citing plaintiff's responses to interrogatories and requests to admit in which plaintiff acknowledged that he had no expert witnesses to disclose and had received no expert opinions that defendant committed malpractice, and asserting that such evidence was essential to plaintiff's malpractice claims. Plaintiff filed an opposition to the motion, arguing that lay jurors could "easily understand the medical error[s]" alleged and that expert testimony was therefore not required. The court disagreed, concluding that "[t]he alleged medical errors at issue, involving surgery on a tendon and treatment of post-operative infection, simply cannot be found to be so obvious as to be understandable to a lay person without the aid of expert testimony." The court also concluded that plaintiff's claim based on a lack of informed consent also required expert testimony, and that in the absence of such evidence the claims were insufficient as a matter of law. Accordingly, the court granted the motion and entered judgment for defendant. This appeal followed.

We note at the outset that plaintiff's brief falls well short of the minimal requirements of V.R.A.P. 28(a) even applying the relaxed standards afforded pro se litigants. The brief consists of one brief paragraph and an argument of essentially one line, to the effect that plaintiff "understand[s] the law to say if something is plain enough for a layperson to understand that I do not need an expert witness testify in my behalf." Apart from this bare assertion (which, as explained below, is accurate as far it goes), plaintiff cites no record evidence, statutes, or other authorities to support the argument or demonstrate that it applies in the circumstances here. See V.R.A.P. 28(a)(4) (appellant's brief must contain citations to authorities, statutes and parts of the record relied on). Nevertheless, considered on its merits, plaintiff's argument is unavailing.

On review of a summary judgment, we apply the same standard as the trial court and will uphold the judgment only if there are no issues of material fact and the moving party is entitled to judgment as a matter of law. O'Donnell v. Bank of Vt., 166 Vt. 221, 224 (1997). "In an action for medical malpractice, plaintiff has the burden of proving the applicable standard of care, that defendant breached that standard, and that as a proximate result plaintiff suffered injuries that would not otherwise have occurred." Jones v. Block, 171 Vt. 569, 569 (mem.); 12 V.S.A. § 1908. Ordinarily, these elements must be proved by expert testimony." Jones, 171 Vt. at 569. Claims based on a lack of informed consent—i.e., a failure to fully disclose the nature of the procedure performed, the alternatives, or the foreseeable risks and benefits—also generally require expert testimony. See Mello v. Cohen, 168 Vt. 639, 640 (1998) (mem.); 12 V.S.A. § 1909(e). The only recognized exception to this requirement is where the breach is so obvious that it may be understood by the ordinary lay person. "Except where the alleged violation of the standard of care is so apparent that it can be understood by a layperson without the aid of medical experts, the burden of proof imposed by § 1908 requires expert testimony." Provost v. Fletcher Allen Health Care, Inc., 2005 VT 115, ¶ 12, 179 Vt. 545; see also Mello, 168 Vt. at 640 (holding that diagnosis of, and alternative treatment procedures for, tongue lesions did not fall within common knowledge of lay jurors and affirming summary judgment for defendant on plaintiff's claim based on lack of informed consent).

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. The human body and its treatment are extraordinarily complex subjects requiring a level of education, training and skill not generally within our common understanding, and this case—involving the alleged wrongful surgical insertion of a stainless steel post and negligent diagnosis and treatment of post-operative infection—is no exception. Accordingly, we conclude that the trial court correctly ruled that expert evidence was required, and properly granted summary judgment based on plaintiff's admission that none was to be offered. See Mello, 168 Vt. at 639-40 (summary judgment proper in medical malpractice case where expert evidence is essential element of claim and plaintiff fails to adduce such evidence).

Skoglund, J., concurring. I agree with the result reached by the majority on the merits, but would have dismissed on the grounds that plaintiff's brief was so inadequate as to preclude appellate review. As the majority explains, plaintiff's brief lacked references to legal authority and citations to the record and his argument was essentially one sentence long. I agree that plaintiff's briefing falls short of even the relaxed Rule 28(a) standards afforded pro se litigants. However, the law is clear in this area: we do not address inadequately briefed issues. See Johnson v. Johnson, 158 Vt. 160, 164 n.* (1992) (this Court will not consider arguments that are

not adequately briefed). Plaintiff's assertion that the trial court erred in ruling for defendant is virtually " 'unaccompanied by facts, law, or reasoning, and therefore need not detain us.' " Schnabel v. Nordic Toyota, Inc., 168 Vt. 354, 362 (1998) (quoting KPC Corp. v. Book Press, Inc., 161 Vt. 145, 152 (1993)). Plaintiff had the burden "to produce a record which supports his position on the issue[] raised on appeal," Condosta v. Condosta, 142 Vt. 177, 121 (1982), and did not carry that burden. "[T]his Court will not search the record for errors inadequately briefed." Bishop v. Town of Barre, 140 Vt. 564, 579 (1982); see also Schnabel, 168 Vt. at 362. Accordingly, I would have dismissed this appeal.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice