ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-042

JULY TERM, 2009

Shawn Pontbriand	}	APPEALED FROM:
v.	}	Franklin Superior Court
Jessica Bascomb, Edward Dionne, Robert Hofmann, Dr. Miller, Prison Health Services, Inc., Heather Ripley and Jay Simon	}	DOCKET NO. S69-08 Fc

Trial Judge: A. Gregory Rainville

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

Plaintiff appeals the superior court's order granting summary judgment to defendant Prison Health Services (PHS),[1] the contracted healthcare provider for the Vermont Department of Corrections (DOC). Plaintiff contends that while he was in the care and custody of DOC, he suffered a heart attack and the PHS defendants committed medical malpractice in responding to his injury. The trial court granted defendants summary judgment because plaintiff failed to produce expert testimony to support his claim that defendants breached a standard of care and that this breach caused him injury. On appeal, plaintiff argues that the court erred in granting summary judgment because (1) his claims can be proven without expert testimony, and (2) the court was required to appoint an expert witness for him as an indigent pro-se litigant. We affirm.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." V.R.C.P. 56(c). In determining whether there is a genuine issue of material fact, the nonmoving party receives the benefit of all reasonable doubts and inferences; however, "[a]llegations to the contrary must be supported by specific facts sufficient to create a genuine issue of material fact." Samplid Enters. v. First Vt. Bank, 165 Vt. 22, 25 (1996). We view the following facts in the light most favorable to plaintiff.

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[1] Plaintiff sued PHS and its employees Dr. Mitchell Miller, Heather Ripley and Jessica Bascomb. For brevity's sake, we refer to this group collectively as the PHS defendants. Plaintiff's suit also named other defendants; those claims were dismissed separately by the trial court and are not relevant to this appeal.

During the relevant time period, plaintiff was an inmate at the Chittenden Regional Correctional Facility. On September 22, 2007, plaintiff was in the recreation yard when he experienced acute chest pain. The pain radiated across his chest and into his shoulders and arms. A correctional officer summoned two PHS employees—a nurse and nursing assistant—to assess plaintiff's situation. The nurses took plaintiff's blood pressure, which registered as 76 over 40. The employees then returned to the facility to call a physician for advice. Plaintiff was left by himself without any attending medical personnel. A PHS doctor was contacted, and he instructed the nurses to obtain emergency medical services. After emergency medical technicians arrived at the facility, they gave plaintiff some oxygen, aspirin and nitroglycerine. They then transported plaintiff to Fletcher Allen Heath Care Center. Plaintiff underwent heart surgery, and a stent was placed in his left ventricular artery.

On January 29, 2008, plaintiff filed a civil complaint, alleging that PHS employees were negligent and failed to provide him with adequate medical care. In March 2008, the PHS defendants served plaintiff with interrogatories and requests to admit, asking plaintiff to identify any expert witnesses he intended to use at trial. On May 2, 2008, plaintiff filed a response to defendants' request indicating that he intended to subpoena the attending cardiac surgeon who had treated him in the hospital.

Defendants filed a motion for summary judgment. Defendants asserted that plaintiff did not have expert testimony necessary to support a claim of medical malpractice. Defendants attached an affidavit by plaintiff's surgeon, in which the surgeon explained that if subpoenaed he would testify concerning the treatment plaintiff received, but would offer no opinion concerning PHS defendants' response to plaintiff's heart attack. Plaintiff opposed summary judgment. He asserted several facts that he claimed were in dispute about his medical diagnosis and treatment, but did not offer any expert affidavits or testimony to support his claims. On January 14, 2009, the court granted defendants' motion for summary judgment, explaining that plaintiff had failed to produce any expert medical opinion favorable to his position and therefore there were no material facts in dispute regarding medical damages and causation.

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:

> (1) The degree of knowledge or skill possessed or the degree of care ordinarily exercised by a reasonably skillful, careful, and prudent health care professional engaged in a similar practice under the same or similar circumstances whether or not within the state of Vermont.
>
> (2) That the defendant either lacked this degree of knowledge or skill or failed to exercise this degree of care; and
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> (3) That as a proximate result of this lack of knowledge or skill or the failure to exercise this degree of care the plaintiff suffered injuries that would not otherwise have been incurred.

12 V.S.A. § 1908. "Ordinarily, these elements must be proved by expert testimony." Jones v. Block, 171 Vt. 569, 569 (2000) (mem.). 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 (mem.).

We disagree with plaintiff's assertion that his claims in this case are so apparent that they could be understood without the aid of medical expert testimony. Plaintiff's complaint alleges that the PHS defendants acted negligently. Specifically, plaintiff's case would require proof of the proper standard of care and proof of the nature of the breach. Such evidence would have had to include what caused damage to plaintiff's heart, when the damage was caused, and whether such damage could have been avoided by more prompt medical attention. These are complex subjects requiring a level of education, training and skill not generally within a lay person's common understanding, and they require the aid of an expert to understand. See Larson v. Candlish, 144 Vt. 499, 502 (1984). Accordingly, we conclude that the trial court correctly ruled that expert evidence was required, and properly granted summary judgment based on plaintiff's failure to produce any. See Mello v. Cohen, 168 Vt. 639, 639-40 (1998) (mem.) (summary judgment proper in medical malpractice case where expert evidence is essential element of claim and plaintiff fails to adduce such evidence).

Plaintiff next argues that if expert testimony was required, the court erred in failing to grant his request for appointment of an expert witness at the court's expense. On June 2, 2008, plaintiff filed a motion for approval of fees and expert witness services under 13 V.S.A. § 5231 and Vermont Rule of Evidence 706. The trial court denied the requests.

On appeal, plaintiff claims that the only reason his complaint was dismissed was that he lacked the resources to hire an expert and that the trial court erred in denying his request for a court-appointed expert under Rule 706(a). We find no error. Rule 706 explains that the court "may enter an order to show cause why expert witnesses should not be appointed." V.R.E. 706(a) (emphasis added). Under the plain language of the Rule, the court's power to appoint an expert is entirely discretionary. While plaintiff may have desired an expert, the court was not obligated to appoint one for him and plaintiff cited no basis for appointment aside from his indigency. Mere inability to hire an expert is not grounds to appoint an expert under the rule. In context, the rule contemplates a court appointed expert for the benefit of the court or jury, rather than for the particular benefit of a party. V.R.E. 706(a)-(d). The court did not abuse its discretion in denying plaintiff's request in this case. See Follo v. Florindo, 2009 VT 11, ¶ 19, __ Vt. __ 970 A.2d 1230 ("We will not disturb a discretionary ruling unless it is shown that such discretion was abused or entirely withheld." (quotation omitted)).

Finally, we find no merit to plaintiff's argument that the court failed to properly apply Vermont Rule of Civil Procedure 26(f) by granting summary judgment before discovery was completed. Essentially, plaintiff contends that the court should have held a conference on discovery before granting defendants summary judgment. See V.R.C.P. 26(f) ("At any time after commencement of an action the court may direct the attorneys for the parties to appear before it

for a conference on the subject of discovery."). A year had lapsed between the time that plaintiff filed his suit and the time the superior court granted summary judgment. Given the ample time that plaintiff had to conduct discovery, the lack of any expert testimony to support plaintiff's claims, and the absence of any ongoing discovery request that might have supported plaintiff's claims, the court did not abuse its discretion in choosing not to hold a conference on discovery before granting defendants summary judgment. See Poplaski v. Lamphere, 152 Vt. 251, 255 (1989) (trial court has discretion to limit time for discovery before granting summary judgment).

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Brian L. Burgess, Associate Justice