IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

TERRANCE D. McCLENDON — **PLAINTIFF**

VERSUS — **NO. A 2401-09-028**

MEMORIAL HOSPITAL AT GULFPORT, D. BIANCA HARBISON, MD, AND JOHN AND JANE DOES — **DEFENDANTS**

ORDER

CAME ON BEFORE THE COURT on May 12, 2011, a Second Motion for Summary Judgment filed by Defendant, Memorial Hospital at Gulfport (MHG), and the Court heard the arguments of counsel and considered the law and the premises and finds that the motion should be granted in part and denied in part.

On November 9, 2007, Terrence McClendon was seen in the emergency room of Memorial Hospital. He was diagnosed as psychotic with delusions, suicidal ideation and paranoia. McClendon was assessed and then transported to the MHG's behavioral unit. McClendon escaped the facility, ran into Highway 49 and was severely injured when he was hit by a tractor-trailer. Following appropriate notice, the initial complaint was filed in January 23, 2009 alleging that MHG and the John and Jane Doe defendants "were negligence" by failing to exercise reasonable care, skill and diligence in attending McClendon; by failing to conform with the applicable standard of care with regard to medications; by failing to properly monitor McClendon; by failing to provide proper care and treatment; and by failing to contain McClendon by chemical or physical means. The complaint also alleged that MHG failed "to have and/or implement appropriate elopement precautions." [1] In October 2010 Plaintiff received

[1]This complaint was not served on MHG and on March 27, 2009, a First Amended Complaint was filed which added D. Bianca Harbison, M.D. as a defendant. The First Amended Complaint contains the exact same allegations. Dr. Harbison was dismissed from the lawsuit in August 2009.

permission to file a Second Amended Complaint which added the door lock manufacturer as a defendant. The second amended complaint added additional language alleging that MHG failed to use reasonable care in the maintenance of the electromagnetic lock on the door and/or failed to use reasonable care to ensure the lock was securely and properly engaged. All other allegations against MHG were unchanged.

MHG's Second Motion for Summary Judgment seeks summary judgment on two grounds. First, MHG argues that plaintiff's failure to respond to the discovery requests and identify expert witnesses who will testify as to a breach of the standard of care entitles MHG to a summary judgment. Second, MHG argues that plaintiff's Second Amended Complaint which "adds additional claims against the hospital" for failure to "use reasonable care in the maintenance of the electromagnetic lock" on the hospital's door does not relate back and is barred by the applicable statute of limitations. In support of its motion MHG provided the Amended Complaint, the Second Amended Complaint, the First and Second Notice of Claim and Plaintiff's Responses to MHG's Interrogatories. No scheduling order has been entered, the matter is not set for trial and there has been no motion to compel discovery filed by the defendant, MHG. McClendon did not file expert affidavits or other expert testimony in response to the motion for summary judgment.

Expert Testimony Requirement

MHG seeks summary judgment as to any medical malpractice claim made because of McClendon's failure to produce medical expert testimony to support his claims of malpractice. Pursuant to Rule 56 of the **Mississippi Rules of Civil Procedure**, summary judgment is available to a party when the movant can establish to the satisfaction of the Court that there is no

genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Plaintiff must rebut the defendant's claim that no genuine issue of material fact exists by producing supportive evidence of significant and probative value which is sufficient to create issues of material fact. ***Palmer v. Biloxi Regional Medical Center***, 564 So.2d 1346, 1355 (Miss. 1990). In the context of a medical malpractice case this requires proof of (1) the existence of a duty by the defendant to conform to a specific standard of conduct for the protection of others against an unreasonable risk of injury; (2) a failure to conform to the required standard; and (3) an injury to the plaintiff proximately caused by the breach of such duty by the defendant. According to our supreme court, "where the matter at issue is not within the scope of a layperson's common knowledge[,] negligence can be proven in a medical malpractice action only where the plaintiff presents medical testimony establishing that the defendant physician failed to use ordinary skill and care." ***McMichael v. Howell***, 919 So.2d 18, 24(¶ 15) (Miss.2005) (quoting ***Powell v. Methodist Health Care-Jackson Hosps.***, 876 So.2d 347, 348(¶ 4) (Miss.2004)). If a plaintiff fails to produce expert medical testimony to support his medical malpractice claim, it is proper for the circuit court to grant summary judgment. *Id.* at (¶ 16).

MHG argues Plaintiff's failure to respond to the motion for summary judgment with an expert affidavit is fatal to any medical malpractice claim alleged by McClendon. Plaintiff argues that because the defendant did not present any evidence, *i.e.* expert affidavits, demonstrating the absence of a breach of the standard of care, he was not required to submit an affidavit from a qualified expert in response to the motion. Plaintiff also argues that MHG's motion is premature since no Motion to Compel has been filed and no deadline for designation has passed. MHG propounded discovery regarding McClendon's experts and their expected testimony. On

December 4, 2009, McClendon responded to those interrogatories and stated, "Discovery in this matter has just been commenced and it is likely that this answer will be supplemented as discovery progresses." MHG's second motion for summary judgment was filed on or about March 10, 2011. The motion came on for hearing on May 12, 2011. To date McClendon has not designated an expert who will testify as to any violation of any standard of care.

McClendon bears the burden of proving his claim and cannot simply rely on his pleadings when responding to a motion for summary judgment. **MRCP** 56(d). Our case law is clear that in medical malpractice cases, "negligence cannot be established without medical testimony that the defendant failed to use ordinary skill and care." ***Neely v. North Mississippi Medical Center, Inc.*** 996 So.2d 726 (Miss. Ct. App. 2008). The "failure to produce this evidence dictates that there is no genuine issue of material fact and therefore, summary judgment [is] appropriate." Id. ¶13. The holding in ***Neely*** is factually similar to McClendon's case[2] and its holding is in accord with ***Kuiper v. Tarnabine***, 20 So.3.d 658, ¶13. As the Court held in ***Kuiper***, when the plaintiffs "failed to provide any evidence, expert or otherwise, in response to the defendants' motion for summary judgment, it was error for the court to deny it." Here McClendon has produced evidence in response to the motion for summary judgment as to the negligence/premises liability claim, but has failed to produce any evidence to support a medical malpractice claim against MHG.

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[2]James Neely was hospitalized for treatment of a left testicle mass. He had a history of seizure disorder and alcohol and tobacco abuse, conditions known to the medical facility. Neely was found with a fatal head injury, outdoors, in close proximity to an emergency exit stairwell. It was assumed that Neely left his room (not for the first time) and climbed to the hospital's roof before falling to his death. The trial court held that, without the testimony of an expert witnes, there was no issue of material fact as to medical negligence.

This is not an issue of violating a scheduling order, or failing to designate an expert 60 days prior to trial or a discovery issue requiring a motion to compel prior to the imposition of sanctions. Medical malpractice actions require a specific type of proof. A party who intends to pursue such a claim cannot be dilatory in producing an expert. Faced with a motion for summary judgment McClendon had the burden of submitting evidence to support his allegations of medical malpractice. He failed to do so and summary judgment as to the medical malpractice claim is granted.

No Statute of Limitations Bar

Defendant relies on ***Russell v. Ford Motor Company***, 960 So.2d 495 (Miss. App. 2007) to support its position that the door lock claims constitute a new cause of action which does not relate back to the filing of the original complaint. Here, unlike in ***Russell***, one of plaintiff's claims has always been that MHG failed in its duties to insure that McClendon could not leave the hospital, i.e. that they used reasonable care to insure that the premises was reasonable safe for McClendon. Those duties encompass both the duty to conform to the standard of care for a medical provider in such circumstances, as well as a duty to exercise reasonable care to prevent McClendon from escaping from the facility. No new claim was alleged in the second amended complaint, although additional factual allegations were added. "An amendment of a . . . complaint which sets up no new cause of action or claim and makes no new demand relates back to the commencement of the action. . ." *See* ***McKesson & Robbins, Inc. v. Coker***, 77 So.2d 302 (Miss. 1955). The claim for negligence and/or premises liability against MHG met the standard for notice pleading in the first complaint served on MHG. *See* Rule 8 **Ms. R. Civ. Pro.** The amended complaint adds no new cause of action and the claim for premises liability against MHG is not barred by the statute of limitations. It is therefore,

ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment is granted as to the allegations of medical malpractice against Memorial Hospital at Gulfport. It is further,

ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment as to the negligence and or premises liability claims is denied.

SO ORDERED AND ADJUDGED, this the 8 day of July 2011.

Roger T. Clark

ROGER T. CLARK
CIRCUIT COURT JUDGE

FILED
JUL 11 2011
GAYLE PARKER
CIRCUIT CLERK
By D.C.

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7-11-11
VIO 3pm

SCANNED