

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2020-CP-00842-COA**

**ERNESTINE MANN**

**APPELLANT**

v.

**PREMIER GASTROENTEROLOGY, PC AND  
DR. TARIQ A. KHAN, INDIVIDUALLY AND IN  
HIS OFFICIAL CAPACITY AS OWNER AND  
OPERATOR OF PREMIER  
GASTROENTEROLOGY, PC**

**APPELLEES**

DATE OF JUDGMENT:	07/07/2020
TRIAL JUDGE:	HON. GERALD W. CHATHAM, SR.
COURT FROM WHICH APPEALED:	DESOTO COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	ERNESTINE MANN (PRO SE)
ATTORNEY FOR APPELLEES:	KEVIN O'NEAL BASKETTE
NATURE OF THE CASE:	CIVIL - MEDICAL MALPRACTICE
DISPOSITION:	AFFIRMED - 06/29/2021
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

**BEFORE CARLTON, P.J., WESTBROOKS AND EMFINGER, JJ.**

**WESTBROOKS, J., FOR THE COURT:**

¶1. Ernestine Mann sued Premier Gastroenterology, PC (PGPC) and Dr. Tariq A. Khan alleging medical malpractice for injuries that she purportedly suffered from an IV insertion. Mann now appeals pro se the grant of summary judgment in favor of the defendants. Finding no error, we affirm.

**FACTUAL AND PROCEDURAL HISTORY**

¶2. On November 15, 2017, Mann went to PGPC to undergo an outpatient upper endoscopy procedure. In preparation for the procedure, an IV was inserted into her right hand

by an unknown employee<sup>1</sup> of PGPC. During the administration of the IV, Mann complained to the unknown employee that she was experiencing pain, discomfort, and a stinging sensation in the area of the IV. When Dr. Kahn and his nurse entered the room to perform the endoscopy, Mann informed them of the persisting pain. However, they performed the procedure without addressing her concern. Following the endoscopy, Mann claims she notified Dr. Kahn and his staff of her ongoing pain.

¶3. Once Mann returned home, her pain worsened and her right hand began to swell in the exact location where the IV had been inserted previously that day. She also contacted Dr. Kahn's office the following day and informed his staff of the pain and intense swelling in her right hand. Subsequently, Mann went back to PGPC to show them the swelling and because she was experiencing severe pain. Since Dr. Kahn was unavailable, his staff told Mann to seek medical attention at an emergency room. She then went to urgent care and a physician prescribed her medication. Afterwards, Mann sought additional medical treatment for the pain and swelling of her hand. While Mann's brief indicates that she was seen by several physicians and was treated with physical therapy, the record is devoid of these facts.

¶4. On November 13, 2019, Mann filed a complaint alleging that PGPC, Dr. Kahn, and others negligently failed to use reasonable care in treating and evaluating her. Limited discovery was conducted. On May 21, 2020, the defendants filed a motion for summary judgment pursuant to Rule 56 of the Mississippi Rules of Civil Procedure. They argued that Mann had not provided an expert witness as required to establish a medical negligence claim.

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<sup>1</sup> The unidentified employee who performed the IV insertion was a physician, nurse, employee, or agent of PGPC.

According to the trial court’s docket, a notice of hearing was filed on the motion for summary judgment. On July 7, 2020, the trial judge signed a consent order granting summary judgment in favor of the defendants finding that there was no genuine issue of material fact.<sup>2</sup> Mann now appeals.

### STANDARD OF REVIEW

¶5. “This Court employs a de novo standard of review when reviewing a trial court’s grant of summary judgment.” *Vaughn v. Miss. Baptist Med. Ctr.*, 20 So. 3d 645, 649 (¶11) (Miss. 2009) (citing *Duckworth v. Warren*, 10 So. 3d 433, 436 (¶9) (Miss. 2009)). “Summary judgment properly may be granted where ‘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 the moving party is entitled to judgment as a matter of law.’” *Id.* (quoting M.R.C.P. 56(c)). In considering a motion for summary judgment, the trial court must view all evidence before it as properly submitted pursuant to Rule 56 in the light most favorable to the nonmoving party. *Id.* at 649-50 (¶11) (citing *Duckworth*, 10 So. 3d at 436-37 (¶9)).

### DISCUSSION

¶6. Mann raises two issues on appeal: (1) whether the trial court erred when granting summary judgment, and (2) whether her counsel violated the Mississippi Rules of Professional Conduct when entering into the agreed order for summary judgment. As the claim of a violation of the Rules of Professional Conduct is being raised for the first time on

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<sup>2</sup> The consent order was an agreed order for summary judgment electronically signed by both parties.

appeal, we will not address it.<sup>3</sup> Our supreme court has stated, “It is a long-established rule in this state that a question not raised in the trial court will not be considered on appeal.” *Taylor v. Taylor*, 201 So. 3d 420, 421 (¶6) (Miss. 2016) (quoting *Adams v. Bd. of Supervisors of Union Cnty.*, 177 Miss. 403, 170 So. 684, 685 (1936)). With regard to the issue of the trial court’s error of granting summary judgment, we find no error and affirm.

¶7. Mann argues that the court erred when signing the consent order granting summary judgment. Because the parties agreed to enter the consent order, this issue has been waived. However, Mann claims that her counsel was unauthorized to consent to summary judgment. While this issue was not preserved for appeal, we will nevertheless address her claims regarding the necessity of an expert witness. Mann claims that an expert witness was not needed to assert medical negligence because the layman’s exception is applicable.

¶8. In *Jones v. MEA, Inc.*, 160 So. 3d 241, 243 (¶¶2-3) (Miss. Ct. App. 2015), this Court stated:

In medical-malpractice cases, expert testimony is critical. An expert is needed not only to establish [that] the medical professional deviated from the standard of care but also to prove this deviation caused the patient’s injury. So in this case, when the wrongful-death beneficiaries . . . sought to establish a medical-malpractice claim without a medical expert, the result was inevitable—the judge granted summary judgment in favor of the medical clinics and hospital that had treated Jones.

On appeal, the beneficiaries claim no expert was needed. As they see it, the malpractice was easily detectable under the “layman’s exception.” But this narrow exception is only available “where a layman can observe and understand the negligence as a matter of common sense and practical experience”—like when a surgeon leaves an object in the patient during

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<sup>3</sup> Mann failed to raise the issue of legal malpractice before the trial court, thus she waived the right to argue this issue on appeal.

surgery.

(Footnotes omitted).

¶9. Our supreme court further clarified when the layman’s exception applies stating, “This Court has applied the layman’s exception in cases involving foreign objects left inside patients or where patients were given the wrong medication. *Vaughn*, 20 So. 3d at 653 (¶26). However, diagnosing symptoms has been explicitly held . . . to be outside of the realm of a lay person and an activity that requires a medical expert.” *Id.* at 653-54 (¶26).

¶10. In *Smith ex rel. Smith v. Gilmore Memorial Hospital, Inc.*, 952 So. 2d 177, 179-80 (¶¶4-8) (Miss. 2007), Jordan Smith asserted a negligence claim against Gilmore Memorial Hospital (GMH), arguing that GMH breached the standard of care when Nurse Shirley Phillips, the circulating nurse for the operating room, failed to inform Smith’s mother that Dr. G. Edward Bryant, Jr. improperly began operating on the incorrect eyelid. GMH moved for summary judgment, arguing entitlement to judgment as a matter of law based on Smith’s failure to designate a medical expert witness as required in Mississippi to prove a claim of medical negligence. *Id.* at 179 (¶2). Smith responded to GMH’s motion by advancing that he was exempt from producing an expert witness under the “layman’s exception.” *Id.* The circuit court declined to apply the layman’s exception and granted GMH’s motion for summary judgment. *Id.* Smith appealed. *Id.* Our supreme court examined this issue and stated, “Here, we must decide whether a nurse failed to meet the required standard of care by choosing not to go beyond her supervising physician’s authority and inform a patient’s mother of the doctor’s initial mistake. To ask a jury to determine whether this was beyond

the standard of care without being told what constituted the proper standard of care by an expert would be inappropriate.” *Id.* at 181 (¶12). The supreme court further stated, “Lay testimony is sufficient to establish only those things that are *purely factual* in nature or thought to be in the common knowledge of laymen.” *Id.* at 181 (¶14) (emphasis added). “Since Nurse Phillips’ actions involved a judgment call, and not something ‘purely factual in nature,’ expert testimony is required.” *Id.*

¶11. Mann relies on *Gatlin v. Methodist Medical Center, Inc.*, 772 So. 2d 1023, 1026 (¶9) (Miss. 2000), which states, “The general rule is that medical negligence may only be established by expert medical testimony, unless a layman can observe and understand the negligence as a matter of common sense and practical experience.” (Citing *Coleman v. Rice*, 706 So. 2d 696, 698 (¶10) (Miss. 1997)). It is noteworthy that Mann references *Gatlin* but overlooks that the plaintiff, Ruthie Gatlin, was not granted the layman exception. *Id.* “Gatlin presented no expert testimony at trial as to the standard of care of [the] blood bank personnel,” and the trial judge ruled that the testimony of the expert anesthesiologist did not qualify to attest to the standard of care. *Id.* at 1026-27 (¶9). Here, Mann is distinguished from *Gatlin* because Mann did not offer any expert testimony at all in an attempt to establish her claim of negligence.

¶12. Mann attested to symptoms of severe pain and swelling in her right hand. The actions call into question whether the IV insertion and administration was proper. This question is not truly factual and needs medical expert testimony. Additionally, a proper standard of care has not been articulated and must be done so by an expert. Therefore, the trial court did not

err when accepting the consent order for summary judgment.

¶13. Finding no error, we affirm.

¶14. **AFFIRMED.**

**BARNES, C.J., CARLTON AND WILSON, P.JJ., GREENLEE, McDONALD,  
LAWRENCE, McCARTY, SMITH AND EMFINGER, JJ., CONCUR.**