

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 1289

FLOYD P. DONLEY, SR.

VERSUS

ACADIAN AMBULANCE SERVICE, BRADLEY GRAVES
AND KELLI DUPLANTIS

Judgment Rendered: March 23, 2012

APPEALED FROM THE TWENTY-FIRST JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF TANGIPAHOA
STATE OF LOUISIANA
DOCKET NUMBER 2009-0003722

THE HONORABLE M. DOUGLAS HUGHES, JUDGE

Floyd P. Donley, Sr.
Amite, Louisiana

Plaintiff/Appellant
Pro Se

Larry M. Roedel
Carlton Jones, III
Benjamin R. Hunter
Baton Rouge, Louisiana

Attorney for Defendants/Appellees
Acadian Ambulance Service, Bradley
Graves and Kelli Duplantis

BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

EGJ - GAIDRY, J. - CONCURS

McDONALD, J.

In this case the plaintiff, Floyd P. Donley Sr., filed suit on October 21, 2009, asserting that on September 24, 2008 the Acadian Ambulance Services, Inc. (Acadian) and medics Kelli Duplantis and Bradley Graves (collectively the defendants) were called to Hudson's Dirt Cheap Store in Amite, where Mr. Donley was having chest pains after an altercation with the store manager. Mr. Donley asserted that defendants performed an EKG on him and the printout indicated a possible heart attack in progress. He asserted that that he should have been immediately transported to the hospital, but instead he was left unattended in the ambulance for approximately 21 minutes. Mr. Donley asserted that Acadian's report contains erroneous and false information and did not contain the information to allow the emergency room doctor to make an appropriate diagnosis. Mr. Donley asserted he sustained mental anguish, additional heart deterioration, and nightmares, and prayed for damages.

Defendants filed exceptions, raising the objection of prematurity, based on plaintiff's failure to first file a request to convene a Medical Review Panel, and prescription. The district court granted the exception of prematurity, but denied the exception of prescription. Thereafter, Mr. Donley filed a request for a medical review panel on January 27, 2010. Subsequently, defendants filed a motion for summary judgment on the issue of prescription, which was granted by the district court at a hearing on August 16, 2010. At the conclusion of the hearing, Mr. Donley made an oral motion for appeal. The district court signed the judgment granting the motion for summary judgment on August 24, 2010, and notice of judgment was mailed on August 25, 2010.

On August 31, 2010, Mr. Donley filed an "Order." The Order states in pertinent part:

Now into Court comes Floyd P Donley Sr. Attorney Pro [S]e with Motion to Order an Appeal to 1st Circuit Court of Appeal....

...

At the hearing of Aug 16, 2010, Plaintiff Floyd P Donley Sr, voiced opposition to Defendants' Motion for Summary Judgment, The Court Ruled in favor of Defendants Acadian Ambulance Service Inc. Before leaving the Bar, Plaintiff notified the Court that Plaintiff would Appeal the verdict and was assured by Judge Hughes that he would approve the Appeal request....

Therefore, Plaintiff Floyd P Donley Sr. for the reasons set forth above, order the 21st Judicial District Court to send this case to the Louisiana 1st Circuit Court of Appeal to rehear the Plaintiff's opposition and to view the argument and exhibits tendered by the Plaintiff in opposing the Defendant's Favorable Summary Judgment.

The Order is signed and dated by the district court judge and contains a request for service on opposing counsel.

On February 22, 2011, Mr. Donley filed a "Motion to File an Out of Time Appeal," in which he requested permission to "file a belated Appeal." The memorandum filed in support of the motion reveals that pursuant to his oral motion for appeal (and seemingly the August 31, 2010 Order), Mr. Donley believed that "Court Documents would be correlated for submission to the Appeal Court and that Plaintiff would be notified of the Cost to submit these documents prior to the Appeal being submitted." In other words, he appears to be asserting that he never received a notice of costs estimate.¹ The record shows the clerk of court did not issue a notice of appeal or a cost estimate pursuant to the August 31, 2010 order.

The district court granted the motion for out of time appeal on April 27, 2011 and set a return date for the appeal of "45 days after costs are paid." The appeal was lodged on July 18, 2011. Mr. Donley filed his brief on August 30, 2011. On July 19, 2011, defendants filed the instant motion to dismiss the appeal as untimely. On November 23, 2011, the motion to dismiss the appeal was referred to this panel to be decided along with the merits of the case.

¹ In the motion, Mr. Donley also states that he is "inept in Judicial Matters" and that he is "severely impaired, suffering the onset of dementia, heart ailments, hearing impairment and other illnesses."

Appeals are favored in the law and should not be dismissed unless the law clearly requires a dismissal. The appeal should be maintained unless the ground urged for dismissal is free from doubt. An appeal is not to be dismissed for a mere technicality. **U.S. Fire Insurance Company v. Swann**, 424 So.2d 240 (La.1982). Recognizing this, the Louisiana Supreme Court has stated that an appeal should not be dismissed when the motion for appeal is timely filed but the order is not signed until after the delay has run. **Traigle v. Gulf Coast Aluminum Corporation**, 399 So.2d 183 (La. 1981). In **Lifecare Hospitals, Inc. v. B & W Quality Growers, Inc.**, 39,065 (La. App. 2nd Cir. 7/8/04), 875 So.2d 135, the Second Circuit, in following **Traigle**, refused to dismiss an appeal where the appellant failed to attach an order to his timely filed motion for appeal and the order was not signed until after the delay had run.

In this case, a review of the August 16, 2010 transcript reveals that after the court ruled in favor of defendants, granting their motion for summary judgment, Mr. Donley stated:

BY MR. DONLEY: I would like to go on record right now, saying that I will appeal, so, I don't have to go through all the rigamarole.

BY THE COURT: No, you just file the necessary paperwork and I will be glad to sign it.

The Louisiana Code of Civil Procedure specifically authorizes an appeal by oral motion, as requested by Mr. Donley. On August 31, 2010 Mr. Donley then timely filed what appears to be an *order of appeal*. In an unsophisticated way, the order requests an appeal and that the matter be sent to this Court for review, and it references the fact that Mr. Donley orally noticed the district court of his intent to appeal at the conclusion of the hearing and that he was assured by the district court judge "that he would approve the Appeal request."

This Court did not rule the appeal as untimely; rather, defendants filed a motion to dismiss. It appears that Mr. Donley filed the motion for out of time

appeal because he never received a cost estimate for the appeal in connection with the August 31, 2010 pleading. Therefore, we conclude that the validity of the appeal is not affected by the clerk of court's failure to send out a notice of appeal.² The oral motion for appeal followed by the August 31, 2010 Order of appeal renders this appeal timely.

THE APPEAL

Mr. Donley is appealing the summary judgment granted in favor of defendants. Our review of a grant or denial of a motion for summary judgment is *de novo*. **Schroeder v. Board of Sup'rs of Louisiana State University**, 591 So.2d 342, 345 (La.1991).

Mr. Donley's claim arises out of the defendants' actions on September 24, 2008. Mr. Donley asserted that he was provided his medical records in November of 2008 and at that time he became aware of the seriousness of his health condition. His suit was filed on October 21, 2009. On January 27, 2010, Mr. Donley requested that a medical review panel review his case.

Under the Medical Malpractice Act, a medical malpractice claim must be presented to a medical review panel before any action is brought in district court, thus the lawsuit filed on October 21, 2009 did not interrupt or suspend prescription. See **LeBreton v. Rabito**, 97-2221 (La. 7/8/98), 714 So.2d 1226, 1230. The request for a medical review panel filed on January 27, 2010, was filed more than one year after Mr. Donley asserted that he became aware of the seriousness of his health condition in November of 2008. Thus, after a *de novo* review, we find that the district court properly granted summary judgment in favor of the defendants, as there is no genuine issue of material fact that the case is prescribed.

² Specifically, La. C.C.P. art. 2121 provides in pertinent part:

When the order is granted, the clerk of court shall mail a notice of appeal to counsel of record of all other parties, to the respective appellate court, and to other parties not represented by counsel. The failure of the clerk to mail the notice does not affect the validity of the appeal.

For the foregoing reasons, the district court judgment, dated August 24, 2010, granting summary judgment in favor of the defendants and against Mr. Donley is affirmed. Costs are assessed against Mr. Donley.

MOTION TO DISMISS APPEAL DENIED; JUDGMENT AFFIRMED.