

[Cite as *Shie v. Ohio Dept. of Rehab. & Corr.*, 2017-Ohio-4465.]

DAVID SHIE

Plaintiff

v.

OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION

Defendant

Case No. 2016-00195

Magistrate Gary Peterson

DECISION OF THE MAGISTRATE

{¶1} Plaintiff, an inmate in the custody and control of defendant, brought this action for negligence. Plaintiff’s complaint lists four claims for negligence. Plaintiff claims that defendant refuses to provide him with food that will not harm his health; plaintiff claims that defendant refuses to allow him to purchase over-the-counter medications to treat his medical conditions; plaintiff claims that defendant refuses to allow him to purchase a wedge pillow to aid in his medical treatment; and plaintiff claims that defendant refuses to provide him with a bottom bunk restriction. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.¹

{¶2} As an initial matter, subsequent to the trial, on February 28, 2017, plaintiff filed a document titled “motion to order that medical records be placed into evidence.” In the motion, plaintiff requests that the court order defendant to submit three medical records as evidence. Plaintiff relates that the parties forgot to offer the documents as exhibits. However, at the trial, each party was offered the opportunity to submit exhibits as evidence. Neither party offered the medical records identified by plaintiff. Additionally, it is not defendant’s duty to submit documents into evidence to support plaintiff’s case. Plaintiff’s motion is not well-taken and is DENIED.

¹At the commencement of the trial, defendant’s February 10, 2017 motion to quash subpoenas was GRANTED.

{¶3} At trial, plaintiff testified that he suffers from several health issues including gastroesophageal reflux disease (GERD), rhinitis, and a hiatal hernia. Plaintiff testified that due to his health conditions, on multiple occasions in April and May of 2015, defendant transported him to the Ohio State University Medical Center (OSUMC) for specialized treatment. Of relevance to this case, plaintiff stated that he was examined by an otolaryngologist, whose name he could not recall, and a gastroenterologist named Dr. Edward Levine.

{¶4} Plaintiff testified that the physicians at OSUMC determined that plaintiff suffered from GERD, rhinitis, and a hiatal hernia. Plaintiff stated that the physicians at OSUMC recommended or prescribed, among other things, that he take Flonase and a proton-pump inhibitor, such as Nexium or Prilosec. Plaintiff provided that the physicians at OSUMC also recommended that he submit to a special diet tailored for patients with GERD and that he elevate his head at night while sleeping. According to plaintiff, when he returned to the Belmont Correctional Institution (BECI), defendant failed to provide him the medications, failed to provide the special diet, and failed to provide him a wedge pillow.

{¶5} Regarding the special diet, plaintiff testified that the physicians at OSUMC recommended that he avoid foods that cause him reflux problems. Plaintiff testified that as a result, he attempts to avoid tomatoes, tomato sauce, cheese, high fat foods, spicy foods, onions, peppers, and greasy foods. Plaintiff stated that through his own independent research and through trial and error, he determined that the above-mentioned foods cause him reflux problems. Plaintiff added that it was also recommended to avoid chocolate, alcohol, caffeine, and acidic foods.

{¶6} Plaintiff stated that he spoke with the BECI diet technician, whom he identified as Ms. Masters, to request a special diet. Plaintiff asserted that shortly thereafter, Michelle Tatman, defendant's dietary operations manager, informed him that there is no special diet for inmates with GERD and that each inmate is responsible for

avoiding or eliminating foods that cause discomfort. (Joint Exhibit 1). Plaintiff added that Tatman recommended avoiding chocolate, peppermint, spearmint, alcohol, caffeinated beverages, and high fat foods. (Joint Exhibit 3). Plaintiff asserted that such statements by Tatman conflicted with statements made by the physicians at OSUMC.

{¶7} According to plaintiff, many of the meals offered at BECI are prepared with tomatoes, tomato sauces, cheese, or what he referred to as creamy sauces. Plaintiff testified that such food items cause him reflux difficulties. Plaintiff added that several of the meals are spicy or greasy and are prepared with onions and peppers; plaintiff asserted that such food items likewise cause him reflux difficulties. Plaintiff offered a sample menu reflecting items served in the chow hall at BECI over a three-week period. (Plaintiff's Exhibit E). Plaintiff also created a chart wherein he noted the meals that cause him problems with his reflux disease. (Plaintiff's Exhibit F). Based on the sample menu and his chart of foods he wishes to avoid, plaintiff determined that out of the 31 meals listed on the sample menu, only seven are what he determined to be GERD compatible.

{¶8} Plaintiff testified that the foods that he has determined to be incompatible with his GERD cause him discomfort and that by attempting to manage his condition and due to the lack of alternative foods available, he has lost 40 pounds over a period of several months. Plaintiff acknowledged however that he also purchased a wide range of food in the BECI commissary but asserted that he did so to determine what would be compatible with his GERD. Plaintiff added that during this time period, Masters performed several weekly weight checks that documented his weight loss.

{¶9} With respect to his medications, plaintiff testified that the physicians at OSUMC recommended that he take Flonase and Prilosec or some other proton-pump inhibitor. Plaintiff stated that he attempted to purchase the items in the BECI commissary inasmuch as they are considered over-the-counter medications, but BECI did not offer them for sale. Plaintiff explained that he requested that he be allowed to

purchase the items in the commissary but such a request was denied. However, plaintiff acknowledged that the commissary sells a generic proton-pump inhibitor. Plaintiff asserted that he used the generic proton-pump inhibitor that is available in the commissary but that he did not see any positive results. Regarding the Flonase, plaintiff testified that he was instructed to purchase other antihistamines that are available in the commissary.

{¶10} Turning to his claim regarding elevating his head while sleeping, plaintiff testified that everyone agrees that one way to manage GERD is to elevate the head while sleeping. Plaintiff stated that as a result he purchased every pillow offered for sale in the commissary but that even while using the pillows, he could not achieve the desired result of elevating his head while sleeping. Plaintiff asserts that the pillows offered simply do not maintain their form. Plaintiff therefore requested that he be allowed to purchase a wedge pillow but such a request was denied.

{¶11} Finally, concerning plaintiff's desire for a bottom bunk restriction, plaintiff testified that to get on to a top bunk he must jump onto the bed because the beds are not equipped with a ladder. According to plaintiff, such actions cause problems with his GERD and his hiatal hernia. Plaintiff conceded however that he is currently assigned to a bottom bunk. Plaintiff added that he fears a future injury if he is not granted a bottom bunk restriction.

{¶12} Michelle Tatman, who is employed by defendant as a Dietary Operations Manager, testified that she received a degree in human nutrition from the Ohio State University and that she received her license as a dietitian in 2013. Tatman testified that her job duties include developing and approving menus for inmates at each of the institutions operated by defendant and managing the diet technicians at each institution by ensuring they follow policy. Tatman asserted that defendant has a policy governing therapeutic diets for inmates. (Defendant's Exhibit 1). Tatman explained that the policy was created by the dietary operations manager, a position she now holds, and

Dr. Andrew Eddy, the Medical Director. Tatman periodically reviews the policy and discusses with Dr. Eddy any issues that arise that may necessitate changes to the policy.

{¶13} According to Tatman, for an inmate to receive a therapeutic diet, the inmate must be evaluated by a doctor to assess the necessity for a special diet. The doctor may then refer the inmate to a dietetic technician for an assessment of energy and nutritional needs. (Defendant's Exhibit 3). The dietetic technician may then recommend a therapeutic diet to the doctor. If the recommended diet is a formulary diet, meaning a therapeutic diet previously approved for use in the institutions, the doctor may approve the recommended diet and the inmate would receive the formulary, therapeutic diet. (Defendant's Exhibit 2). However, if the recommended diet is non-formulary, the request is then sent to Dr. Eddy and to Tatman for approval.

{¶14} Tatman testified that after reviewing an internal institutional letter that plaintiff had sent her, she determined that plaintiff did not require a non-formulary diet. Tatman asserted that prior to making that determination, she reviewed plaintiff's medical records, plaintiff's purchasing history in the commissary, plaintiff's medications, and plaintiff's weight checks, and body mass index scores (BMI), which were recorded by the dietetic technician at BECI. According to Tatman, plaintiff's BMI never fell below the normal range that would require a therapeutic diet. Tatman explained that if plaintiff's BMI would have fallen below the normal range, she would have recommended a therapeutic diet.

{¶15} Additionally, Tatman testified that there is no standard GERD diet. Rather, Tatman explained that each individual dealing with GERD is responsible for identifying the specific foods that cause reflux issues and should tailor the diet as necessary. Tatman asserted that American Academy of Nutrition and Dietetics (AAND), the certifying body for dieticians, recommends a trial of identifying foods that trigger reflux and limiting those foods from the diet. Tatman testified that the foods of which plaintiff

complaints are not the same foods identified by the AAND as foods that potentially cause reflux. Tatman stated that the AAND recommends limiting or eliminating chocolate, peppermint, spearmint, alcohol, caffeinated beverages, and high fat foods. (Joint Exhibit 3). Tatman added, that if there is objective data, such as a weight issue, indicating a need for a non-formulary therapeutic diet, then she would approve such a diet.

{¶16} Scott Gallagher, currently employed at BECI as a Financial Associate Supervisor, testified that he was previously employed at BECI as the Commissary Manager. Gallagher explained that his responsibilities previously included managing the commissary, which he described as a general store operated inside the prison. Gallagher stated that the commissary sells, among other things, food products, hygiene items, and over-the-counter medications. Gallagher testified that defendant maintains a policy regarding items that are required to be available for purchase in the commissary. (Defendant's Exhibit 4). Gallagher added that the approval or denial of a product not available for purchase in the commissary is within the discretion of his supervisors, Michelle Matheroon and Walt Woodruff.

{¶17} Gallagher testified that plaintiff previously approached him regarding his issues in dealing with GERD. Gallagher explained that he personally suffers from GERD and that he related to plaintiff general practices of not eating before bedtime, sleeping with the head elevated, and avoiding coffee. Regarding the specific items requested by plaintiff, Gallagher testified that Nexium and Flonase, which he stated is a nasal saline spray, are not available for purchase in the commissary, although the commissary does sell generic versions of both products. Finally, Gallagher identified and authenticated a two-year period of plaintiff's sales receipts for commissary purchases, which documented, among other things, plaintiff's purchases of french fries, potato chips, cream cheese, cheddar cheese bars, mozzarella cheese bars, pizza,

provolone cheese bars, atomic fireballs, snickers candy bars, and meat ham and cheese sticks. (Defendant's Exhibit 5).

{¶18} Joe Murphy, Health Care Administrator at BECI, testified that his job duties include overseeing the daily operations of the medical department. Murphy testified that when an inmate sees a medical provider outside the institution, the outside medical provider may make a recommendation for treatment. Murphy explained that the recommendation is forwarded to the physicians in the institutions who determine whether to implement the recommendations. Murphy added that certain recommendations are required to be sent for collegial review by Dr. Eddy.

{¶19} Regarding the medications that plaintiff seeks, Flonase and Nexium, Murphy testified that defendant maintains a list of over-the-counter medications available for purchase in the institution and that those medications are referred to as formulary medications. Murphy explained that the list is compiled and approved by defendant's central office. Murphy added that if the medication is not on the list, then it is considered non-formulary and must be approved by Dr. Eddy. Murphy stated that Flonase and Nexium are non-formulary medications and that plaintiff needs a prescription to obtain those items.

{¶20} Finally, with respect to elevating plaintiff's head, Murphy testified that the commissary does not sell wedge pillows, but if one were prescribed, the commissary manager would provide it. Murphy added that plaintiff may purchase additional pillows to elevate his head while sleeping.

{¶21} "To prevail in a negligence action, the plaintiff must show (1) the existence of a duty, (2) a breach of that duty, and (3) an injury proximately resulting from the breach." *Price v. Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 14AP-11, 2014-Ohio-3522, ¶ 9, quoting *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, ¶ 21. "In the context of a custodial relationship between the state and its prisoners, the state owes a common-law duty of reasonable care and protection from unreasonable risks." *Woods*

v. Ohio Dept. of Rehab. & Corr., 130 Ohio App.3d 742, 744-745 (10th Dist.1998). “‘Reasonable care’ is the degree of caution and foresight that an ordinary prudent person would employ in similar circumstances.” *Taylor v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 11AP-1156, 2012-Ohio-4792, ¶ 15. “Further, although the state is not an insurer of the safety of inmates, once it becomes aware of a dangerous condition, it must take reasonable care to prevent injury to the inmate.” *Briscoe v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 02AP-1109, 2003-Ohio-3533, ¶ 15.

{¶22} Upon review of the evidence presented at trial, the magistrate finds that plaintiff suffers from several health problems including GERD, rhinitis, and a hiatal hernia for which he was treated by specialists at OSUMC. While those specialists may have recommended a course of treatment that included Prilosec, Flonase, a therapeutic diet, and elevating of the head while sleeping, the physician serving as the chief medical officer of plaintiff’s assigned correctional institution had the ultimate authority over plaintiff’s care and treatment once plaintiff returned from OSUMC. There is no dispute that at no point did plaintiff have a prescription for Prilosec or Flonase. Rather, the evidence demonstrates that defendant provides a generic nasal saline spray and a generic proton-pump inhibitor for purchase in its commissary. Both medications are considered over-the-counter. The evidence does not establish that defendant ever prevented plaintiff from purchasing a nasal saline spray or a proton-pump inhibitor. Indeed, plaintiff acknowledged purchasing such items from the commissary. Furthermore, there is no evidence that Prilosec or Flonase are superior forms of treatment as compared to the generic versions available for purchase in the institutional commissary.

{¶23} Similarly, the magistrate finds that the specialists at OSUMC recommended a therapeutic diet for plaintiff, but, as previously stated, the ultimate authority over his medical care and treatment rested with the medical officers of his assigned institution once he returned from OSUMC. It was not shown that the chief medical officer or other

medical professionals at the institution specifically prescribed a certain diet for plaintiff, but regardless, the evidence demonstrates that there is food available to plaintiff in the institutional chow hall which comports with a GERD friendly diet. As explained by Tatman, there is no formulary GERD diet and it is up to each inmate to identify which foods cause reflux issues and to avoid those foods. Additionally, the magistrate finds Tatman's testimony regarding the availability of GERD friendly foods in the chow hall to be more authoritative and persuasive than that of plaintiff's. Indeed, Tatman testified that the food items which plaintiff identifies as the cause of his reflux are not the same food items identified by the AAND as foods to avoid for someone managing GERD. Additionally, as shown on the meal menu submitted by plaintiff, there are plenty of meal options from which plaintiff may choose. Furthermore, plaintiff's commissary purchases undermine his complaints concerning tomatoes, tomatoes sauces, fatty foods, spicy foods, cheeses, and cheese sauces; as noted in his sales receipts, plaintiff repeatedly purchased foods that he identifies as triggering his reflux. (Defendant's Exhibit 5). Moreover, while plaintiff did lose weight over a period of several months after learning of his GERD diagnosis, at no point did plaintiff's BMI fall below the normal level. In short, it was not shown that defendant has failed to provide plaintiff with a GERD friendly diet or that defendant is required to provide a GERD friendly diet.

{¶24} With respect to plaintiff's claim that defendant failed to provide a wedge pillow, it was not shown that plaintiff was prescribed a wedge pillow. Rather, it appears that all recommendations are that plaintiff elevate his head while sleeping. To that end, the commissary makes pillows available for purchase. Plaintiff purchased four such pillows and, although he did not achieve his desired result, there is no evidence that a wedge pillow would be any more beneficial.

{¶25} Finally, at the conclusion of plaintiff's case, defendant moved, pursuant to Civ.R. 41(B)(2), to dismiss plaintiff's claim concerning his bottom bunk restriction and to dismiss any potential claim for medical malpractice. With respect to plaintiff's claim that

he was denied a bottom bunk restriction, the evidence establishes that plaintiff is assigned to a bottom bunk. Additionally, plaintiff failed to establish that any denial of a bottom bunk restriction proximately caused him to suffer any injury. Regarding any claim for medical malpractice, plaintiff failed to set forth expert testimony establishing the standard of care and defendant's failure to conform to that standard. *Foy v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin Nos. 16AP-723 and 16AP-724, 2017-Ohio-1065, ¶ 23; *Reeves v. Healy*, 192 Ohio App.3d 769, 2011-Ohio-1487, ¶ 38 (10th Dist.), citing *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 131 (1976) ("Expert testimony is required to establish the standard of care and to demonstrate the defendant's alleged failure to conform to that standard."); see also *Gordon v. Ohio State Univ.*, 10th Dist. Franklin No. 10AP-1058, 2011-Ohio-5057, ¶ 67 ("The *Bruni* standard applies to an inmate's claim for medical malpractice.").

{¶26} Based upon the foregoing, the magistrate finds that plaintiff failed to prove his claims by a preponderance of the evidence. Accordingly, judgment is recommended in favor of defendant.

{¶27} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).*

GARY PETERSON
Magistrate

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