[Cite as *Alford v. Ohio Dept. of Rehab. & Corr.*, 2017-Ohio-7145.]

BRIAN KEITH ALFORD Plaintiff v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION Defendant	Case No. 2016-00609 Judge Patrick M. McGrath Magistrate Sophia Chang ENTRY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

{¶1} On April 17, 2017, defendant filed a motion for summary judgment. Plaintiff filed a memorandum contra on April 27, 2017, a corrected memorandum contra on April 28, 2017, and a motion for leave to file an amended memorandum contra pursuant to Civ.R. 15, along with the amended memorandum contra on May 10, 2017. The court notes that Civ.R. 15 only applies to pleadings rather than for the purpose that plaintiff is attempting to use it. Nevertheless, upon review of the memorandum contra, plaintiff's motion for leave is GRANTED. The motion for summary judgment is now before the court for a non-oral hearing pursuant to Civ.R. 56 and L.C.C.R. 4.

{¶2} Civ.R. 56(C) states in part, as follows:

{¶3} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, 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. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." *See also*

Gilbert v. Summit Cty., 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977).

{¶4} Plaintiff, an inmate in the custody and control of defendant at London Correctional Institution, alleges in his complaint that defendant refused to provide non-formulary artificial tear drops after having surgery to repair a retinal tear in his left eye. Plaintiff claims that as a result of using the generic drops rather than receiving the non-formulary drops, he has suffered irritation, pain, and discomfort in his eye as well as peripheral vision loss. In the disposition to the grievances he submitted to the institution prior to filing this case, defendant noted that Dr. Eddy, defendant's Chief Medical Officer, made the medical decision to discontinue plaintiff's eye drop order. Although plaintiff frames his claim against defendant as one of negligence, "[t]he mere fact that claims in a complaint are couched in certain legal terms is insufficient to confer jurisdiction upon a court. * * * [T]he court must look beyond the language used in the complaint and examine the underlying nature of the claims." *Guillory v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin Nos. 07AP-861 & 07AP-928, 2008-Ohio-2299, ¶ 11. Regardless of how plaintiff characterizes his claim, plaintiff's claim concerning the discontinuation of plaintiff's prescription eye drop order arises out of medical care, treatment, or diagnosis. Because medical skill and judgment are necessary to determine whether it is medically necessary for plaintiff to be given the non-formulary drops as opposed to the generic version, plaintiff has stated a claim for medical negligence. *Sturm v. University of Cincinnati Med. Ctr.*, 137 Ohio App.3d 557, 562 (10th Dist.2000).

{¶5} "In order to support a cause of action for medical negligence, [plaintiff] must show the existence of an applicable standard of care within the medical community, a breach of that standard of care by the defendant, and that such breach was the proximate cause of the injury sustained." *Campbell v. Ohio State Univ.,* 10th Dist. Franklin No. 04AP-96, 2004-Ohio-6072, ¶ 10, citing *Bruni v. Tatsumi,* 46 Ohio St.2d 127, 131 (1976); *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."). "Expert testimony is required to establish the standard of care and to demonstrate the defendant's alleged failure to conform to that standard." *Reeves v. Healy,* 192 Ohio App.3d 769, 2011-Ohio-1487, ¶ 38 (10th Dist.), citing *Bruni* at 130-131.

{¶6} Defendant argues in its motion for summary judgment that plaintiff cannot prevail on his claim because he has not identified an expert witness who will testify regarding any alleged breach of the applicable standard of care that proximately caused plaintiff harm. In support of its motion, defendant provides the affidavit of its counsel who states that the court ordered plaintiff to furnish defendant with the names of expert witnessesand a copy of their reports on or before February 3, 2017 and that plaintiff failed to do so. Furthermore, the affidavit includes defendant's request for admissions as exhibits. In the admissions, plaintiff denies that he does not have an expert and that the testimony will be provided at trial. Plaintiff also denied not sending a copy of the report as ordered by the court stating that he requested an extension of time to provide one. However, based on the court's docket, plaintiff did not file such a motion.

{¶7} Plaintiff responds by providing his own affidavit in support which affirms defendant's assertion that this is a medical negligence claim. Plaintiff states that his claim is based on defendant's "failure to provide medical treatment and prescribed medications." Even so, plaintiff argues that a lay person could understand that there was negligence in this case which obviates the need for an expert. Plaintiff also includes various medical documents, his grievance documents, interrogatories served on him by the Ohio State University Wexner Medical Center, which is no longer a party in this case, and interrogatories he served upon defendant. Plaintiff, however, does not provide any evidence regarding defendant's argument that he has no expert witness. Furthermore, there is no dispute that plaintiff failed to provide counsel for defendant with the names of expert witnesses or a copy of their reports pursuant to the court's order. *See* L.C.C.R. 7(E). Although plaintiff states that he will have expert testimony at trial in

the requests for admissions and tries to couch his claim in terms of ordinary negligence so that medical experts would not be necessary, he effectively admits in his response to defendant's second request for admissions that he has not provided counsel with a copy of a report from an expert witness prior to the deadline set by the court.

{¶8} Civ.R. 56(E) states, in part, that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party."

{¶9} Plaintiff has failed to provide any evidence to refute the affidavit provided by defendant to demonstrate a genuine issue of material fact. There is no dispute that plaintiff has failed to provide defendant with a copy of an expert report from an expert who will testify on plaintiff's behalf regarding standard of care and proximate cause at trial. A mere statement that he will have an expert at trial does not comply with L.C.C.R. 7(E) which requires that if an expert is to testify at trial, the expert report must be provided to opposing counsel. Therefore, the court concludes that plaintiff cannot prevail on his medical negligence claim.

{¶10} Upon review of the evidence and viewing this matter in light most favorable to plaintiff, the court finds that there are no issues of material fact and that defendant is entitled to judgment as a matter of law. As a result, defendant's motion for summary judgment is GRANTED, and judgment is hereby rendered in favor of defendant. All previously scheduled events are VACATED. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge

cc:

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