[Cite as *Scudder v. Ohio Dept. of Rehab. & Corr.*, 2019-Ohio-5463.]

KEVIN SCUDDER Plaintiff v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION Defendant	Case No. 2016-00630JD Magistrate Gary Peterson DECISION OF THE MAGISTRATE

{¶1} Plaintiff, an inmate in the custody and control of defendant, Ohio Department of Rehabilitation and Correction (DRC), brought this action for negligence. Following a trial on the issue of liability, the magistrate recommended that judgment be entered in favor of plaintiff regarding a fall plaintiff suffered on June 3, 2016. Over objections filed by both parties, judgment was entered in favor of plaintiff. The case then proceeded to trial on the issue of damages.

{¶2} At trial, plaintiff, who is a paraplegic amputee, testified that on June 3, 2016, while housed at the Franklin Medical Center (FMC), he was attempting to transfer from his wheelchair to the toilet, when the grab bar broke away from the wall, causing him to fall. Plaintiff believes he hit his head on the toilet, knocking out two teeth and chipping another. Plaintiff testified that he also suffered a bruise to his head and injuries to his neck and shoulder. Plaintiff estimated that his pain was a 10 out of 10, with 10 representing the most severe pain. After his roommate called for help, five or six nurses arrived and returned plaintiff to his chair. Plaintiff recalled that photographs were taken of his injury. Plaintiff reports, that later during the day, he developed a headache and complained to staff about the pain in his mouth. Plaintiff subsequently received Tylenol.

{¶3} Plaintiff stated that the following day, he was transported to Ohio State University, where he received pain medication. Plaintiff recalled that the pain at that time was mainly in his mouth. Plaintiff maintained that later during the day, after he

returned to FMC, he received additional pain medication after reporting his pain to medical staff at FMC.

{¶4} Plaintiff testified that he subsequently saw a dentist regarding his teeth. Plaintiff explained that he has an allergy to local anesthetics, which he refers to as "caines," but the dentist would not perform repairs under general anesthetics. Plaintiff testified that at the time of trial, he continues to have pain in his mouth and that his teeth have not been repaired/replaced. Plaintiff added that it is painful when he eats. Plaintiff submitted as an exhibit a small container of the teeth that he believes were dislodged or chipped in the fall. (Plaintiff's Exhibit 5). Plaintiff reported that at the time of trial, his teeth have not been repaired.

{¶5} Plaintiff testified that after he fell, he lost vision in his right eye. Plaintiff maintained that he reported his vision loss the day he fell. According to plaintiff, at the time of the trial, he can now only see light and shadows in his right eye. Plaintiff subsequently authored several informal complaint resolutions detailing his criticisms with the care he received following the fall. However, in many of them, plaintiff refers to a single tooth being broken. (Plaintiff's Exhibit 1B). Plaintiff reports that he continues to suffer headaches and neck and shoulder pain, which he maintains is constant, and that he continues to have pain in his mouth.

{¶6} Adale Shank testified that she represents plaintiff in unrelated litigation. Shank reported that plaintiff frequently contacted her following the fall expressing his dissatisfaction with the medical care he was receiving at FMC. Shank believed that plaintiff was in some pain and distress after the fall and stated that an employee of DRC with whom she spoke acknowledged that plaintiff was bruised following the fall. As a result, Shank attempted to intervene and assist plaintiff in receiving medical care. Shank also searched for records documenting plaintiff's claimed allergy to caines. Shank produced several documents that list caines as an allergy, but she acknowledged that it is likely that plaintiff self-reported the allergy listed on the

documents. Shank believed that DRC wished to administer a test to confirm plaintiff's allergy, but due to a cancelation, the test did not go forward.

{¶7} Randall Speer testified that he is employed by Mid-America Health under a contract to provide dental services to inmates for DRC. Dr. Speer stated that he maintains a weekly clinic at FMC and that he has been practicing general dentistry since 1974. Dr. Speer provided dental treatment to plaintiff on several occasions, beginning at the earliest in 2012. Dr. Speer recalled that following a dental visit on October 24, 2013, he recommended that plaintiff's tooth 8 and tooth 10 be extracted. Dr. Speer explained that the front teeth are numbered 6-11

{¶8} Dr. Speer testified that he evaluated plaintiff on June 27, 2016, which was after plaintiff fell. Dr. Speer learned that plaintiff claimed to have broken his front tooth in a fall and pointed to the front of his mouth. Dr. Speer believed plaintiff was referring to tooth 8, which he stated previously had a lot of decay. Dr. Speer asserted that he would not recommend putting a decayed tooth in plaintiff's mouth, even if plaintiff had presented him with the broken tooth. Dr. Speer did not recall plaintiff claiming to have broken more than one tooth or chipping any other teeth. Dr. Speer added that plaintiff complained of pain, but that he was unable to observe any objective indication of pain from the broken tooth. Dr. Speer clarified that plaintiff had numerous broken teeth unrelated to the fall in addition to periodontal disease. Dr. Speer acknowledged that plaintiff had previously been evaluated for broken and missing teeth, including broken upper right teeth and a missing front middle tooth. (Defendant's Exhibit A, pg. 30). Dr. Speer stated that his recommendation for extraction remained unchanged following his June 27, 2016 exam.

{¶9} Regarding plaintiff's claimed allergy to caines, Dr. Speer testified that he would never recommend extraction without the use of local anesthetics. Dr. Speer added that he also usually does not recommend extraction of teeth under general anesthetic as the risk of the anesthetic outweighs any advantage. Dr. Speer testified

that he saw plaintiff again in September 2016, where he noted that plaintiff was scheduled for testing for his allergy, but Dr. Speer believed that plaintiff declined to proceed. Dr. Speer noted that on another occasion plaintiff was scheduled for allergy testing, but the documented note provides that plaintiff declined to be tested as indicated by the against medical advice or AMA notation on the document. (Defendant's Exhibit A, pg. 66).

{¶10} Dr. Speer saw plaintiff in November 2016 and documented that plaintiff had no complaints of pain at that time. Dr. Speer was unable to recall plaintiff complaining of any tooth pain at that time. Dr. Speer also recalled occasions where plaintiff refused treatment due to his claimed allergy, an occasion where plaintiff claimed he was ill and missed an appointment, and an occasion where plaintiff refused to get in the dental chair. Dr. Speer added that during his visits, he prescribed plaintiff antibiotics and a topical steroid for inflammation, but Dr. Speer denied prescribing plaintiff medication for pain.

{¶11} David Merker testified that he works for Mid-America Health under a contract to provide dental services to inmates for DRC. Dr. Merker testified that he has practiced general dentistry since 1982 and that he saw plaintiff as a patient in April 2019. Dr. Merker reviewed plaintiff's dental records and noted that as of 2013, plaintiff was missing at least 9 teeth, including an upper front middle tooth. Dr. Merker remarked that tooth 8 was decayed, plaintiff had gum disease, and multiple abscesses, which means the nerve is dead. Regarding changes to plaintiff's teeth between 2013 and 2019, Dr. Merker stated that 4 additional teeth may be missing, but he could not confirm that any tooth was broken because of plaintiff's fall. Dr. Merker added that plaintiff's teeth are damaged such that eating or bumping into something could cause them to break. Dr. Merker testified that during the evaluation, plaintiff stated that his teeth are tender when he eats. Finally, Dr. Merker stated that he has never seen a patient who has an allergy to local anesthetics.

{¶12} Richard Miller testified by deposition that he works for Advanced Eyecare and Sports Vison Center, Inc., which contracts with DRC to provide vision services to inmates in DRC custody. Dr. Miller graduated from the College of Optometry at Ohio State University in 1990. Dr. Miller examined plaintiff on August 5, 2016 as a result of plaintiff's claim that he broke his lower orbital bone and has splinters in his right eye as a result of a fall out of his wheelchair while transferring to a toilet. After performing vision tests, Dr. Miller was unable to observe any obstruction in the eye itself to prevent plaintiff's vision. Dr. Miller testified that plaintiff's subjective complaint was that he only had light perception in his right eye. Dr. Miller requested a consultation with an ophthalmologist, but explained that he is not involved with consultations as a contractor. Dr. Miller clarified that the doctors who are employed by DRC at FMC are responsible for consultations. Dr. Miller added that he requested the consultation to determine if there was nerve damage affecting plaintiff's vision. Dr. Miller acknowledged that nerve damage is not something that would typically later improve. Dr. Miller examined plaintiff again on November 3, 2017 for plaintiff's complaints of blurred vision. Dr. Miller stated that he examined plaintiff's vision through autorefraction, which provides an objective reading of plaintiff's vision, and determined that his vision as of November 3, 2017 was 20/60. Dr. Miller explained that such a change in vision means plaintiff's vision significantly improved from his subjective complaint of only being able to see light perception in August 2016, to 20/60 by November 2017.

{¶13} "In order to sustain an action for negligence, a plaintiff must show the existence of a duty owing from the defendant to the plaintiff or injured party, a breach of that duty, and that the breach was the proximate cause of resulting damages." *Sparre v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 12AP-381, 2013-Ohio-4153, ¶ 9. "'It is axiomatic that every plaintiff bears the burden of proving the nature and extent of his damages in order to be entitled to compensation.'" *Jayashree Restaurants, LLC v. DDR PTC Outparcel LLC*, 10th Dist. Franklin No. 16AP-186, 2016-Ohio-5498, ¶ 13, quoting

Akro-Plastics v. Drake Indus., 115 Ohio App.3d 221, 226 (11th Dist.1996). "As a general rule, the appropriate measure of damages in a tort action is the amount which will compensate and make the plaintiff whole." *N. Coast Premier Soccer, LLC v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 12AP-589, 2013-Ohio-1677, ¶ 17. "[D]amages must be shown with reasonable certainty and may not be based upon mere speculation or conjecture * * *." *Rakich v. Anthem Blue Cross & Blue Shield*, 172 Ohio App.3d 523, 2007-Ohio-3739, ¶ 20 (10th Dist.).

{¶14} "Although a claimant may establish proximate cause through circumstantial evidence, 'there must be evidence of circumstances which will establish with some degree of certainty that the alleged negligent acts caused the injury.'" *Mills v. Best W. Springdale*, 10th Dist. Franklin No. 08AP-1022, 2009-Ohio-2901, ¶ 20, quoting *Woodworth v. New York Cent. RR. Co.*, 149 Ohio St. 543, 549 (1948). "It is well-established that when only speculation and conjecture is presented to establish proximate causation, the negligence claim has failed as a matter of law." *Harris v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 13AP-466, 2013-Ohio-5714, ¶ 15. "Generally, where an issue involves a question of scientific inquiry that is not within the knowledge of a layperson, expert testimony is required." *Id.* at ¶ 16, citing *Stacey v. Carnegie-Illinois Steel Corp.*, 156 Ohio St. 205 (1951). "Where complicated medical problems are at issue, testimony from a qualified expert is necessary to establish a proximate causal relationship between the incident and the injury." *Tunks v. Chrysler Group LLC*, 6th Dist. Lucas No. L-12-1297, 2013-Ohio-5183, ¶ 18.

{¶15} Plaintiff claims the following injuries as a result of his fall while transferring from the wheelchair to the toilet: two broken teeth; chipped tooth; temporary bruising to his face; pain in his head, mouth, shoulder, and neck; headaches; and blindness in his right eye. Of the injuries he claims, plaintiff asserts that all his injuries, other than the temporary bruising to his face, are permanent or have not yet resolved.

{¶16} Plaintiff's claimed injuries are supported by his testimony and that of his attorney in unrelated matters. Plaintiff's testimony, however, lacks credibility. At trial, plaintiff claimed he broke two teeth and chipped another. Plaintiff even offered as evidence a container of what he claimed were the broken/chipped teeth. However, in an informal complaint resolution dated June 12, 2016, plaintiff states that the fall caused him to break a single tooth. (Plaintiff's Exhibit 1b). In another informal complaint resolution dated July 20, 2016, plaintiff states that in a fall on June 3, 2016, he broke one front tooth. *Id*. On August 18, 2016, in a notification of grievance, plaintiff refers to a single broken tooth as a result of the fall. *Id*. On July 16, 2017, plaintiff states that the fall caused him to break multiple teeth. *Id*.

{¶17} The medical records also support a conclusion that plaintiff's testimony lacks credibility. In a progress note dated June 3, 2016, it states that the exam showed a broken front tooth, but the medical staff was unable to determine if it was a new loss. (Plaintiff's Exhibit 14). In another note also dated June 3, 2016, the medical staff noted that plaintiff complained of a fall and stated that he chipped a tooth, which he claims is in his hand. *Id*. On June 4, 2016, the progress note indicated that plaintiff has possible broken teeth. *Id*. Plaintiff reported to Dr. Speer that he broke a single tooth. Regarding plaintiff's vision, a progress note dated June 10, 2016, states that plaintiff claimed to have damaged a tooth and developed vision loss four days after the fall. *Id*. Plaintiff, at trial, testified that he developed and reported his vison loss the day of the fall. Given the numerous inconsistent accounts of his injuries plaintiff has provided in his personal correspondence, at trial, and to medical personnel as recorded in the medical records, the magistrate is forced to conclude that plaintiff's testimony regarding his claimed injuries lacks credibility.

{¶18} Shank did not testify that she personally witnessed any of plaintiff's injuries. Indeed, Shank conceded that plaintiff communicated with her by telephone regarding his injuries. As a result, little if any weight can be given to her testimony.

{¶19} Additionally, plaintiff failed to offer expert testimony establishing the proximate cause of his permanent, subject soft-tissue injuries that he claims are not resolved. Plaintiff testified that he continues to suffer from headaches and pain in his shoulder and neck. However, plaintiff failed to prove that any of those internal, permanent subjective injuries were proximately caused by his fall. *See Argie v. Three Little Pigs, Ltd.,* 10th Dist. Franklin No. 11AP-437, 2012-Ohio-667, 2012 Ohio App. Lexis 570, ¶ 15 (Subjective, soft-tissue injuries, being internal and elusive and not observable, require expert testimony to establish causation). Likewise, plaintiff failed to support his claim of permanent vision loss with expert testimony.

{¶20} Nevertheless, the magistrate finds that plaintiff fell while transferring from his wheelchair to the toilet and sustained some injury. Photographs following the incident depict bruising to plaintiff's head, and Shank credibly testified that an individual at DRC acknowledged that plaintiff was bruised because of the fall. Additionally, it seems likely that plaintiff may have suffered some other minor bruising or discomfort to his body because of the fall from his wheelchair. The bruising and any other minor injuries associated with falling from his wheelchair were likely temporary and resolved shortly thereafter.

{¶21} The magistrate further finds that plaintiff broke a tooth in the fall. Such a finding is consistent with medical records created immediately after the fall identifying a possible new tooth loss. Additionally, the tooth that broke, tooth number 8, was present prior to the fall as noted in the dental records, but was no longer in plaintiff's mouth after the fall. It was also established that plaintiff had lost as many as 9 teeth before he fell and suffered from tooth decay, abscesses, and periodontal disease. There is no dispute that at the time of trial the tooth had not been replaced. However, plaintiff bears responsibility for the difficulties in receiving medical care. Plaintiff claims an allergy to "caines," but there is no corroborating evidence to support such a claim. The allergies listed in the medical records were reported by plaintiff and although DRC attempted to

perform allergy testing, the testing never occurred due to plaintiff's reluctance. Additionally, Dr. Speer credibly testified regarding instances where plaintiff refused dental treatment. Regardless, the magistrate finds that plaintiff broke a tooth in the fall, which likely caused some temporary pain and suffering.

{¶22} Based upon the foregoing, the court finds that plaintiff is entitled to recover $4,525 which represents $4,500 in damages, plus the $25 filing fee. Accordingly, it is recommended that judgment be entered for plaintiff in that amount.

{¶23} *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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