

[Cite as *Hopkins v. Ohio Dept. of Rehab. & Corr.*, 2002-Ohio-5323.]

IN THE COURT OF CLAIMS OF OHIO

WILLIAM HOPKINS	:	
Plaintiff	:	CASE NO. 2001-07998
v.	:	<u>MAGISTRATE DECISION</u>
DEPARTMENT OF REHABILITATION AND CORRECTION	:	Magistrate Steven A. Larson
Defendant	:	
.....	:	

{¶1} Plaintiff brought this action against defendant alleging negligence. Defendant denied liability and the case was tried to a magistrate of the court on the issue of defendant’s liability.

{¶2} At all times relevant hereto, plaintiff was an inmate in the custody and control of defendant pursuant to R.C. 5120.16. In March 1998, during a previous incarceration, plaintiff had surgery to remove a parotid tumor located on his face, just below his left ear. In November 1999, he was incarcerated at defendant’s Correctional Reception Center (CRC) for a parole violation. While at CRC, plaintiff complained that his tumor had returned and was causing him discomfort. On December 22, 1999, plaintiff was sent to the Correctional Medical Center (CMC) for a needle biopsy of the tumor. The biopsy specimen was sent to The Ohio State University Hospital (OSU) for tests. A follow-up visit to discuss the biopsy results was scheduled at CMC for February 16, 2000.

{¶3} On February 14, 2000, plaintiff was transferred to Noble Correctional Institution (NCI). Upon his arrival, he underwent a health screening during which he informed the nurse about his tumor and his scheduled appointment at CMC. (Plaintiff’s

Exhibit 5.) Nevertheless, plaintiff was not sent to CMC as scheduled. On April 11, 2000, plaintiff kited Vanessa Sawyer, Health Care Administrator at NCI, and requested that she obtain the results of his biopsy. On April 12, 2000, Sawyer responded: "Still looking for results. Called both [sic] CRC, CMC and also OSU for results. All say found no results. I have referred this problem to the Bureau of Medical Services in Columbus." (Plaintiff's Exhibit 5.) The results of the biopsy performed at CMC were never located.

{¶4} On April 20, 2000, plaintiff was treated for vision problems and a cold. He did not mention his tumor at that time. On August 2, 3 and 4, 2000, plaintiff was treated for pneumonia, but again failed to mention his tumor or inquire about the results of his biopsy.

{¶5} On November 10, 2000, plaintiff sent an "Informal Complaint Resolution" to Sawyer stating that his cyst was getting worse and that he believed he was not receiving timely medical care. In response, Sawyer scheduled an appointment for November 16, 2000, with Jose Venosa, M.D., Medical Director at NCI.

{¶6} Dr. Venosa referred plaintiff to Emmanuel D. Noche, M.D., an independent ear, nose and throat (ENT) specialist. Dr. Noche examined plaintiff on December 4, 2000, and diagnosed a left parotid tumor. He recommended that it be surgically removed. A biopsy was ordered prior to surgery which revealed that no malignant cells were present. On March 27, 2001, Dr. Noche successfully removed the tumor.

{¶7} Dr. Noche testified that the surgery was difficult because of scar tissue surrounding the tumor which had been caused by either the prior surgery or by infection. He further explained that the parotid gland had two layers, the superficial lobe and the lateral lobe. The superficial lobe that contained the tumor was removed, but the lateral lobe, which contained delicate facial nerves, was left intact. Dr. Noche concluded that the surgery was a success because the tumor was removed and the facial nerves in the lateral lobe remained intact.

{¶8} After the surgery, plaintiff complained to Dr. Venosa that he was having nerve pain and muscle spasms at the site of the surgery. In this case, plaintiff does not contend

that the surgery was negligently performed. Rather, plaintiff argues that the adverse side effects were caused by the delay in performing surgery resulting from defendant's failure to locate his initial biopsy results.

{¶9} To establish a claim of medical malpractice, plaintiff "must show the existence of a standard of care within the medical community, breach of that standard of care by the defendant, and proximate cause between the medical negligence and the injury sustained." *Taylor v. McCullough-Hyde* (1996), 116 Ohio App.3d 595; citing *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127. These elements must be established by expert testimony unless the negligent conduct "is so apparent as to be within the comprehension of layman and requires only common knowledge and experience to understand and judge it." *Bruni*, supra at 130.

{¶10} Plaintiff failed to present any evidence, medical or otherwise, to support his claim that defendant was negligent or that defendant caused him injury. However, Dr. Noche testified as a medical expert for defendant that, in his opinion, any delay of the surgery caused by a failure to locate plaintiff's original biopsy results did not adversely affect the outcome of the surgery which he performed in March 2001. According to Dr. Noche, the delay could have adversely affected plaintiff, only if the tumor had been malignant. Conversely, since the tumor was not malignant, the delay had no adverse effect. (Plaintiff's Exhibit 3.)

{¶11} Assuming, arguendo, that defendant was negligent, plaintiff still would not prevail. Ohio's Comparative Negligence Statute, R.C. 2315.19, bars plaintiff from recovery if his contributory negligence was greater (more than fifty percent) than defendant's. The greater weight of the evidence shows that plaintiff was negligent in failing to notify defendant that his tumor was causing problems despite having been treated by medical personnel on several occasions between April 11 and November 10, 2000.

{¶12} Based on the totality of the evidence, the lack of any expert medical testimony from plaintiff, and Dr. Noche's expert testimony on behalf of defendant, the court

finds that defendant did not breach its duty of care to plaintiff with regard to plaintiff's medical treatment. The court further finds that there is no evidence that failure to locate the results of plaintiff's initial biopsy adversely affected plaintiff. In summary, plaintiff has failed to prove by a preponderance of the evidence that defendant breached any duty of care owed to him. Judgment is recommended in favor of defendant.

{¶13} In light of the foregoing, defendant's motions made at trial pursuant to Civ.R. 41(B) and Civ.R. 50 are DENIED.

STEVEN A. LARSON
Magistrate

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