[Cite as *Whiteside v. Ohio Dept. of Rehab. & Corr.*, 2004-Ohio-315.]

IN THE COURT OF CLAIMS OF OHIO

NORMAN V. WHITESIDE :

Plaintiff : CASE NO. 2002-05760
Magistrate Steven A. Larson

v. :

MAGISTRATE DECISION

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION :

:

Defendant

: : : : : : : : : : : : : : : : : :

{¶1} On August 5, 2003, this case came on for trial at Madison Correctional Institution (MCI), on the issues of liability and damages. The case was tried to a magistrate of the court.[1]

{¶2} At all times relevant hereto, plaintiff was an inmate in the custody and control of defendant pursuant to R.C. 5120.16. His complaint alleges that the medical treatment he received while at the former Orient Correctional Institution, was below the applicable standards of care. Plaintiff claims that defendant negligently administered prescription medications. Specifically, plaintiff contends that defendant administered Baycol as a substitute for Lipitor and that defendant improperly co-administered Elavil and Clonidine. Defendant contends that it adhered to acceptable medical standards in the treatment of plaintiff.

{¶3} Plaintiff testified that he was prescribed Lipitor for high triglycerides but that Baycol was substituted for it instead. He presented a patient prescription summary that shows Baycol was dispensed four times between May 2001 and July 2001. (Plaintiff's

[1]Defendant moved for a Civ.R. 41(B) directed verdict and the motion was taken under advisement. The court now DENIES the motion and rules on the merits of this case.

Exhibit 9.) The summary shows that Baycol was last prescribed on July 26, 2001. Plaintiff also produced a "retyped" letter from the Bayer corporation to health care professionals informing them of the Baycol recall. (Plaintiff's Exhibit 11.) The letter is dated August 8, 2001. Cindy Rees, the health care administrator at MCI and a registered nurse, testified that Baycol was an approved substitute for Lipitor. There was no testimony as to whether Elavil and Clonidine were co-administered.

{¶4} Plaintiff testified that when he talked to a nurse about the Baycol substitution, he was told that Baycol was the same as Lipitor. Plaintiff also described how he felt weak and could not do normal activities after taking Baycol for one month. Joseph Woods and Michael A. Grover, Jr., both inmates at MCI and acquainted with plaintiff, testified that during the time in question, plaintiff was weak with an illness and that he complained about his medications.

{¶5} Plaintiff opined that he received substandard medical treatment when Baycol was substituted for Lipitor, and that the substitution resulted in adverse side effects.

{¶6} In *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, at paragraph one of the syllabus, the Supreme Court of Ohio established plaintiff's burden of proof in a medical malpractice case:

{¶7} "*** in order to establish medical malpractice, it must be shown by a preponderance of the evidence that the injury complained of was caused by the doing of some particular thing or things that a physician or surgeon of ordinary skill, care and diligence would not have done under like or similar conditions or circumstances, or by the failure or omission to do some particular thing or things that such a physician or surgeon would have done under like or similar conditions and circumstances, and that the injury complained of was the direct and proximate result of such doing or failing to do some one or more of such particular things."

{¶8} In *Buerger v. Ohio Dept. of Rehab. & Corr.* (1989), 64 Ohio App.3d 394, the Tenth District Court of Appeals found the *Bruni v. Tatsumi* standard applicable to a claim of medical malpractice brought by a prisoner.

{¶9} Plaintiff called fellow inmate, James Luoma, as his expert witness. Inmate Luoma became a registered nurse in 1985 and was subsequently incarcerated in 1986. Plaintiff cited *Sloan v. Dept. of Rehab. & Corr.* (1997), 119 Ohio App.3d 331, as authority for the proposition that registered nurses are allowed to give expert testimony in medical malpractice cases. However, in *Sloan*, both nurses testified as to nursing duties and a physician testified as to a physician's standard of care. Id. at 335.

{¶10} In *Bruni v. Tatsumi*, supra at 130, the Supreme Court of Ohio established that the appropriate standard of care must be proven by expert testimony. Ohio Evidence Rule 601 states, "Every person is competent to be a witness except: *** (D) [a] person giving expert testimony on the issue of liability in any claim asserted in any civil action against a physician *** arising out of the diagnosis, care, or treatment of any person by a physician *** unless the person testifying is licensed to practice medicine *** by the state medical board or by the licensing authority of any state, and unless the person devotes at least one-half of his or her professional time to the active clinical practice in his or her field of licensure, or to its instruction in an accredited school. ***."

{¶11} It was established upon cross-examination that inmate Luoma was not a pharmacist or physician, had never published any articles, had never held a teaching position, and had never been qualified or certified by a court to provide expert medical testimony. The court concludes that inmate Luoma is not qualified to give a medical opinion.

{¶12} The court finds that plaintiff has failed to produce expert testimony as to the propriety of substituting Baycol for Lipitor and whether such substitution caused any of the conditions about which plaintiff complained. Further, plaintiff has failed to produce any

evidence other than his own testimony that his medical treatment fell below the standard of care for such treatment.

{¶13} The court concludes that plaintiff has failed to prove by a preponderance of the evidence that defendant did not provide proper medical treatment. Accordingly, judgment is recommended in favor of defendant.

{¶14} On another matter, plaintiff's January 6, 2004, motion for a mistrial is DENIED.

{¶15} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision. A party shall not assign as error on appeal the court's adoption of any finding or conclusion of law contained in the magistrate's decision unless the party timely and specifically objects to that finding or conclusion as required by Civ.R. 53(E)(3).*

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STEVEN A. LARSON
Magistrate

Entry cc:

Norman V. Whiteside, #A184-313 — Plaintiff, Pro se
Box 740
London, Ohio 43140-0740

Randall W. Knutti — Attorney for Defendant
Assistant Attorney General
150 East Gay Street, 23rd Floor
Columbus, Ohio 43215-3130

LM/cmd
Filed January 26, 2004
To S.C. reporter January 26, 2004