

Court of Claims of Ohio

The Ohio Judicial Center
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DANIEL P. MCKINNEY

Plaintiff

v.

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION

Defendant

Case No. 2014-00571

Judge Patrick M. McGrath
Magistrate Robert Van Schoyck

ENTRY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

{¶1} On January 22, 2015, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). On February 9, 2015, plaintiff filed a response. On February 19, 2015, defendant filed a motion for leave to file a reply, which is GRANTED. The motion for summary judgment is now before the court for a non-oral hearing pursuant to L.C.C.R. 4(D).

{¶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, brings this action alleging a failure on the part of defendant's medical professionals to provide him with proper care and treatment for knee and shoulder ailments. The complaint provides that plaintiff first complained of these ailments to defendant's medical professionals several years ago, and at various times has been examined and prescribed medication and exercise, and undergone an X-ray. The complaint also provides that a prison physician diagnosed plaintiff as having arthritis.

{¶5} According to plaintiff, his conditions have not been properly diagnosed and the treatment he has received has been ineffective and falls below the applicable standards of care, particularly to the extent that he has not been provided with an MRI or CT scan, undergone arthroscopic or arthrogram examination, or been referred to an orthopedist. Plaintiff alleges that, as a result, he continues to suffer knee and shoulder pain, his knee pain has caused him to develop back pain, and on two occasions in 2014 his left knee "gave out," causing him to fall and suffer further injury.

{¶6} The complaint raises theories of medical malpractice, negligent credentialing, negligent hiring/supervision/retention, breach of contract, and negligent infliction of emotional distress, and plaintiff also seeks "declaratory and injunctive relief requiring Defendants to provide Plaintiff responsive and adequate medical treatment * * *."

{¶7} "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.

{¶8} Defendant argues that the care and treatment rendered by its medical professionals did not fall below the applicable standard of care. In support, defendant submitted an affidavit from Stephen R. Payne, M.D., an Ohio-licensed, board-certified internist who practices in Cincinnati. Through his affidavit, and consistent with Civ.R. 56, Dr. Payne authenticates a copy of an expert report he prepared. See *Cunningham v. Children’s Hosp.*, 10th Dist. Franklin No. 05AP-69, 2005-Ohio-4284, ¶ 15. Among other things, Dr. Payne states in the report that he reviewed plaintiff’s complaint and the attachments to it, as well as the medical records defendant has kept with respect to plaintiff’s care and treatment from 2004 to 2014, a copy of which defendant filed under seal. Dr. Payne also states that the medical records show plaintiff complained to defendant’s medical professionals of various musculoskeletal symptoms, including bilateral knee pain and left shoulder pain, at times throughout his incarceration. Dr. Payne relates that the records show plaintiff was seen by medical personnel at or around the time of his complaints and received, among other things, medical examinations, X-rays, anti-inflammatory and analgesic medications, knee support devices, activity limitations and accommodations, and numerous follow-up evaluations. Dr. Payne states that the “evaluations were consistent with degenerative joint disease and various degrees of musculoskeletal strains and sprains.” Based upon his education, training, and experience, Dr. Payne avers that, in his opinion, “to a reasonable degree of medical probability the care rendered to Mr. McKinney by the physicians and staff of the Ohio Department of Rehabilitation and Correction complied with the applicable standards of care.”

{¶9} While plaintiff argues that Dr. Payne is unqualified to serve as an expert in this matter because he is not an orthopedist, it is well-settled that “[u]nder Ohio law, any doctor licensed to practice medicine is competent to testify on medical issues.” *Schooley v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 05AP-823, 2006-Ohio-2072, ¶ 13. Indeed, the affidavit and report of Dr. Payne demonstrate that the diagnosis, care, and treatment rendered to plaintiff by defendant’s medical professionals complied with the applicable standards of care. In keeping with the standards established by Civ.R. 56 and *Bruni*, “once expert testimony is produced by a defendant in support of a motion for summary judgment, the plaintiff must submit counterbalancing expert testimony to demonstrate the existence of a material issue of fact on each of the elements of a medical negligence claim addressed by the defendant’s evidence, unless the standard of care in the case is so obvious that non-experts could reasonably be expected to evaluate the impact of the defendant’s conduct.” *Campbell* at ¶ 10; *see also Schooley* at ¶ 17.

{¶10} In this case, plaintiff has failed to provide any evidence, much less an affidavit from a medical expert, to controvert the expert testimony submitted by defendant and demonstrate a genuine issue of material fact as to whether defendant’s medical professionals deviated from the standard of care, and if so, whether such deviations proximately caused harm to plaintiff. Therefore, it must be concluded that plaintiff cannot prevail on his claim of medical malpractice.

{¶11} To the extent that the complaint raises a theory of breach of contract, it is clear that this claim too is based upon the alleged misconduct of medical professionals and constitutes medical malpractice, so this theory must also fail as a matter of law. *See Prysock v. Ohio State Univ. Med. Ctr.*, 10th Dist. Franklin No. 01AP-1131, 2002-Ohio-2811, ¶ 9 (“It is well-settled that the misconduct of medical professionals constitutes malpractice regardless of whether such misconduct is framed in terms of negligence or breach of contract.”). Furthermore, the negligent credentialing theory

must fail inasmuch as such claims require the plaintiff to establish underlying medical malpractice by a physician. *Schelling v. Humphrey*, 123 Ohio St.3d 387, 2009-Ohio-4175, ¶ 19. Similarly, the theory of negligent hiring/supervision/retention must fail inasmuch as plaintiff has not provided any evidence to demonstrate incompetence on the part of defendant's agents or employees, which is a necessary element for proving such claims. *Chapa v. Genpak, LLC*, 10th Dist. Franklin No. 12AP-466, 2014-Ohio-897, ¶ 106. And, as set forth in the complaint, plaintiff's claim of negligent infliction of emotional distress, as well as his claims for declaratory and injunctive relief, are also predicated upon alleged medical malpractice and must therefore fail as well.

{¶12} Based upon the foregoing, the court concludes that there are no genuine 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 other pending motions are DENIED as moot. 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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