[Cite as *Hairston v. Ohio Dept. of Rehab. & Corr.*, 2015-Ohio-5654.]

PAUL R. HAIRSTON, JR. Plaintiff v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION Defendant	Case No. 2013-00631 Judge Patrick M. McGrath JUDGMENT ENTRY

{¶1} On December 1-5, 2014, a trial was held for the purpose of determining liability only. On April 24, 2015, the magistrate issued a decision recommending judgment in favor of defendant.

{¶2} Civ.R. 53(D)(3)(b)(i) states, in part: "A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i)." On May 8, 2015, plaintiff filed a motion for an extension of time to file objections to the magistrate's decision which was granted. Plaintiff filed objections on May 13, 2015. On May 20, 2015, defendant Ohio Department of Rehabilitation and Correction (ODRC) filed a response to plaintiff's objections. Plaintiff raises the following four (4) objections:

a. Objections 1 and 2: The Magistrate erred in allowing the testimony of Matthew Flaherty, M.D. and/or Michael Yaffe, M.D. because they were unable to state within a reasonable degree of medical probability an alternative cause of plaintiff's hemorrhagic stroke or intracerebral hemorrhage. And, the Magistrate erred in failing to find that plaintiff met

his burden of establishing that his stroke was caused by uncontrolled blood pressure.

{¶3} Plaintiff argues that, pursuant to the holding in *Stinson v. England*, 69 Ohio St.3d 451, 1994-Ohio-532, 633 N.E.2d 532, defendant's experts should not have been permitted to testify. The Supreme Court of Ohio in *Stinson* found that, an "* * * expert opinion regarding a causative event, including alternative causes, must be expressed in terms of probability irrespective of whether the proponent of the evidence bears the burden of persuasion." *Id.* at 456.

{¶4} Regarding Dr. Yaffe, plaintiff asserts he has not conducted any research on the particular anti-hypertension medication in question, Lisinopril. Yet, he opined that plaintiff's blood pressure would not rise above 125 systolic if he discontinued taking the medication. Plaintiff argues, and the court agrees, that this testimony is not consistent with the evidence which demonstrates that fourteen of plaintiff's blood pressure readings were above 125 systolic between January 2011 and October 2012. (*See* Plaintiff's Exhibits 25, 26).

{¶5} Plaintiff argues that Dr. Yaffe's inconsistent testimony is based, in part, on incomplete medical records and/or a lack of a thorough medical history provided by defendant to its experts. For instance, neither of defendant's experts was aware that plaintiff had a history of hypertension prior to his diagnosis at ODRC. Nor were they aware that plaintiff's hypertension, necessitating medication, continued after his release from OSU. Or, that he continues taking medication for his hypertension to this day.

{¶6} Plaintiff asserts that Dr. Yaffe could not state what was the most probable cause of plaintiff's stroke. Dr. Yaffe opined that the cause of plaintiff's stroke was:

> * * * about 50/50 in my mind that he either had this stroke because of the chronic effects of having hypertension and diabetes, although those are relatively minor degrees of those diseases, or he had the stroke from unknown causes and it's idiopathic. So I guess the best answer is I really don't know with certainty what the basis was for his hemorrhagic stroke.

(Trial Transcript, pgs. 162-163). However, according to plaintiff, based on the definition of idiopathic provided by Dr. Yaffe at trial (strokes which occur in patients with no risk factors), plaintiff's stroke could not have been idiopathic in nature, because he has a number of risk factors. Therefore, it must have been caused by uncontrolled hypertension.

{¶7} Likewise, Dr. Flaherty was unable to say, more likely than not, plaintiff's stroke was caused by unknown factors, or was idiopathic in nature. (Trial Transcript, pgs. 120-121). To the contrary, Dr. Flaherty testified that, to a reasonable degree of medical certainty, hypertension was a contributing cause of plaintiff's stroke. (Trial Transcript, p. 107). Accordingly, plaintiff asserts that the magistrate erred in allowing defendant's experts' testimony and in failing to find that hypertension was a legal cause of plaintiff's injuries.

{¶8} Contrary to plaintiff's assertion, defendant argues that both of its experts opined that the lack of Lisinopril for two months did not cause plaintiff's stroke. Further, defendant replies that plaintiff failed to provide the testimony of a neurologist to offer an opinion on whether plaintiff's stroke was caused by a failure to take his low dose of Lisinopril for two months prior to his stroke. Defendant also points out that none of the treating physicians at Ohio State University were called to testify about the causation of plaintiff's stroke.

{¶9} Regarding the notion that defendant's experts did not have a complete understanding of plaintiff's history of hypertension, defendant asserts that plaintiff did not demonstrate a history of hypertension. Plaintiff testified that he had not seen a physician since his youth, was never hospitalized prior to age 49, his blood pressure was always normal when he checked it at Kroger pharmacy. Further, plaintiff's blood pressure was normal when taken upon his arrival at the Correctional Reception Center in January 2011, and upon arrival at Pickaway Correctional Facility (PCI) he indicated on admission forms that he did not have a personal risk factor for high blood pressure.

{¶10} Defendant also asserts, and the court agrees, that plaintiff mischaracterizes *Stinson*. The flaw in reasoning appears to be the exact same error employed by appellants in *Stinson*. That is the assumption that plaintiff's expert's theory (the stroke was caused by uncontrolled hypertension due to a failure to take prescribed medication for a period of two months) was one of the alternative causes considered by defendant's experts. *Id.* at 457. In *Stinson*, the court held that the cause deemed "most likely" by the defendant's expert, "[e]ven if it had a likelihood of less than fifty percent * * * had a greater likelihood than the theory espoused by appellants * * *." *Id.* Likewise, in this case, defendant's experts would not offer an opinion that an alternative cause, idiopathic or multifactorial was the probable cause. However, they both opined that a lack of medication was not the cause. "The significance of the testimony, therefore, was in its ascription of likelihood not to the alternative cause but to the cause espoused by [plaintiff]." *Id*. Here, the defense experts did not offer an opinion on the "most likely" cause out of the alternatives. However, since they did outright refute the possibility that a two month cessation of a low dose of Lisinopril was the cause, they effectively opined that the alternatives were more likely than plaintiff's stated cause.

{¶11} Defendant argues that the defense experts can testify that there were alternative causes to plaintiff's injuries even when there are several different causes, none of which is probable. It argues that defendant's experts need not give an opinion as to the exact cause of plaintiff's stroke. Rather, they may "* * * rule out plaintiff's failure to take his anti-hypertensive medications as the cause or offer potentials to refute Dr. Mukand." (Defendant's response, p. 5). The court finds defendant's argument persuasive. Particularly, in light of the following from *Stinson*:

> Once a prima facie case has been demonstrated, the adverse party may attempt to negate its effect in various ways. He may cross-examine the expert of the other part. He may adduce testimony from another expert

> which contradicts the testimony of the expert for his adversary. Further he may adduce expert testimony which sets forth an alternative explanation for the circumstances at issue.

(*Id*. at 456). Defendant chose to present alternative causes (even though idiopathic causes by their very nature are unknown and therefore not truly a cause but rather the absence of a known cause). However, it was not required to adduce such a cause in order to refute the prima facie case established by plaintiff. Here, defendant's experts also contradicted plaintiff's expert's testimony in regards to the lack of medication as the probable cause. The magistrate found the defense experts' testimony more credible than plaintiff's expert as it pertains to the effect of plaintiff's low dose of Lisinopril and the amount of time it would take for a stroke to be caused by uncontrolled hypertension.

{¶12} Upon careful consideration, the court finds the magistrate's analysis to be an accurate interpretation of the testimony presented. "The admission [3] or exclusion of evidence, including expert testimony, is a matter within the trial court's discretion and will be reversed only for an abuse of that discretion." *Robertson v. Mount Carmel E. Hosp.*, 2011-Ohio-2043 (10th Dist.). "An abuse of discretion requires more than an error of law or judgment; it connotes that the court's attitude is unreasonable, unconscionable or arbitrary." *Fritch v. Univ. of Toledo Coll. of Med.*, 2011-Ohio-4518, ¶ 5 (10th Dist.). The court finds no evidence that the magistrate's decision was unreasonable, unconscionable or arbitrary. In fact, the court finds based on the evidence that plaintiff failed to meet his burden of establishing that hypertension (due to a two-month lapse in medication) was the proximate cause of plaintiff's stroke.

{¶13} Further, the credibility of witnesses and the weight attributable to their testimony are primarily matters for the trier of fact. *State v. DeHass*, 10 Ohio St. 2d 230, 227 N.E. 2d 212 (1967), paragraph one of the syllabus. The court is free to believe or disbelieve, all or any part of each witness's testimony. *State v. Antill*, 176 Ohio St. 61, 197 N.E. 2d 548 (1964). The magistrate found, and the court agrees, that the testimony of defendant's medical experts was more persuasive than the testimony

offered by plaintiff's medical expert. Plaintiff did not offer testimony from a neurologist, choosing rather to present the testimony of Dr. Mukand whose practice focuses on providing post-stroke treatment to patients, as opposed to pre-stroke prevention. To the contrary, defendant offered the testimony of Dr. Flaherty, a board certified neurologist. The court agrees with the magistrate's opinion and finds that Dr. Flaherty was more qualified than Dr. Mukand to offer an opinion on the causation of plaintiff's stroke. In fact, Dr. Mukand admitted that while preventative measures are an important aspect of his practice, he does not usually investigate the cause of his patients' strokes.

{¶14} Therefore, plaintiff's first and second objections are OVERRULED.

b. Objection 3: The Magistrate erred in finding that plaintiff did not return his Health Service Request form (HSR) until October 22, 2012.

{¶15} Plaintiff argues that defendant asserted during its opening statement that the evidence would demonstrate that plaintiff had a history of non-compliance as a patient. However, no such testimony or evidence was offered at trial to corroborate this assertion. To the contrary, Nurse Askins, Dr. Yaffe, and plaintiff all confirmed the opposite – plaintiff was consistently compliant with his duties as a patient at PCI.

{¶16} The magistrate found plaintiff's testimony regarding his daily routine credible and that plaintiff was generally compliant in taking his medications. However, the magistrate also found that plaintiff submitted the Health Service Record (HSR) dated August 22, 2012 on October 22, 2012. Plaintiff asserts that these contradictory findings of fact cannot be rectified. However, the court does not agree.

{¶17} The magistrate was free to believe that plaintiff was generally compliant with the exception of his testimony regarding the HSR processed on October 22, 2015. *Id*. Upon careful review of the testimony and evidence, the court finds there is not sufficient evidence from which it can infer that plaintiff did in fact submit the HSR on August 22, 2015.

{¶18} Therefore, plaintiff's third objection is OVERRULED.

c. Objection 4: The Magistrate erred in determining that plaintiff was contributorily negligent in failing to obtain his essential medicine while also determining that his lack of medication was not the cause of his injury.

{¶19} The court agrees that plaintiff may only be contributorily negligent if his actions/inactions were a proximate cause of his injuries. The magistrate found that plaintiff failed to prove that the lack of medication was a proximate cause of plaintiff's stroke. Hence, it follows that plaintiff's own actions which may have resulted in a two-month lapse in medication cannot be a proximate cause. However, this is a moot point. The magistrate qualified his finding by stating that, "[e]ven if plaintiff had proved that defendant's breach of the standard of care caused his stroke, plaintiff's own conduct in receiving healthcare would be at issue." (Magistrate's Decision, p. 17). By employing such conditional language, it is clear the magistrate did not making contradictory findings. Rather, he simply provided the parties, and this court, with a detailed account of his analysis so that his decision may be fully understood. In the event this court disagreed with the magistrate's finding, and found that the lack of medication caused plaintiff's stroke, plaintiff's own negligence would be taken into account. Since the court agrees with the magistrate regarding plaintiff's failure to demonstrate a proximate cause, such analysis is not necessary.

{¶20} Accordingly, plaintiff's fourth objection is OVERRULED.

{¶21} Upon review of the record, the magistrate's decision and the objections, the court finds that the magistrate has properly determined the factual issues and appropriately applied the law. Therefore, the objections are OVERRULED and the court adopts the magistrate's decision and recommendation as its own, including findings of fact and

conclusions of law contained therein. Judgment is rendered in favor of defendant. 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

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