[Cite as *Schadhauser v. Dept. of Rehab. & Corr.*, 2017-Ohio-8465.]

WILLIAM SCHADHAUSER Plaintiff v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION Defendant AND WILLIAM SPIKES Plaintiff v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION Defendant AND JARED T. FERGUSON Plaintiff v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION Defendant	Case Nos. 2016-00349, 2016-00423 and 2016-00657 Judge Patrick M. McGrath Magistrate Gary Peterson ENTRY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

{¶1} On August 9, 2017, defendant filed a motion pursuant to Civ.R. 56(B) for summary judgment. On August 29, 2017, with leave of court, plaintiffs filed a memorandum in opposition.

{¶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} Plaintiffs each filed individual cases against defendant, the Ohio Department of Rehabilitation and Correction (DRC). On September 29, 2016, plaintiffs filed motions pursuant to Civ.R. 42(A)(1) to consolidate the cases for the purposes of trial inasmuch as the matters involve common questions of law and fact. The motions were not opposed and, by an order of a magistrate, the cases were consolidated.

{¶5} According to the complaints, at all times relevant, plaintiffs were inmates in the custody and control of defendant at the Chillicothe Correctional Institution (CCI). Plaintiffs allege that defendant negligently exposed them to pigeon droppings while they were in defendant's custody at CCI. The complaints provide that the pigeon droppings were throughout CCI. Plaintiffs state that defendant was aware of the danger caused by pigeon droppings but failed to correct the health hazard. Plaintiffs allege that as a

result of their exposure to the pigeon droppings, they contracted histoplasmosis and suffered permanent injuries that are progressive in nature.

{¶6} In its motion for summary judgment, defendant argues that plaintiffs need expert testimony to establish that plaintiffs contracted histoplasmosis from their exposure to pigeon droppings at CCI. Motion page 3. Defendant states that the deadline by which plaintiffs were required to provide it with the names of expert witnesses and copies of their reports has passed and plaintiffs did not provide it with the names of expert witnesses or copies of their reports.

{¶7} In support of its motion, defendant submitted the affidavit of counsel for defendant, Jeanna Jacobus. Jacobus avers, among other things, that she participated in a case management conference with the court on October 27, 2016, after which the court set deadlines by which the parties were to disclose expert witnesses. Plaintiffs sought and received two extensions of the deadline and the court set July 24, 2017 as plaintiffs' final deadline. Finally, Jacobus avers that as of August 9, 2017, plaintiffs have not provided defendant with any list of experts and copies of their reports.

{¶8} In response, plaintiffs acknowledge that they did not provide defendant with a list of their expert witnesses and copies of their reports. Nevertheless, plaintiffs argue that they "were advised by medical personnel of Defendant that the cause of Histoplasmosis was pigeon feces." Memorandum in opposition page 1. In support, plaintiffs each submitted their own affidavits in addition to the affidavit of their counsel, Richard Swope. Plaintiffs each generally aver that they were exposed to pigeon droppings throughout CCI and that each plaintiff was subsequently diagnosed with histoplasmosis.

{¶9} Plaintiff William Spikes avers that "[a]n Ohio State University contract doctor diagnosed me with Histoplasmosis and explained it was caused by pigeon feces." Affidavit ¶ 5. Spikes further avers that "Doctors from the Ohio State University Wexner Medical Center told me that exposure to bird droppings at the Chillicothe Correctional

Institution caused my Histoplasmosis. I believe other doctors at the prison would acknowledge the pigeon droppings and my exposure caused my Histoplasmosis." Affidavit ¶ 8.

{¶10} Plaintiff Jared Ferguson avers, among other things, that "Dr. McGuire, an Ohio State University contract doctor, in a video conference, diagnosed me with Histoplasmosis, asking if there was a large pigeon population. * * * I intend to call as witnesses all DRC medical staff and Dr. McGuire as upon cross-examination * * * My attorney was unable to find a local expert in the field of Histoplasmosis but assert the medical records prove I was diagnosed with Histoplasmosis and I firmly believe it was from the exposure to bird droppings at the Chillicothe Correctional Institution. Doctors at the prison would acknowledge the pigeon droppings and my exposure did cause my condition." Affidavit ¶ 6-9.

{¶11} Plaintiff William Schadhauser avers, among other things, that "[m]y attorney was unable to find a local expert in the field of Histoplasmosis, but assert the medical records prove I was diagnosed with Histoplasmosis and I firmly believe it was from the exposure to bird droppings at the Chillicothe Correctional Institution. Doctors at the prison would acknowledge the pigeon droppings and my exposure did cause my condition." Affidavit ¶ 5.

{¶12} Finally, counsel for defendant avers that he "has been unable to find an expert, but believes treating doctors and medical personnel who treated the involved inmates would acknowledge the direct and proximate cause of inmates' infection with Histoplasmosis * * * All treating physicians, including contract doctors, are subject to cross-examination and discovery is incomplete, thus making the motion moot." Affidavit ¶ 2-3.

{¶13} "To recover on a negligence claim, a plaintiff must prove by a preponderance of the evidence (1) that a defendant owed the plaintiff a duty, (2) that a defendant breached that duty, and (3) that the breach of the duty proximately caused a

plaintiff's injury." *Ford v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 05AP-357, 2006-Ohio-2531, ¶ 10. "In the context of a custodial relationship between the state and its prisoners, the state owes a common-law duty of reasonable care and protection from unreasonable risks." *Jenkins v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 12AP-787, 2013-Ohio-5106, ¶ 8.

{¶14} "'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).

{¶15} "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).

{¶16} It appears that the parties agree that expert testimony is necessary to establish that plaintiffs contracted histoplasmosis from pigeon droppings at CCI. Furthermore, it has previously been held that expert testimony is required to establish the proximate cause of an inmate's histoplasmosis allegedly contracted while in prison. *Yoakem v. Ohio Dept. of Rehab. & Corr*., Ct. of Cl. No. 1999-13720 (Dec. 21, 2000); *Gloden v. Ohio Dept. of Rehab. & Corr*., Ct. of Cl. No. 1999-08556 (Dec. 21, 2000);

Bowles v. Ohio Dept. of Rehab. & Corr., Ct. of Cl. No. 1999-08564 (Dec. 21, 2000). Indeed, the mechanisms for contracting histoplasmosis and the disease process are not within the knowledge of a layperson. Evid.R. 702(A). Therefore, expert testimony is necessary to establish that plaintiffs contracted histoplasmosis in the manner in which they claim. *See Harris* at ¶ 16-17, (inmate required to submit expert testimony to establish that he contracted MRSA from the prison barber shop in order to show a genuine issue of material fact).

{¶17} Upon review, it is undisputed that plaintiffs failed to disclose any expert witnesses or copies of their reports by the deadline established by this court. L.C.C.R. 7(E) requires the parties to identify expert witnesses and exchange copies of their reports. The cases were previously voluntarily dismissed and plaintiffs were given two extensions of the deadline to provide defendant with the names of expert witnesses and copies of their reports. Plaintiffs failed to identify any experts who would testify at trial or provide copies of their reports. Nevertheless, counsel for plaintiff states in the memorandum in opposition that he was unaware that plaintiffs would testify as to an "admission" of causation until faced with the motion for summary judgment.

{¶18} Plaintiffs argue that an alleged "admission" by physicians at The Ohio State University Wexner Medical Center is sufficient to overcome defendant's motion for summary judgment. However, Civ.R. 56(E) provides, in relevant part, "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to matters stated in the affidavit." There is no doubt that plaintiffs are not qualified to testify as to the proximate cause of their histoplasmosis. Furthermore, the alleged "admission" put forth by plaintiffs is inadmissible hearsay. "When ruling upon a motion for summary judgment, a trial court only considers admissible evidence. *Tokles & Son, Inc. v. Midwestern Indemn. Co*., 65 Ohio St.3d 621, 631 (1992), fn. 4 ('Only facts which would be admissible in evidence can be * * *

relied upon by the trial court when ruling upon a motion for summary judgment.') 'Hearsay statements, unless an exception to the hearsay rule, are not admissible evidence in a summary judgment context.' *Paulino v. McCary,* 10th Dist. Franklin No. 04AP-1186, 2005-Ohio-5920, ¶ 6, fn. 1." *Havely v. Franklin County*, 10th Dist. Franklin No. 07AP-1077, 2008-Ohio-4889, ¶ 24, quoting *Guernsey Bank v. Milano Sports Enters., L.L.C.*, 177 Ohio App. 3d 314, 2008-Ohio-2420, ¶ 59 (10th Dist.). It appears plaintiffs believe the statement is an admission by party-opponent, but it is not defendant's statement and none of the other exceptions identified in the rule apply. Evid.R. 801(D)(2). Moreover, none of the other hearsay rule exceptions apply. Accordingly, such a statement cannot be considered.

{¶19} Even if the court considered the alleged "admission" in the affidavits, such a statement does not qualify as expert testimony and is insufficient to create a genuine issue of material fact as to the proximate cause of plaintiffs' histoplasmosis. Plaintiffs argue that an unidentified Ohio State University doctor diagnosed Spikes with histoplasmosis and explained it was caused by pigeon feces. Spikes Affidavit ¶ 5. Such a conclusory statement does not meet the requirements for expert testimony. *See Avery v. Ohio Dept. of Rehab. & Corr*., 10th Dist. Franklin No. 16AP-856, 2017-Ohio-7376, ¶ 16-17, (inmate's testimony that he was told by defendant's medical staff and by the chief inspector as to the cause of his symptoms does not qualify as expert testimony and is insufficient to prove proximate causation).

{¶20} First, there is no evidence that the unidentified doctor is qualified to opine as to the cause of plaintiffs' histoplasmosis. *Cunningham v. Children's Hosp*., 10th Dist. Franklin No. 05AP-69, 2005-Ohio-4284, ¶ 17, (upholding a trial court's decision to disregard ostensible expert testimony where it was not established that the purported expert was competent to testify). Additionally, there is no evidence demonstrating the basis upon which the unidentified doctor reached such an opinion. Evid.R. 702(C) requires expert witness testimony to be based on reliable scientific, technical, or other

specialized information. The alleged "admission" does not provide the basis for any such opinion and does not establish that the opinion is held to a reasonable degree of probability. *Shumaker v. Oliver B. Cannon & Sons, Inc*., 28 Ohio St.3d 367, 369 (1986), ("It is well-settled that the establishment of proximate cause through medical expert testimony must be by probability."). Furthermore, the statement in Ferguson's affidavit that Dr. McGuire, an Ohio State University doctor, diagnosed him with histoplasmosis and asked if there was a large pigeon population, fails to meet the requirements set forth above for expert testimony. Ferguson Affidavit at ¶ 6. Moreover, such a statement does not contain any opinion as to causation.

{¶21} Civ.R. 56(E) provides:

{¶22} "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party."

{¶23} Plaintiffs, as the nonmoving parties, were required to produce evidence identified in Civ.R. 56(C) to demonstrate that there is a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 289 (1996). Plaintiffs failed to put forth any evidence that they provided defendant with the names of their expert witnesses and copies of their reports by the deadline established by the court. Furthermore, the "admission" plaintiffs point to in their affidavits is inadmissible hearsay. Moreover, the "admission" does not meet the requirements for expert testimony and fails to establish that an expert witness will testify at trial that the proximate cause of plaintiffs' histoplasmosis is pigeon droppings at CCI. Thus, reasonable minds can only conclude that plaintiffs cannot meet their burden of proof on their claim for negligence and that

there are no genuine issues of material fact for trial. Therefore, defendant is entitled to judgment as a matter of law.

{¶24} Based upon the foregoing, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. All previously scheduled events are VACATED. Court costs are assessed against plaintiffs. 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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