

[Cite as *Payne v. Dept. of Rehab. & Corr.*, 2017-Ohio-9147.]

SCOTT PAYNE

Plaintiff

v.

OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION,
et al.

Defendants

Case No. 2015-00953

Judge Patrick M. McGrath

DECISION

{¶1} Currently before the court are plaintiff Scott Payne’s objections which, after obtaining an extension, he filed on August 29, 2017. Defendants Ohio Department of Rehabilitation and Correction (DRC) and Office of Risk Management filed a memorandum contra the objections on September 29, 2017. Plaintiff’s claims stem from an accident that occurred on May 16, 2014, during which plaintiff fell approximately five-and-a-half feet from a loading dock to the pavement below after one of DRC’s employees drove a truck away from the dock while plaintiff unloaded it. After the parties stipulated to liability, the case proceeded to a damages trial before the court’s magistrate. On July 17, 2017, the magistrate issued a decision recommending judgment for plaintiff in the amount of \$12,025.00, representing \$12,000 in damages plus the \$25 filing fee. Plaintiff delineates three objections to the magistrate’s decision.

{¶2} Objections to factual findings must be supported by a transcript or, where a transcript is unavailable, with an affidavit of evidence, the latter of which plaintiff submitted with his objections. Civ.R. 53(D)(3)(b)(iii). Further, Civ.R. 53(D)(3)(b)(ii) provides “[a]n objection to a magistrate’s decision shall be specific and state with particularity all grounds for objection.” As to the trial court’s duty when considering objections, Civ.R. 53(D)(4)(d) provides, in pertinent part:

Action on objections. If one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. (emphasis added).

In reviewing objections:

The trial court has the ultimate authority and responsibility over the magistrate's findings and rulings. The trial court must undertake an independent review of the magistrate's report to determine any errors.

When reviewing a magistrate's decision, the trial court does not sit in the position of an appellate court. Instead, the trial court must conduct a de novo review of the facts and conclusions in the magistrate's decision. As the ultimate finder of fact, the trial court must make its own factual determinations through an independent analysis and should not adopt the magistrate's findings unless the trial court fully agrees with them. It is the trial court's obligation to determine whether the magistrate properly determined the facts and applied the appropriate law. If the trial court determines, in its judgment, the magistrate has failed to do so, the trial court must substitute its judgment for that of the magistrate.

Ramsey v. Ramsey, 10th Dist. Franklin No. 13AP-840, 2014-Ohio-1921, 2014 Ohio App. Lexis 1868, ¶¶ 16-17 (internal citations omitted).

PLAINTIFF SUBMITTED AN INCOMPLETE AFFIDAVIT OF EVIDENCE, AFFORDING A PROPER BASIS UPON WHICH TO OVERRULE OBJECTIONS TO FACTUAL FINDINGS.

{¶3} As noted, plaintiff submitted an affidavit of evidence due to his inability to pay for a transcript. In *Gumins v. Ohio Dep't of Rehab. & Corr.*, 10th Dist. Franklin No. 10AP-941, 2011-Ohio-3314, 2011 Ohio App. Lexis 2755, ¶ 13; 16, the 10th District indicated that Civ.R. 53(D)(3)(b)(iii) requires a description of *all* the relevant evidence and the omission of certain evidence would be a proper basis for rejecting an affidavit offered in support of objections. See also *Gladden v. Grafton Corr. Inst.*, 10th Dist. Franklin

No.

05AP-567, 2005-Ohio-6476, 2005 Ohio App. Lexis 5814, ¶ 8 (An affidavit of evidence does not comply with Civ.R. 53 unless it includes “all of the evidence presented to the magistrate, not merely selected portions of the evidence.”)

{¶4} In *Gill v. Grafton Corr. Inst.*, 10th Dist. Franklin No. 10AP-1094, 2011-Ohio-4251, 2011 Ohio App. Lexis 3562, ¶ 16, the 10th District stated:

An objecting party, therefore, cannot disregard unfavorable evidence in compiling an affidavit of evidence. Additionally, nothing prevents an opposing party from pointing out that an affidavit omits relevant evidence or inaccurately states the evidence. If a trial court suspects that an affidavit of evidence is incomplete or incorrect, it may hear the matter itself, take additional evidence, or return the matter to the magistrate with a request that the magistrate provide his or her own recollection of the evidence.

Thus, the 10th District has indicated that, when faced with an affidavit that fails to describe all relevant evidence, the court’s options range from rejection of the affidavit to conducting further proceedings to requesting that the magistrate weigh-in on the evidence presented.

{¶5} Defendants did not take issue with plaintiff’s affidavit. However, a comparison between it and the magistrate’s factual findings makes clear that plaintiff’s affidavit omits certain evidence. For example, the magistrate noted Dr. Houglan’s testimony that plaintiff had not been purchasing Tylenol from the commissary despite instructions to do so whereas plaintiff, though contesting this fact, makes no mention of this testimony in his affidavit. The magistrate also cited Dr. Houglan’s testimony that plaintiff’s limp became exaggerated or “more theatrical” when plaintiff knew he was being observed, any mention of which is absent from plaintiff’s affidavit. Further, the magistrate cited plaintiff’s testimony that he suffered another fall subsequent to the May 16, 2014 accident upon which his claims are based and that he started using a cane after this later fall. Plaintiff’s affidavit makes no mention of the subsequent fall. While plaintiff’s affidavit briefly summarizes the testimony of Nurse Linda Hancock, it makes

no mention of Ms. Hancock's testimony that three of her four appointments with plaintiff were related to chronic care treatment for plaintiff's hypertension and not plaintiff's back.

{¶6} Based on the omissions, the court could reject the affidavit and overrule plaintiff's objections to the magistrate's factual findings. See *Black v. Columbus Sports Network, LLC*, 10th Dist. Franklin No. 13AP-1025, 2014-Ohio-3607, 2014 Ohio App. Lexis 3545, ¶ 19 (The failure to submit all evidence relevant to the magistrate's factual findings is a proper basis upon which to overrule objections to the magistrate's factual findings.). The court will nevertheless consider plaintiff's objections beginning with plaintiff's second objection.

THE MAGISTRATE PROPERLY APPLIED THE LAW IN HANDLING THE TESTIMONY OF DR. HOUGLAN INCLUDING THE OBJECTIONS THERETO.

Plaintiff's second objection asserts:

[t]he magistrate erred in denying counsel the right to ask the opinion of licensed treating physicians, whether [plaintiff] now suffers from an aggravation of pre-existing conditions or if the injuries were as a direct and proximate result of the accident, for not accepting Dr. Houglan's opinion which substantiated [p]laintiff's claim, and for refusing to accept Dr. Houglan's evidence.

Though plaintiff references treating physicians, his second objection discusses only Dr. Todd Houglan's testimony and the magistrate's ruling on an objection thereto.

{¶7} At trial, plaintiff's counsel examined Dr. Houglan on cross-examination regarding his treatment of plaintiff. Plaintiff's counsel eventually asked Dr. Houglan whether the treatments he provided plaintiff were directly and proximately caused by the May 16, 2014 accident. Defendants objected that Dr. Houglan had not been identified or retained as an expert which the parties then confirmed on the record. After some back and forth among counsel, the magistrate eventually allowed plaintiff to ask Dr. Houglan the question and the following exchange ensued:

Mr. Swope: ...do you have an opinion based upon a reasonable degree of certainty that the treatment that you provided to Scott Payne were a direct and proximate cause of, directly and proximately caused by the accident of May 16, 2014? First, do you have an opinion?

Dr. Houglan: I can state that he started coming for complaint of pain after the reported accident.

Mr. Swope: Did you find any other explanation for it except the accident of May 16, 2014?

Dr. Houglan: It happened at the approximate time. People come to me with back pain that didn't have a fall as well.

Mr. Swope: But, you saw no evidence that he had consistently complained of low back pain or been treated for back pain prior to this incident, is that correct?

Dr. Houglan: I started seeing him for back pain after the incident occurred.

* * *

Magistrate: Okay... uh, I rule that make the objection moot. I don't think that is causally related.

Immediately thereafter, plaintiff's counsel asked Dr. Houglan whether he could relate plaintiff's complaints to the accident, to which defendants again objected. The magistrate sustained the objection stating, "I think the doctor was asked substantially the same question and has answered this as best he can."

{¶8} The magistrate did not deny counsel the right to ask Dr. Houglan's opinion as plaintiff asserts in his objection. Rather, after initially considering the objection and inquiring whether plaintiff identified Dr. Houglan as an expert witness during discovery, the magistrate allowed plaintiff's counsel to question Dr. Houglan regarding causation

and did so despite that plaintiff failed to identify Dr. Houglan as an expert.¹ After Dr. Houglan answered a few causation related questions and the magistrate considered his answers, the magistrate found that Dr. Houglan's opinion did not establish causation and found the objection moot and thereafter sustained an 'asked and answered' objection to Dr. Houglan's testimony. The court finds no error in the magistrate's sustaining of an objection to Dr. Houglan's testimony and finds that the magistrate appropriately applied the law in ruling on defendants' objections and in otherwise handling Dr. Houglan's testimony.

{¶9} As he did at trial, plaintiff argues Dr. Houglan qualifies as an expert under Evid.R. 702 and asserts that inmates, like himself, cannot afford to hire expert witnesses. Plaintiff's arguments are not well-taken. The application of Evid.R. 702 and Dr. Houglan's qualification to provide expert testimony at trial were not at issue before the magistrate. Defendants did not raise a *Daubert* challenge to Dr. Houglan's testimony or assert that Dr. Houglan lacked the "specialized knowledge, skill, experience, training, or education" necessary to testify or that Dr. Houglan's opinion lacked a basis in "reliable, scientific, technical, or other specialized information." See *Evid.R. 702(B) and (C)*. Indeed, plaintiff's failure to disclose Dr. Houglan as an expert and provide a report prevented defendants from properly presenting such a challenge. Further, plaintiff's inability to retain or compensate experts also had no bearing on

¹The court's local rules require attorneys to "exchange with all other trial attorneys, in advance of the trial, written reports of [all] medical and expert witnesses expected to testify * * * in accordance with the schedule established by the court." The report "must reflect [the expert's] opinions as to each issue on which the expert will testify." The rule also provides, "[a] party may not call an expert witness to testify unless a written report has been procured from said witness." L.C.C.R. 7(E). Here, plaintiff had until June 15, 2016 to identify experts and provide reports to defendants which plaintiff failed to do. Thus, defendants' initial objection that plaintiff failed to identify Dr. Houglan as an expert would have been well-taken and Dr. Houglan could have been precluded from testifying had the magistrate ruled on the objection. However, the magistrate acted within the law in allowing plaintiff to proffer Dr. Houglan's testimony and finding the objection moot.

plaintiff's failure to disclose expert witnesses, on the substance of Dr. Houglan's testimony, or on the magistrate's ruling regarding the 'asked and answered' objection.

{¶10} The magistrate allowed plaintiff to elicit Dr. Houglan's opinion relative to causation. Dr. Houglan offered no opinion, stated in terms of probability, a reasonable degree of medical certainty, or otherwise that the May 16, 2014 accident caused plaintiff's claimed injuries and the magistrate found defendants' initial objection moot. Plaintiff's counsel, though rephrasing his question, again attempted to elicit a causative opinion from Dr. Houglan which drew another objection that the magistrate properly sustained on the basis that Dr. Houglan had already answered plaintiff's questions. See *Imperial Painting Co., Inc. v. W. A. M. Builders, Inc.*, 10th Dist. Franklin No. 73AP-342, 1974 Ohio App. LEXIS 3758 at *2-3 (Feb. 12, 1974) (In sustaining objection to question that had been asked and answered and limiting cross-examination of witness, trial court did not abuse its discretion because further cross-examination "would have produced only repetitious answers and cumulative evidence.").

{¶11} Given the above, the court OVERRULES plaintiff's second objection.

THE MAGISTRATE PROPERLY DETERMINED THE FACTS AND APPROPRIATELY APPLIED THE LAW IN DETERMINING DAMAGES.

{¶12} Plaintiff's first objection asserts "[i]n awarding damages the Magistrate disregarded the medical evidence and the history of the accident and awarded damages that were so inadequate they result in an abuse of discretion and a shock to the conscious of the court (sic)." Plaintiff's third objection asserts "[t]he Magistrate erred because his award of damages is against the manifest weight of the evidence and

contrary to law.”² Given the similarities of these objections and the arguments plaintiff offers in support thereof, the court addresses the objections together.

{¶13} Initially, the court finds the magistrate did not disregard any medical evidence or the history of the accident. In his decision, the magistrate thoroughly summarized the testimony of the treating physicians, Drs. Houglan and Douglas, as well as the testimony of nurses Beltz and Hancock. Plaintiff’s medical records were introduced as exhibits at trial and the magistrate’s decision frequently cites these materials as well. Various test results from MRI’s, x-rays, and EMG’s are all noted in the magistrate’s decision. Likewise, the magistrate thoroughly discussed plaintiff’s testimony including testimony regarding the accident and the state of his health both pre-accident and post-accident.

{¶14} In the court’s view, plaintiff’s first and third objections challenge the magistrate’s determinations regarding proximate cause. Plaintiff’s arguments in support of both boil down to an assertion that the magistrate should have found that the May 16, 2014 fall proximately caused plaintiff to suffer debilitating and continuing injuries and, therefore, should have awarded a much higher amount of damages. Plaintiff asks that the court modify the magistrate’s award of damages upward to \$300,000. Based on its independent review, the court finds that the magistrate properly determined the factual issues and appropriately applied the law in awarding damages.

{¶15} In support of his first and third objections, plaintiff points to parts of Dr. Douglas and Dr. Houglan’s testimony as well as notations in plaintiff’s medical records, asserting these records reference plaintiff’s “fall as the basis of treatment.” Plaintiff also references the magistrate’s handling of the objection to Dr. Houglan’s testimony

²Plaintiff offers no legal authority or support for the application of either an abuse of discretion or shock the conscience standard. Further, the manifest weight standard, though applicable to civil cases, is normally applied to appellate review of verdicts. The law is clear that, when reviewing a magistrate’s decision upon objection, the trial court does not sit as a court of appeals. Rather, as indicated, the court’s duty is to conduct an independent, *de-novo* review as to the objected matters and to determine whether the magistrate properly determined the facts and appropriately applied the law.

discussed, *supra*. Finally, plaintiff points to the amount obtained through judgment or settlement in other cases. The court finds plaintiff's arguments lack merit.

{¶16} Plaintiff's burden to establish causation cannot rest on *post hoc ergo propter hoc* reasoning. The fact that plaintiff's treatment took place subsequent to the accident, standing alone, does not establish causation. As already discussed and contrary to plaintiff's assertion, the magistrate did not prevent Dr. Houglan from answering causation related questions. Indeed, Dr. Houglan refused to relate plaintiff's continuing injuries to the May 16, 2014 accident. Dr. Houglan's testimony, in sum, states nothing more than the fact that plaintiff complained of back pain and sought treatment after the accident. Likewise, when asked if her treatment "was related" to the accident, Dr. Douglas testified, "[m]y treatment was related to what his complaints were at that time." When asked if a fall would be "more disastrous" for an individual with degenerative changes than for an individual who was "normal," the doctor stated, "I don't know." Dr. Houglan and Dr. Douglas's testimony does not establish causation. The doctors testified to providing treatment after the accident based on plaintiff's subjective complaints. They did not testify that the May 16, 2014 accident caused plaintiff's continuing back injury or that the May 16, 2014 accident aggravated plaintiff's preexisting back injury.

{¶17} Likewise, the medical records plaintiff references do not establish causation. The notes in the medical records reflect plaintiff's subjective complaints as noted by the doctors; they are not statements of causation phrased in terms of probability. The records certainly do not establish a causal connection between the accident and any permanent or continuing injury. The statements in the medical records parrot plaintiff's subjective complaints in which he attributes his subjective complaints to the accident but they do not establish causation for continuing and/or permanent, internal and elusive injuries.

{¶18} The magistrate also properly determined that plaintiff's claimed injuries required expert testimony to establish causation and that plaintiff failed to offer such testimony. As the magistrate recognized in his decision, "[d]amages must be shown with reasonable certainty and may not be based upon mere speculation or conjecture." *Rakich v. Anthem Blue Cross & Blue Shield*, 172 Ohio App.3d 523, 2007-Ohio-3739, ¶ 20 (10th Dist.). The court also agrees with the magistrate's determination that plaintiff's injuries, being subjective in nature and not easily observable or understood, require expert testimony to establish that the May 16, 2014 proximately caused them. *See Argie v. Three Little Pigs, Ltd.*, 10th Dist. Franklin No. 11AP-437, 2012 Ohio 667, 2012 Ohio App. Lexis 570, ¶ 15 (Subjective, soft-tissue injuries, being internal and elusive and not observable, require expert testimony to establish causation). Though plaintiff attempts to rely on the common-knowledge doctrine, the court finds it does not apply to this case given the nature of plaintiff's injuries. *See White Motor Corp. v. Moore*, 48 Ohio St.2d 156, 158, 357 N.E.2d 1069 (1976) ("Where the issue of causal connection between an injury and the specific subsequent physical disability involves questions which are matters of common knowledge, medical testimony is not necessary in order to submit the case to the jury."). In fact, per *Argie*, plaintiff's claims require expert testimony as a matter of law.

{¶19} It bears emphasis that plaintiff seeks recovery for a permanent and/or continuing injury and not solely for treatment which he received after the accident. Thus, plaintiff's burden goes beyond demonstrating treatment post-accident coupled with continued subjective symptoms. Rather, plaintiff needed to provide expert testimony, stated in terms of probability, that the May 16, 2014 accident caused his claimed injuries. The doctors' testimony of their treatment of plaintiff post-accident fails to establish causation for the persistent and continuing pain which plaintiff claims he still endures. Thus, the magistrate properly found that, absent expert testimony, causally

relating the accident to plaintiff's continued pain would be based on speculation and conjecture.

{¶20} Further, the magistrate properly determined that there are numerous other facts that undercut plaintiff's assertion that the May 16, 2014 accident proximately caused continuing and/or permanent injury. At the very least, these other facts make the necessity of expert testimony even more apparent. Dr. Douglas testified that plaintiff told her he had prior back problems. Plaintiff himself testified to a second fall, after which he began using a cane. Further, the magistrate noted an x-ray from 2010 which showed degenerative changes including narrowing of the spine at the L-5/S-1 level of plaintiff's spine, an indicator that plaintiff had some level of degenerative disc disease four years before the accident. The medical testimony also established that plaintiff's symptoms are consistent with degenerative disc disease, the only ailment with which plaintiff has been diagnosed. Despite numerous medical diagnostics and tests including x-rays, MRI's, and EMG's, the evidence revealed no other diagnosis such as nerve damage or a fracture which could be causally related to the accident. Further, the magistrate also noted personal observations of plaintiff and contrasted those observations with plaintiff's claim that his pain is at the top end of a 10-point scale. The magistrate also noted that, at least as to some later medical appointments, medical staff treated plaintiff for ongoing medical conditions unrelated to the accident.

{¶21} The magistrate properly found that plaintiff's burden was to establish a causal connection between the May 16, 2014 accident and his claimed injuries in terms of probability and that plaintiff could not sustain this burden by demonstrating the possibility that the May 16, 2014 fall caused plaintiff's claimed injuries. Further, the magistrate found plaintiff's claims required expert testimony to establish causation and that, absent such testimony, plaintiff could not recover for continuing and/or permanent soft-tissue injuries. The magistrate awarded damages for the fall and some treatment

despite the lack of expert testimony and properly determined an amount of damages when all factors are considered.

{¶22} Given the above, the court OVERRULES plaintiff's first and third objections.

CONCLUSION

{¶23} Upon independent review as to the objected matters, the court determines that plaintiff's August 29, 2017 objections to the magistrate's decision of July 17, 2017 should be overruled. The court finds that the magistrate has properly determined the factual issues and appropriately applied the law related to plaintiff's claims.

PATRICK M. MCGRATH
Judge

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Plaintiff

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Defendants

Case No. 2015-00953

Judge Patrick M. McGrath

JUDGMENT ENTRY

{¶24} For the reasons set forth in the decision filed concurrently herewith, upon independent review as to the objected matters, the court OVERRULES plaintiff's objections. The court finds that the magistrate has properly determined the factual issues and appropriately applied the law. The court adopts the magistrate's decision and recommendation as its own. Judgment is rendered in favor of plaintiff in the amount of \$12,025.00. Court costs are assessed against defendants. 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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