

duties of education and counseling as mandated by defendant's policies.

{¶ 3} Defendant denies liability and asserts that it has established protocols for managing inmates with chronic Hepatitis and that since plaintiff has been treated pursuant to such guidelines, his claims are baseless.

{¶ 4} In order to prevail on a negligence claim, plaintiff must prove by a preponderance of the evidence that defendant owed him a duty, that it breached such duty, and that the breach proximately caused plaintiff's injuries. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285. Ohio law imposes a duty of reasonable care upon the state to provide for its prisoner's health, care and well-being. *Clemets v. Heston* (1985), 20 Ohio App.3d 132, 136.

{¶ 5} Dr. Williams, nurse Cain, and Ms. Wipert testified that literature was readily available to inmates and that plaintiff received both counseling and educational literature regarding his condition on several occasions. The medical records also contain notations documenting the fact that information was distributed and that counseling was provided to plaintiff in regard to his condition. Plaintiff denied receiving any literature and contended that he was forced to seek information from sources outside the institution. Because of the differing accounts offered at trial, the determination of whether defendant breached a duty owed to plaintiff necessarily turns upon witness credibility. "In determining the issue of witness credibility, the court considers the appearance of each witness upon the stand; his manner of testifying; the reasonableness of the testimony; the opportunity he had to see, hear, and know the things about which he testified; his accuracy of memory; frankness or lack of it; intelligence,

interest, and bias, if any; together with all facts and circumstances surrounding the testimony." *Adair v. Ohio Dept. of Rehab. & Corr.* (1998), 96 Ohio Misc.2d 8, 11; See 1 Ohio Jury Instructions (1994), Section 5.30.

{¶ 6} Upon review of the testimony and evidence presented on this issue, the court finds that plaintiff failed to meet his burden of proof. In considering the conflicting testimony of the witnesses, the court finds the testimony of defendant's employees to be more credible. Even assuming that plaintiff never received any literature or counseling, plaintiff failed to prove that such omissions caused him injury.

{¶ 7} In addressing the civil immunity issues, R.C. 2743.02(F) provides, in part:

{¶ 8} "A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of the officer's or employee's employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action. ***"

{¶ 9} R.C. 9.86 provides, in part:

{¶ 10} "*** no officer or employee [of the state] shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were *manifestly outside*

*the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner. ***.*" (Emphasis added.) In order to find malicious purpose, bad faith, or wanton or reckless conduct there must be a showing that the employee harbored a willful or intentional design to do injury; acted upon self-interest or sinister motive; and/or perversely disregarded a known risk. See, e.g., *Jackson v. Butler County Bd. of County Commrs.* (1991), 76 Ohio App.3d 448, 453-454; *Lowry v. Ohio State Highway Patrol* (Feb. 27, 1997), Franklin App. No. 96API07-835; *Hackathorn v. Preisse* (1995), 104 Ohio App.3d 768, 771; *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 105, quoting Restatement of the Law 2d, Torts (1965) at 590, Section 500, Comment f.

{¶ 11} It is the opinion of the court that the testimony of each Dr. Williams, nurse Cain, and Debra Wipert was candid and credible and that there was nothing in their testimony or demeanor that compelled the court to believe that they harbored willful, intentional, sinister or perverse motives or dispositions toward plaintiff. The evidence was wholly insufficient to establish that the conduct of defendant's named employees was manifestly outside the scope of their state employment, or that any of their actions were taken with malicious purpose, in bad faith, or in a wanton or reckless manner. In light of the above findings, the court concludes that defendant's employees did not act manifestly outside the scope of their employment, with malicious purpose, in bad faith, or in a wanton or reckless manner. Thus, they are entitled to civil immunity pursuant to R.C. 9.86 and 2743.02(F) and the courts of common pleas do not have jurisdiction over any civil

actions that may be filed against them based upon the allegations in this case.

{¶ 12} To the extent that plaintiff claims Dr. Williams was negligent because he did not recommend that plaintiff receive a "consult" with a gastroenterologist, plaintiff has failed to satisfy his burden of proof. To establish a claim of medical malpractice, plaintiff "must show the existence of a standard of care within the medical community, breach of that standard of care by the defendant, and proximate cause between the medical negligence and the injury sustained." *Taylor v. McCullough-Hyde Memorial Hospital* (1996), 116 Ohio App.3d 595, 599, citing *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, 131-132. These elements must be established by expert testimony unless the negligent conduct "is so apparent as to be within the comprehension of laymen and requires only common knowledge and experience to understand and judge it ***." *Bruni*, supra, at 130.

{¶ 13} Here, plaintiff did not produce expert testimony on the issue of medical malpractice. The only medical testimony in this case was that of Dr. Williams, plaintiff's treating physician at RIC1. Dr. Williams testified that in his opinion, plaintiff's condition was stable and slowly improving. Dr. Williams explained that serial laboratory tests showed plaintiff's viral load was decreasing and that his liver enzymes were not elevated. Thus, he concluded that plaintiff's body was mounting an immune response to the virus and, as such, no further treatment was indicated at that time other than periodic observations and blood tests. According to Dr. Williams, he would refer a patient for a GE consult if the viral load began to rise and the liver enzymes became elevated. He noted that approximately 20 to 30 percent of patients infected with

Hepatitis C will be able to overcome the virus and have no detectable viral load in the blood. He opined that plaintiff's body was in the process of healing itself and that there was no need for a GE consult at the present time. Dr. Williams further opined that his treatment of plaintiff complied with the applicable standard of care.

{¶ 14} Although plaintiff argues that his medical condition is such that only common knowledge and experience are needed to understand it, the trier of facts disagrees. The testimony of Dr. Williams referenced such complex medical issues as viral load, immune response, liver enzymes, clotting factors, and the effects of dietary protein consumption on lab values. Based upon the totality of the evidence, the court concludes that the medical treatment provided to plaintiff met or exceeded the standard of care in the profession. The court further finds that defendant established a protocol for the treatment of chronic Hepatitis C and that protocol was followed appropriately with regard to plaintiff's care. Consequently, the court finds that Dr. Williams was not negligent when he elected not to order a GE consult. Plaintiff has failed to prove his claims by a preponderance of the evidence and, accordingly, judgment is recommended in favor of defendant.

{¶ 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).*

STEVEN A. LARSON
Magistrate

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SJM/cmd
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