

[Cite as *Smith v. Trumbull Correctional Inst.*, 2005-Ohio-3961.]

IN THE COURT OF CLAIMS OF OHIO
 www.cco.state.oh.us

PAUL SMITH	:	
Plaintiff	:	CASE NO. 2004-06020
	:	Judge J. Craig Wright
v.	:	Magistrate Steven A. Larson
TRUMBULL CORRECTIONAL INSTITUTE	:	<u>MAGISTRATE DECISION</u>
Defendant	:	
	:	

: : : : : : : : : : : : :

{¶ 1} Plaintiff brought this action against defendant, Trumbull Correctional Institution (TCI), alleging negligence. The issues of liability and damages were bifurcated and the case proceeded to trial on the issues of liability and civil immunity of Dr. Kirby.

{¶ 2} At all times relevant to this action, plaintiff was an inmate in the custody and control of defendant pursuant to R.C. 5120.16. Plaintiff notified the medical department that a tooth was causing him pain and he was scheduled to see a dentist on August 1, 2003. At his appointment, plaintiff attempted to communicate to Dr. Kirby, a TCI dentist, the location where he was experiencing pain; he insisted that his tooth needed to be extracted. Dr. Kirby proceeded to take x-rays and also applied cold fluid to plaintiff's teeth to help pinpoint the origin of his discomfort. After conducting the exams, Dr. Kirby extracted tooth number 15. Plaintiff continued to experience pain and on September 10, 2003, another TCI dentist extracted tooth number 13.

{¶ 3} Plaintiff's complaint alleges dental malpractice. To establish a claim of medical [dental] 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 Mem. Hosp.* (1996), 116 Ohio App.3d 595; citing *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127. 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.

{¶4} Plaintiff did not present the testimony of a dental expert to support his dental malpractice claim; rather, the sole testimony presented at trial was that of plaintiff. Upon review of the testimony and evidence presented at trial, the court finds that plaintiff has failed to prove his claim of dental malpractice by a preponderance of the evidence.

{¶5} Although plaintiff testified that Dr. Kirby extracted the incorrect tooth, the evidence shows that both teeth numbers 13 and 15 exhibited significant bone loss. (Plaintiff's Exhibit O.) At the August 1, 2003, appointment, plaintiff signed an informed consent form for the extraction of two teeth, numbers 13 and 15. (Plaintiff's Exhibit M.) The evidence also shows that after a thorough exam, Dr. Kirby chose to remove only tooth number 15 during plaintiff's first appointment. Plaintiff contends that Dr. Kirby breached the standard of care when she chose to extract tooth number 15 instead of tooth number 13; however, plaintiff has failed to offer any expert testimony to support his claim. In this instance, the court cannot conclude that it is within a lay person's common knowledge and experience as to what stage of tooth decay requires extraction of that tooth. In addition, plaintiff

failed to present any medical evidence to substantiate his claim of delayed treatment.

{¶ 3} For the foregoing reasons, the court finds that plaintiff has failed to prove his claim of dental malpractice by a preponderance of the evidence and accordingly, judgment is recommended in favor of defendant.

{¶ 4} In light of the above findings, the court concludes that Dr. Kirby did not act manifestly outside the scope of her employment, with malicious purpose, in bad faith, or in a wanton or reckless manner. She is therefore 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 her based upon the allegations in this case.

{¶ 5} *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

Entry cc:

Paul Smith, #333-052
5701 Burnett Road
P.O. Box 901
Leavittsburg, Ohio 44430-0901

Plaintiff, Pro se

James P. Dinsmore Attorney for Defendant
Assistant Attorney General
150 East Gay Street, 23rd Floor
Columbus, Ohio 43215-3130

LM/mdw
Filed July 18, 2005
To S.C. reporter August 3, 2005