

[Cite as *Bugh v. Grafton Correctional Inst.*, 2006-Ohio-2545.]

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

RICHARD BUGH :

Plaintiff : CASE NO. 2005-08999
Judge J. Craig Wright
v. : Magistrate Steven A. Larson

GRAFTON CORRECTIONAL : DECISION
INSTITUTION :
Defendant :

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{¶ 1} On February 22, 2006, defendant filed a motion for summary judgment. On March 17, 2006, plaintiff filed a response. On March 27, 2006, plaintiff filed a "motion to compel compliance with discovery." On April 14, 2006, defendant filed its response. The case is now before the court for determination of these motions.

{¶ 2} Civ.R. 56 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 County*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing, *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317.

{¶ 4} At all times relevant hereto, plaintiff was an inmate in the custody and control of defendant at Grafton Correctional Institution (GCI) pursuant to R.C. 5120.16. In his complaint, plaintiff states that in 1980, prior to his incarceration, he suffered serious crushing injuries to his feet in industrial and automobile accidents and that, as a result, he began to develop arthritis after his incarceration in 1989. Plaintiff asserts that in lieu of surgery an orthopedic specialist at GCI recommended that plaintiff be provided "rigid rocker" orthopedic boots to alleviate pain in his feet. According to plaintiff, the boots wore out quickly and had to be replaced, a process that entailed making trips to the Corrections Medical Center Orthotics Clinic in Columbus, Ohio. Plaintiff alleges that the round trips to Columbus are "punitive and disruptive"; that GCI should transport the boots, and not him, to Columbus; and that GCI staff are "consciously and deliberately indifferent to [his] pain and suffering in violation of the VIII Amendment of the Federal Constitution." Plaintiff seeks compensation in the sum of \$2,500 for the pain and suffering occasioned by the alleged violation of his constitutional rights and an order requiring GCI to provide him with a spare pair of the medically prescribed boots to have available when another pair is being replaced.

{¶ 5} In its motion for summary judgment, defendant asserts that plaintiff's claims must be dismissed for three reasons: lack of jurisdiction over constitutional claims; discretionary immunity; and lack of any expert testimony to support the medical claims.

{¶ 6} Upon review, the court finds defendant's motion to be well-taken.

{¶ 7} It is well-settled that constitutional and Section 1983, Title 42, U.S.Code claims are not actionable in the Court of Claims. *Burkey v. Southern Ohio Correctional Facility* (1988), 38 Ohio App.3d 170, 171; *Thompson v. Southern State Community College* (June 15, 1989), Franklin App. No. 89AP-114; *Bleicher v. University of Cincinnati College of Medicine* (1992), 78 Ohio App.3d 302. Plaintiffs in the Court of Claims are limited to causes of action which they could pursue if defendant were a private party. *Thompson*, citing *McCord v. Div. of Parks & Recreation* (1978), 54 Ohio St.2d 72. Thus, since constitutional violations require an element of state action, the Court of Claims is without jurisdiction to determine such matters.

{¶ 8} In addition to his constitutional claims, plaintiff has also sought relief from GCI's decision to frequently transport him to Columbus to obtain replacement boots rather than to transport only the boots. The Supreme Court of Ohio has held that "[t]he language in R.C. 2743.02 that 'the state' shall 'have its liability determined *** in accordance with the same rules of law applicable to suits between private parties ***' means that the state cannot be sued for its legislative or judicial functions or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion." *Reynolds v. State* (1984), 14 Ohio St.3d 68, 70; *Van Hoene v. State* (1985), 20 Ohio App.3d 363, 364.

{¶ 9} Although plaintiff disagrees with the medical and procedural decisions of GCI, he has not alleged any negligence on the part of GCI with respect to those decisions. Both the medical decision to provide boots in lieu of surgery and the transport decision are "characterized by the exercise of a high degree of

official judgment or discretion." Thus, the state is immune from suit for such decisions. Id.

{¶ 10} Plaintiff has not couched his claims in terms of medical negligence; however, to the extent that his claims can be so construed, the court agrees with defendant's assertion that expert medical testimony would be required in order for plaintiff to prevail. In a medical malpractice claim, the court must evaluate the conduct of a physician or surgeon and determine "whether the physician, in the performance of his service, either did some particular thing or things that physicians and surgeons, in that medical community, of ordinary skill, care and diligence would not have done under the same or similar circumstances, or failed or omitted to do some particular thing or things which physicians and surgeons of ordinary skill, care and diligence would have done under the same or similar circumstances. He is required to exercise the average degree of skill, care and diligence exercised by members of the same medical specialty community in similar situations." *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127 at 130. In addition, the question whether a physician or surgeon has provided treatment that falls within the requisite standard of care and skill must ordinarily be determined from the testimony of medical experts. Id.

{¶ 11} The deadline for identifying expert witnesses and providing copies of their reports has passed. This case is set for trial on May 22, 2006, and as of the date of pretrial on April 21, 2006, plaintiff had yet to identify any expert witness. Therefore, plaintiff's claims also must fail for this reason.

{¶ 12} In short, pursuant to Civ.R. 56(C), and construing the evidence most strongly in favor of plaintiff, the court concludes that defendant is entitled to judgment as a matter of law. Therefore, defendant's motion for summary judgment shall be

granted. Accordingly, plaintiff's March 27, 2006, motion to compel is DENIED as moot.

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GRAFTON CORRECTIONAL : JUDGMENT ENTRY
INSTITUTION :

Defendant

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A non-oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED and 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.

J. CRAIG WRIGHT
Judge

Entry cc:

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