[Cite as *Schwind v. Ohio Dept. of Rehab. & Corr.*, 2022-Ohio-1597.]

JARED SCHWIND Plaintiff v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION Defendant	Case No. 2020-00314JD Judge Patrick E. Sheeran Magistrate Gary Peterson ENTRY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

{¶1} On December 6, 2021, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). On January 12, 2022, and on February 7, 2022, plaintiff filed responses in opposition to defendant's motion for summary judgment. Defendant filed a reply on February 1, 2022. For the reasons stated below, defendant's motion shall be granted.

Standard of Review

{¶2} Motions for summary judgment are reviewed under the standard set forth in Civ.R. 56(C), which states, in part:

> 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 summary 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.

"[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of material fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). To meet this initial burden, the moving party must be able to point to evidentiary materials of the type listed in Civ.R. 56(C). *Id*. at 292-293.

{¶3} If the moving party meets its initial burden, the nonmoving party bears a reciprocal burden outlined in Civ.R. 56(E), which states, in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the 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.

Factual Background

{¶4} According to the amended complaint, plaintiff is an inmate in the custody and control of defendant at the Madison Correctional Institution. Amended complaint at ¶ 2. The amended complaint goes on to relate that because of an injury that occurred prior to plaintiff's incarceration, his shoulder periodically dislocates. *Id*. at ¶ 5. Plaintiff relates that he previously received treatment from a chiropractor who would put his shoulder back into place whenever it would dislocate. *Id*. at ¶ 6-7. According to plaintiff, defendant does not offer chiropractic services; rather, the treatment he receives consists of "pills that simply do not work." *Id*. at ¶ 8. Plaintiff adds that defendant refuses to x-ray his shoulder. *Id*. at ¶ 9. The amended complaint faults defendant for failing to offer chiropractic services

and failing to x-ray his injury. Plaintiff indicates that his pain is so significant that he often sleeps in a chair. *Id*. at ¶ 10-11.

{¶5} Plaintiff alleges that he also suffers from a herniated disc. *Id*. at ¶ 12. Plaintiff goes on to explain that the medical treatment he receives consists of "talking to him." *Id*. at ¶ 14. Plaintiff identifies the basis of his amended complaint as medical malpractice and alleges that the standard of care has been breached regarding both his shoulder and his herniated disc.[1]

{¶6} Defendant moves for summary judgment arguing that plaintiff cannot prevail on a claim for medical malpractice because he has not provided an expert report or identified an expert witness who will testify regarding any alleged breach of the applicable standard of care that proximately caused him harm.

Law and Analysis

{¶7} Plaintiff's claim against defendant arises out of medical diagnosis, care, or treatment of his injuries. To establish a cause of action for medical malpractice, the "plaintiff must demonstrate by the preponderance of the evidence that the injury complained of was caused by a practice that a physician of ordinary skill, care or diligence, would not have employed, and that plaintiff's injury was the direct and proximate result of such practice." *Schmidt v. Univ. of Cincinnati Med. Ctr.*, 117 Ohio App.3d 427, 430, 690 N.E.2d 946 (10th Dist.1997), citing *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 346 N.E.2d 673 (1976), paragraph one of the syllabus. Additionally, expert testimony is required to establish the standard of care and to demonstrate the defendant's alleged failure to conform to that standard. *Bruni* at 130-31. Failure to establish the standard of care is fatal to a prima facie case of medical malpractice. *Id*. at 130; *see also Foy v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin Nos. 16AP-723 and 16AP-724,

[1] This court previously determined that plaintiff stated a claim for medical malpractice rather than a claim alleging deliberate indifference to serious medical needs. Entry, September 16, 2020.

2017-Ohio-1065, ¶ 23 (an inmate's claim against the Department of Rehabilitation and Correction arising in the course of medical diagnosis, care, or treatment is a medical claim); *Gordon v. Ohio State Univ*., 10th Dist. Franklin No. 10AP-1058, 2011-Ohio-5057, ¶ 67 ("The *Bruni* standard applies to an inmate's claim for medical malpractice.").

{¶8} In support of its motion, defendant submitted the affidavit of counsel for defendant, Jenna Jacobus, and defendant's requests for admission to plaintiff. Jacobus avers that plaintiff did not provide her with a copy of any expert reports by the deadline. Jacobus further avers that after twice serving plaintiff with requests for admission, plaintiff responded on November 5, 2021. In the response, which is submitted as Defendant's Exhibit A-3, plaintiff admits that he did not send a copy of a report for any expert to defendant before April 9, 2021. Plaintiff, however, denies that he does not have an expert who will testify that defendant was negligent in providing him medical care. Defendant's Exhibit A-3. Finally, Jacobus avers that as of December 6, 2021, plaintiff has not identified to her, or other counsel, a doctor or expert witness who will testify on his behalf that defendant was negligent in providing medical care to him. Defendant's Exhibit A.

{¶9} The court notes that the original deadline for plaintiff to furnish the names of expert witnesses and copies of their reports was April 9, 2021. Plaintiff subsequently obtained counsel who entered an appearance on April 28, 2021. Plaintiff's former counsel then obtained a continuance of all the scheduled dates in this matter. The parties then filed a discovery plan on July 29, 2021, and the parties set a new deadline for plaintiff to disclose any expert and provide copies of any reports on or before October 1, 2021. Plaintiff was subsequently granted another extension until February 7, 2022, in which to obtain an expert who will testify that defendant breached the standard of care and provide a copy of that expert's report to defendant.

{¶10} L.C.C.R. 8(E) provides "[a] party may not call an expert witness to testify unless a written report has been procured from said witness" and that "an expert will not be permitted to testify or provide opinions on issues not raised in the expert's report." The rule also provides that where parties are unable to obtain written reports, "the party must

demonstrate that a good faith effort was made to obtain the report" and must still identify the expert. *Id*.

{¶11} In response plaintiff submitted several unauthenticated documents; however, none of the documents submitted are of the type identified in Civ.R. 56(C). Civ.R. 56(C) provides that [n]o evidence or stipulation may be considered except as stated in this rule." Therefore, plaintiff failed to submit any evidence of the type identified in Civ.R. 56(C) in opposition to defendant's motion for summary judgment. On that basis alone, defendant's motion could be granted. However, in the interest of justice, the court will nonetheless consider the documents.

{¶12} Plaintiff submitted what appears to be electronic communications between him and his former attorney, communications to an individual identified as Joseph Clark, informal grievances, and a form captioned "expert witness form." However, none of the documents confirm that plaintiff identified an expert witness who will testify that defendant was negligent in its medical care or that plaintiff submitted a copy of an expert report to defendant by the deadline established by this court. Indeed, it appears that plaintiff inquired of his attorney whether such acts had occurred, but there is no indication that plaintiff obtained an expert and submitted a report by any of the deadlines. Furthermore, plaintiff admitted in his response to plaintiff's requests for admission that he did not submit a report to defendant. As a result, there is no dispute that plaintiff failed to identify an expert witness who will testify regarding the standard of care and breach of that standard and that plaintiff failed to provide a copy of any expert report to defendant by the deadline established by this court.

{¶13} Even if it could be concluded that plaintiff timely identified an expert and timely submitted a report, plaintiff's "expert witness form" does not include any opinion regarding a breach of the standard of care or proximate cause of any injuries. Plaintiff submitted an "expert witness form" authored by Stephen Aurand, who identifies himself as plaintiff's previous treating doctor holding a Doctor of Chiropractic. The statement

provides that Dr. Aurand has treated plaintiff previously and that with his treatment, plaintiff's medical issues mostly resolved. The statement goes on to provide that "it is hard to gauge his current issues as he has not been seen in nearly 5 yrs."

{¶14} The "expert witness form" does not indicate that it was provided to defendant by the deadline. More importantly, Dr. Aurand does not express any opinion regarding any breach of the standard of care and proximate cause of any of plaintiff's injuries. Indeed, Dr. Aurand expresses no opinion whatsoever related to the standard of medical care, breach of that standard, and proximate cause of any injuries. "[A]n expert will not be permitted to testify or provide opinions on issues not raised in the expert's report." L.C.C.R. (E). As a result, it must be concluded that plaintiff did not identify an expert who will testify regarding the standard of care and breach of that standard of care proximately causing harm, and plaintiff did not provide a copy of an expert report to defendant by the deadline.

{¶15} Finally, in his response to defendant's motion for summary judgment, plaintiff argues that his expert was prevented from viewing or otherwise accessing his medical records. However, plaintiff never moved for an order compelling defendant to produce a copy of his medical records. Moreover, "R.C. 5120.21(C)(2) places limitations on an inmate's access to medical records." *Nicely v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 09AP-187, 2009-Ohio-4386, ¶ 8; *see also Hernandez v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 17AP-37, 2017-Ohio-8646. "R.C. 5120.21(C)(2) states that the inmate's medical records shall be available for review on two conditions. One is that the inmate make a signed written request for the records, and the other is that his request be accompanied by a written request of an attorney or physician designated by the inmate." *Goings v. Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 90AP-1041, 1991 Ohio App. LEXIS 2527, 7 (May 28, 1991). There is no indication that plaintiff has made a written request for his medical records accompanied by a written request of an attorney or physician. Accordingly, plaintiff's argument is without merit.

{¶16} In this case, plaintiff failed to provide any evidence to controvert the evidence submitted by defendant and demonstrate a genuine issue of material fact. Therefore, there is no dispute that plaintiff failed to provide counsel for defendant with the names of any expert witnesses who will testify that defendant breached the standard of care and that such a breach proximately caused injuries. Moreover, plaintiff did not provide an expert report to defendant by any of the deadlines in this case. *See* L.C.C.R. 8(E). Accordingly, it must be concluded that plaintiff cannot prevail on his claim of medical malpractice.

Conclusion

{¶17} The court finds there is no genuine issue of material fact regarding plaintiff's failure to retain an expert to testify that defendant breached the standard of care and provide a report from that expert. Lacking expert testimony, reasonable minds could only conclude that plaintiff cannot sustain his burden regarding the standard of care, breach of that standard of care, and proximate cause. As plaintiff must present expert testimony to prevail on his medical malpractice claim and has failed to obtain an expert and provide an expert report, defendant is entitled to judgment as a matter of law. For these reasons, the court GRANTS defendant's motion for summary judgment and judgment is hereby rendered in favor of defendant. All previously scheduled events are VACATED. The court DENIES all other pending motions as moot. 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.

PATRICK E. SHEERAN
Judge

Filed March 9, 2022
Sent to S.C. Reporter 5/12/22