

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

MICHAEL COLLINS

Plaintiff

v.

OHIO DEPT. OF REHABILITATION
AND CORRECTION

Defendant

Case No. 2006-04792-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} On or about August 25, 2005, plaintiff, Michael Collins, an inmate incarcerated at defendant's Ohio State Penitentiary ("OSP"), went on sick call to the OSP infirmary where he was examined by OSP employee, Dr. Haddad, M.D. Plaintiff stated he went on sick call "because of a small lump in my leg." Plaintiff explained he had previously suffered a gun shot wound to his left leg and Dr. Haddad therefore assumed the small lump in his leg was probably a bullet fragment. Plaintiff related that about an hour after he was examined Dr. Haddad, "took me to medical and cut my leg open and there wasn't any bullet fragments in my leg." Plaintiff's leg was sutured with three stitches after the minor surgical procedure. Due to the fact no bullet fragment was discovered, plaintiff contended OSP medical staff should have had x-rays taken of his leg as a diagnostic aid before any medical decision was made to perform an exploratory surgical procedure.

{¶ 2} On or about September 6, 2005, plaintiff's left leg was x-rayed to determine if any bullet fragments were in fact present. Plaintiff stated the September 6, 2005 x-ray did not reveal any bullet fragments in his leg. Plaintiff consequently expressed the belief that "Dr. Haddad had cut my leg for nothing."

{¶ 3} On March 16, 2005, more than six months after he had the surgical procedure on his leg performed, plaintiff went to the OSP infirmary complaining of

swelling and burning in his leg. Plaintiff claimed the incision made by Dr. Haddad in August 2005 had never healed and a small hole remained in his leg. Plaintiff pointed out that when he went to the infirmary on March 16, 2006, puss was draining from the small hole in his leg. Upon arriving at the OSP infirmary, plaintiff was examined and treated by OSP employee, Nurse Frazier. Plaintiff recalled Nurse Frazier wrote in his patient file that he was suffering from a staphylococcus coagulase infection. Plaintiff also recalled Nurse Frazier treated his infection by administering the antibiotic Clindamycin. By March 28, 2006, the infection was no longer present and by April 21, 2006, plaintiff's leg wound was reportedly well healed.

{¶ 4} Plaintiff has alleged Dr. Haddad's medical treatment of him was unnecessary and ineffective. Plaintiff contended Dr. Haddad was negligent in not having diagnostic x-rays taken of his leg before pursuing a surgical course of treatment. Plaintiff also contended the infection he subsequently suffered was proximately caused by the August 2005 surgery performed by Dr. Haddad. Plaintiff essentially alleged Dr. Haddad's treatment decision fell below the accepted standard of care and consequently, he suffered damages of pain, swelling, infection, distress, scarring, and discoloration. Therefore, plaintiff filed this complaint seeking to recover \$2,250.00 for the damages claimed. This medical claim alleging substandard treatment is founded on plaintiff's opinion that the decision by Dr. Haddad to not x-ray his leg was an unsound medical determination and was the proximate cause of the leg infection he suffered in March 2006. Plaintiff did not produce any expert medical testimony to support his opinions about substandard medical care and resulting infection. Payment of the filing fee was waived.

{¶ 5} On April 13, 2006, plaintiff filed a grievance with defendant's Inspector, Ms. Tracy England, concerning his complaints over the medical treatment he received from Dr. Haddad. The medical issues expressed by plaintiff in the grievance were resolved by referring the matter to defendant's medical treatment team who apparently devised a treatment plan for plaintiff. On April 24, 2006, plaintiff appealed the grievance

disposition basically restating his complaint of receiving substandard medical care in August 2005 from Dr. Haddad. Defendant's Assistant Chief Inspector, Hugh J. Daley, affirmed the decision rendered in the April 13, 2006 grievance notifying plaintiff that, "[b]ased upon the available information, your complaint has merit." Similar notification language was used by defendant's Inspector, Tracy England, in the April 13, 2006 grievance disposition, when she wrote, "[b]ased upon the available evidenced, Inmate Collins complaint appears to have merit." Copies of both grievance dispositions were submitted.

{¶ 6} On November 6, 2007, defendant filed a motion to dismiss plaintiff's complaint based on the grounds that plaintiff failed to provide an affidavit of medical merit on his medical claim as required by Civ.R. 10(D). Additionally, defendant requested plaintiff's claim characterized as one of "deliberate indifference" a purported violation of Section 1983 of the Federal Civil Rights Act be dismissed due to the fact this court lacks subject matter jurisdiction. Defendant pointed out that previous determinations have consistently found that actions against the state cannot be brought under Section 1983, Title 42, U.S. Code, because the state is not a "person" within the meaning of section 1983. See, e.g., *Jett v. Dallas Indep. School Dist.* (1989), 491 U.S. 701, 109 S. Ct. 2702, 105 L. Ed 2d 598; *Burkey v. Southern Ohio Correctional Facility* (1988), 38 Ohio App. 3d 170, 528 N.E. 2d 607; *White v. Chillicothe Correctional Institution* (Dec. 29, 1992), Franklin App. No. 92AP-1230.

{¶ 7} Subsequently, this court denied defendant's motion to dismiss plaintiff's medical claim. In denying the motion to dismiss, the court found "plaintiff has presented sufficient evidence to withstand a motion to dismiss." The court, in making that determination, relied on the language used by defendant's inspectors in the dispositions of grievances where both inspectors ruled plaintiff's complaint had "merit." The court characterized the finding of "merit" as "an admission against interest on the part of defendant" to adequately resist dismissal on procedural grounds.

{¶ 8} Defendant denied plaintiff received inadequate and insufficient medical

care in regard to the treatment of his left leg. Furthermore, defendant contended plaintiff failed to offer requisite proof to establish defendant was negligent in treating his leg. Defendant denied any OSP personnel made any statements that could be construed as an admission of liability in the matter before the court. Defendant acknowledged OSP physician, Dr. Haddad, excised a lump from plaintiff's left leg in August 2005 after plaintiff had signed a general informed consent documentation ("Consent to Treatment Procedure" Form, copy submitted). By affixing his signature to the "Consent to Treatment Form" plaintiff not only consented to have a suspected foreign body surgically removed from his left leg, but also consented "to the performance of such additional operations or procedures as are considered necessary or desirable in the judgment of the medical staff." It is undisputed no foreign body was found. However, Dr. Haddad did excise the lump on plaintiff's leg subsequently applying three sutures to the excision site and prescribing pain medical and antibiotics. Prior to the procedure when plaintiff signed the Consent to Treatment document he acknowledged he received full explanations regarding reasonably known risks including "bleeding infection nerve injury" associated with the treatment. On or about September 2, 2005, the sutures were removed from plaintiff's leg and presumably due to plaintiff's complaint of pain, an x-ray of his leg was taken. The x-ray did not show any physical signs of complications. According to defendant, plaintiff made no complaints of wound draining or infection until March 16, 2006, although he did complaint of leg pain to OSP medical staff on some occasions between September 2, 2005 and March 16, 2006. Defendant essentially asserted plaintiff received proper medical care from OSP staff regarding the treatment for his left leg.

{¶ 9} Defendant also maintained plaintiff received proper care on and after March 16, 2006, the first time he "complained of drainage from an opening on his left calf." Defendant explained plaintiff's leg wound was cleansed at that time, the drainage was cultured, and a referral was made to OSP physician Dr. Martin Escobar. According to defendant, Dr. Escobar examined plaintiff on March 20, 2006, "diagnosed the area as

a cyst with yellow drainage and ordered a dermatology consult.” Dr. Escobar noted the cultured drainage from plaintiff’s leg revealed “a staph infection, which was treated with antibiotics.” Defendant related plaintiff was seen at OSP sick call on March 27, 2006 with continued white drainage from the leg opening. Defendant stated the white drainage matter “was cultured and he was started on antibiotics.” Antibiotic and pain medication therapy was continued by Dr. Escobar through April 2006. Plaintiff’s treatment regime remained unchanged even after plaintiff filed a grievance on April 13, 2006 complaining about experiencing continuing problems with his leg wound. By April 20, 2006, Dr. Escobar examined plaintiff and “found the open area to be well healed with no signs of infection.” As a precaution plaintiff was continued on antibiotics and pain medication. Defendant asserted plaintiff’s condition consisted of a cyst, scar tissues, and a minor staph infection that completely healed. Defendant contended plaintiff failed to produce any evidence to prove the infection he experienced in March 2006 was causally related to the minor surgery performed on his leg in August 2005. Furthermore, defendant contended plaintiff failed to offer sufficient evidence to show he ever received substandard or untimely care for his medical complaints.

{¶ 10} Defendant submitted an affidavit from OSP medical Director, Martin Escobar, M.D., wherein Dr. Escobar expressed his professional opinion concerning the medical treatment plaintiff received for the complaint regarding his left leg. Dr. Escobar noted that he had received all inmate medical records pertaining to plaintiff and had personally treated plaintiff. Upon the record review and his own treatment experience, Dr. Escobar observed: “Based upon my training, education, experience and treatment of Mr. Collins, it is my opinion, to a reasonable degree of medical certainty that the treatment by excision of Mr. Collins’ ‘lump’ and treatment of an infection in the same area seven months later comported with acceptable standards of medical care.”

{¶ 11} Defendant explained the “continuing open seeping wound” plaintiff presented in March 2006 was treated aggressively due to the possibility the wound area may have harbored a dangerous infection commonly known as MRSA, “a potentially

devastating organism in a prison environment.” Defendant maintained the possible threat plaintiff may have been infected with MRSA, “drove the high interest in (his) wound.” This heightened degree of concern, according to defendant, prompted OSP medical staff to convene a treatment team to set up a treatment plan for plaintiff’s seeping wound. The actions of defendant were addressed in an April 13, 2006 “Disposition of Grievance” document (copy submitted) in response to an earlier grievance filed by plaintiff. In this “Disposition of Grievance” OSP Inspector, Tracy England, wrote, “[b]ased on the available evidence Inmate Collins’ complaint appears to have merit.” Defendant filed a written statement from Tracy England where she addressed her language choices used in the April 13, 2006 “Disposition of Grievance” she wrote. England related, “my disposition of grievance (April 13, 2006) addressed issues regarding Inmate Collins’ immediate condition and need for care.” Additionally, England offered this explanation of the merit language noting, “[t]he determination that Inmate Collins’ grievance had merit was based upon his statement that he had an ongoing issue that required attention.” Essentially defendant asserted any statement by any OSP personnel concerning plaintiff’s complaint having merit was never intended to serve as an admission of liability and should in no way be construed to constitute an admission of liability in this present action.

{¶ 12} Plaintiff filed a response contending Dr. Haddad committed malpractice by choosing to perform minor surgery on his leg without opting to first have the leg x-rayed. Plaintiff did not offer any evidence other than his own opinion that the medical decision of Dr. Haddad to forego an x-ray constituted actionable malpractice. Plaintiff stated he consented to the surgery because Dr. Haddad “is a doctor and I figured he knew what he was talking about.” Plaintiff related he would not have consented to surgery if an x-ray of his leg had been taken before rather than after the surgery. Plaintiff contended the infection he suffered in March 2006 was directly related to the August 2005 surgery performed by Dr. Haddad. Plaintiff did not offer any evidence other than his own assertion to establish a causal connection between the surgery on his leg and the

presence of an infection. Plaintiff stated he did not experience any signs of illness until seven months after the August 2005 surgery. Plaintiff insisted his leg at the surgical site did not heal after the surgery. Plaintiff expressed the belief that Dr. Haddad's choice to not x-ray his leg before surgery was negligent and that his subsequent remote in time infection was proximately caused by an unnecessary surgery.

{¶ 13} Defendant asserted plaintiff has failed to offer sufficient evidence to sustain his burden of proof on his medical claim, an action that requires plaintiff, pursuant to *Bruni v. Tatsumi* (1976), 46 Ohio St. 2d 127, 75 O.O. 2d 184, 346 N.E. 2d 673, to prove:

{¶ 14} “1. The standard of care recognized by the medical community;

{¶ 15} “2. The failure of defendant to meet the requisite standard of care;

{¶ 16} “3. The direct causal connection between the medically negligent act and the injury sustained.”

{¶ 17} Defendant argued plaintiff must offer expert medical testimony to meet his burden of proof in a medical malpractice action. *Bruni*. Defendant pointed out plaintiff did not offer any such testimony. The Supreme Court of Ohio stated in *Bruni* at 131, “*** in order to establish medical malpractice, it must be shown by a preponderance of the evidence that the injury complained of was caused by the doing of some particular thing or things that a physician or surgeon of ordinary skill, care and diligence would not have done under like or similar conditions or circumstances, or by the failure or omission to do some particular thing or things that such a physician or surgeon would have done under like or similar conditions and circumstances, and that the injury complained of was the direct result of such doing or failing to do some one or more of such particular things.”

{¶ 18} In *Buerger v. Ohio Dept. of Rehab. & Corr.* (1989), 64 Ohio App. 3d 394, 581 N.E. 2d 1114, the Tenth District Court of Appeals found the *Bruni v. Tatsumi* standard applicable to a claim of medical malpractice brought by a prisoner. When a plaintiff is alleging substandard medical treatment, expert medical opinion must be

provided to establish a prima facie case. Plaintiff may not simply rest upon allegations of medical negligence as stated in his complaint. *Saunders v. Cardiology Consultants, Inc.* (1990), 66 Ohio App. 3d 418, 420, 584 N.E. 2d 809; *Hoffman v. Davidson* (1987), 31 Ohio St. 3d 60, 61, 31 OBR 165, 508 N.E. 2d 958; *Guth v. Huron Road Hospital* (1987), 43 Ohio App. 3d 83, 84, 539 N.E. 2d 670. In the present claim, plaintiff has failed to produce expert medical opinion regarding the cause of any injury or disability and therefore, his claim is denied.

{¶ 19} Furthermore, any allegations or claims couched as violations of plaintiff's constitutional rights are dismissed. This court lacks jurisdiction to hear a claim to the extent it asserts constitutional violations. *Gersper v. Ohio Dept. of Hwy. Safety* (1994), 95 Ohio App. 3d 1, 641 N.E. 2d 1113. Constitutional claims and claims based on Section 1983, Title 42, U.S. Code are not actionable in this court. *Bleicher v. Univ. of Cincinnati College of Med.* (1992), 78 Ohio App. 3d 302, 604 N.E. 2d 783.

Case No. 2006-04792-AD

- 9 -

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- 10 -

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ENTRY OF ADMINISTRATIVE
DETERMINATION

Having considered all the evidence in the claim file and, for the reasons set forth in the memorandum decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Michael Collins, #376-048
878 Coitsville-Hubbard Road
Youngstown, Ohio 44505

Gregory C. Trout, Chief Counsel
Department of Rehabilitation
and Correction
1050 Freeway Drive North

Columbus, Ohio 43223

RDK/laa

4/30

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