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In support of its motion, defendant submitted the affidavit of Lt. Shelby Bennett, who avers as follows:

"3. On December 13, 2019 I was in a Rules Infraction Board (RIB) hearing for Ms. Garko. She was screaming and cussing during her hearing, so it was terminated due to her non-compliance. Ms. Garko dropped to the floor. I directed her several times to stand to her feet and walk. She finally complied and Officer Arthur Jones and I escorted Ms. Garko back to the Residential Treatment Unit. (RTU).

4. Once inside the recreation room, Ms. Garko was kicking and trying to pull away from us and threw her head back and spit on Officer Jones' left chest area and arm. She then started to kick and had to be placed on the ground. Ms. Garko was trying to pull her hands out of the handcuffs. She continued to spit and did spit on another inmate. She turned in my direction and pulled her head back like she was going to spit on me, so I deployed OC to protected [sic] myself and others from being spit on.

5. The OC was ineffective because Ms. Garko turned her face away."  
(Defendant's Exhibit C.)

In response, plaintiff filed her own affidavit, wherein she avers, in relevant part, as follows:

"5. As I was being escorted to the RTU I did spit on CO Jones [sic] left chest area and arm. After this incident spitting on CO Jones, I was immediately taken face first, flat on the ground by Lt. Shelby Bennett, while handcuffed in the back.

6. Lieutenant Shelby Bennett did immediately bend down and spray me directly at close range on my right side of my face, aiming the OC spray directly in my injured, right eye.

7. At no time during this incident did I ever spit on another inmate. At no time during this incident did I ever try to pull out of my handcuffs. At no time during this

yes

yes

incident did I ever attempt to spit on Lt. Shelby Bennett, nor did I continue to spit.” (Plaintiff’s Affidavit, filed Nov. 15, 2021.)

Upon review of both affidavits, the court notes that plaintiff admits that she spit on CO Jones when he and Lt. Bennett were escorting her to the RTU. Lt. Bennett avers that after plaintiff spit on CO Jones, plaintiff then started to kick and had to be placed on the ground. Lt. Bennett also avers that plaintiff was trying to pull her hands out of the handcuffs, and that plaintiff continued to spit and that she did spit on another inmate. Lt. Bennett further avers that plaintiff then “turned in my direction and pulled her head back like she was going to spit on me, so I deployed OC to protected [sic] myself and others from being spit on.” (Defendant’s Exhibit C.)

In contrast, plaintiff avers that after she spit on CO Jones, she did not continue to spit and did not try to pull out of her handcuffs. Plaintiff further avers that, “[a]t no time during this incident did I ever attempt to spit on Lt. Shelby Bennett, nor did I continue to spit.” (Plaintiff’s Affidavit.) The court notes that plaintiff admits that she spit on CO Jones, and that plaintiff does not deny kicking. Most importantly, plaintiff does not deny that she turned in Lt. Bennett’s direction and pulled her head back like she was going to spit on Lt. Bennett. While plaintiff denies attempting to spit on Lt. Bennett, she does not deny turning in Lt. Bennett’s direction or pulling her head back. Based upon plaintiff’s immediate past conduct of spitting on CO Jones, kicking, and turning her head in Lt. Bennett’s direction, the court cannot find that it was unreasonable for Lt. Bennett to believe that plaintiff was about to spit on her. Therefore, the only reasonable conclusion is that Lt. Bennett’s use of force, deploying a burst of OC spray, did not exceed that force which reasonably appeared to be necessary to act in self-defense from physical attack or threat of physical harm. Accordingly, it can only be concluded that, under the circumstances, Lt. Bennett had the lawful authority and privilege to use such force as may have reasonably appeared necessary at the time. It must also be concluded that the degree of force used during the incident was justified, privileged, and satisfied the



duty of reasonable care. Therefore, defendant is entitled to judgment as a matter of law on plaintiff's excessive use of force and assault and battery claims.

## II. **Medical Malpractice**

Turning to plaintiff's claims about the inadequate medical care she received for her eye injuries, as stated in *Reeves v. Healy*, 192 Ohio App.3d 769, 2011-Ohio-1487, ¶ 38 (10th Dist.):

To establish a cause of action for medical malpractice, the 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." *Deer v. River Valley Health Sys.*, 4th Dist. No. 00CA20, 2001 Ohio 2662, quoting *Taylor v. McCullough-Hyde Mem. Hosp.* (1996), 116 Ohio App.3d 595, 599, 688 N.E.2d 1078. Expert testimony is required to establish the standard of care and to demonstrate the defendant's alleged failure to conform to that standard. *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, 130-31, 346 N.E.2d 673. Failure to establish the standard of care is fatal to a prima facie case of medical malpractice. *Id.* at 130.

Likewise, competent expert testimony is required to establish that the medical negligence at issue was the direct and proximate cause of injury. *Corwin v. St. Anthony Med. Ctr.*, 80 Ohio App. 3d 836, 840 (10th Dist.1992). Medical experts must express their "opinions in terms of a reasonable degree of medical probability." *Reinhardt v. Univ. of Cincinnati Med. Ctr.*, 10th Dist. Franklin No. 94API04-603, 1994 Ohio App. LEXIS 5554, at \*15 (Dec. 13, 1994).

Finally, 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 "[a]n 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,

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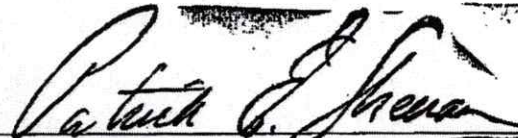
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"the party must demonstrate that a good faith effort was made to obtain the report" and must still identify the expert.

In support of its motion, defendant filed the affidavit of Jeanna Jacobus, counsel for defendant, wherein she avers that she never received any expert report from plaintiff. Defendant's motion and the affidavit of counsel attached thereto establish that plaintiff failed to disclose an expert and provide a report by the August 6, 2021 deadline previously set by the court.

The court finds there is no genuine issue of material fact regarding plaintiff's failure to retain an expert and provide a report. Lacking expert testimony, reasonable minds could only conclude that plaintiff cannot sustain her burden regarding the standard of care, breach of that standard of care, and proximate cause. As plaintiff must present expert testimony to prevail on her medical malpractice claim and has failed to procure an expert, defendant is entitled to judgment as a matter of law.

Accordingly, for the foregoing reasons, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant.



PATRICK E. SHEERAN  
Judge