IN THE OHIO COURT OF CLAIMS

TERI GARKO, Plaintiff v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, Defendant	Case No. 2020-00369JD Magistrate Holly True Shaver DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant, Department of Rehabilitation and Correction (DRC), moves this Court, pursuant to Ohio Rule of Civil Procedure 56, for an order granting summary judgment in its favor. The grounds for this motion are set forth more fully in the attached memorandum.

Respectfully submitted,

DAVE YOST
Ohio Attorney General

/s/ Jeanna V. Jacobus

LAUREN D. EMERY (0095955)
JEANNA V. JACOBUS (0085320)
LINDSEY M. GRANT (0088167)
Assistant Attorneys General
Co-counsel for Defendant
Ohio Attorney General's Office
Court of Claims Defense Section
30 East Broad Street, Floor 16
Columbus, Ohio 43215
(614) 466-7447
Lauren.Emery@OhioAGO.gov
Jeanna.Jacobus@OhioAGO.gov
Lindsey.Grant@OhioAGO.gov

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MEMORANDUM IN SUPPORT

INTRODUCTION

Plaintiff's allegations in her Complaint are not entirely precise, but she clarifies her allegations in response to Defendant's discovery requests. (Exhibit A, Jacobus Affidavit; Exhibit B, Plaintiff's Response to Defendant's Discovery Requests.) She has two allegations. First, she alleges that from 2016-2019, medical providers at the Ohio Reformatory for Women (ORW) were deliberately indifferent to her medical needs causing permanent injury to her eye. *Id.* at pp. 15, 18-21. Second, she alleges excessive use of force by Lt. Shelby Bennett on Dec 13, 2019. *Id.* at pp. 2, 7-10. She alleges this force exacerbated the preexisting injury to her right eye. *Id.* at pp. 11-12, 15.

Plaintiff's claims fail because:

1. This court does not have jurisdiction over claims of deliberate indifference to medical needs.
2. If the court interprets her claim as medical negligence, it fails on the merits because she does not have an expert.
3. The alleged excessive force on December 13, 2019 was not excessive force but an appropriate use of force in response to Plaintiff spitting on a correctional officer and threatening to spit on another.
4. Plaintiff alleges the excessive force exacerbated the previous injury to her right eye; however, she has no medical expert to prove exacerbation (and thus cannot prove injury).

STATEMENT OF FACTS

On December 13, 2019, Plaintiff was in a Rules Infraction Board (RIB) hearing with Lt. Shelby Bennett. (Affidavit of Lt. Bennett, Exhibit C.) Plaintiff was screaming and cussing during her hearing, so Lt. Bennett terminated the hearing due to Plaintiff's non-compliance. *Id.* Plaintiff dropped to the floor. *Id.* Lt. Bennett directed her several times to stand to her feet and walk. *Id.*

She finally complied and Correctional Officer Arthur Jones and Lt. Bennett escorted Plaintiff back to the Residential Treatment Unit (RTU). *Id.*

Once inside the recreation room, Plaintiff was kicking and trying to pull away from her escorts and she threw her head back and spit on Officer Jones' left chest area and arm. *Id.* (Plaintiff admits she spit on Officer Jones. Exhibit B, p. 10.) In response, officers placed her on the ground. *Id.* While on the ground, Plaintiff tried pulling her hands out of the handcuffs and continued to spit, including on another inmate. *Id.* Plaintiff then turned toward Lt. Bennett and pulled her head back like she was going to spit on Lt. Bennett, so Lt. Bennett deployed OC to protect herself and others from being spit on. *Id.* Never DID any of this

STANDARD OF REVIEW

Summary judgment "* * * is a procedural device designed to terminate litigation at an early stage where a resolution of factual disputes is unnecessary." *Frericks-Rich v. Zingarelli*, 94 Ohio App.3d 357, 360, 640 N.E.2d 905 (10th Dist.1994). Summary judgment is appropriate when (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to one conclusion, and that conclusion is adverse to the non-moving party. *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996). The non-moving party is entitled to have evidence construed most strongly in its favor. *Id.* However, the non-moving party may not rest upon the mere allegations or denials of his pleadings, but his response must set forth specific facts showing that there is a genuine, material issue for trial. Civ.R. 56(E); *Dresher* at 293.

LAW AND ARGUMENT

1. **This court does not have jurisdiction over claims of deliberate indifference to medical needs.**

Plaintiff's first allegations constitute a constitutional claim for deliberate indifference to her medical needs. (Exhibit B, at pp. 15, 18-21.) An inmate's claim for deliberate indifference to serious medical needs is a claim under Section 1983, Title 42, of the U.S. Code. *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). The Court of Claims lacks jurisdiction to hear such a claim. Actions in the Court of Claims are limited to those that could be brought against private parties. *Bleicher v. Univ. of Cincinnati College of Medicine*, 78 Ohio App.3d 302, 306, 604 N.E.2d 783 (10th Dist.1992); *Burkey v. S. Ohio Corr. Facility*, 38 Ohio App.3d 170, 171, 528 N.E.2d 607 (10th Dist.1988). Constitutional rights violations require an element of state action and therefore cannot be brought against a private individual. *Bleicher* at 307; *Burkey* at 171. Thus, constitutional claims "present no viable cause of action to be heard in the Court of Claims." *Bleicher* at 307.

In sum, Plaintiff's first claim is based on an alleged violation of her constitutional rights and is improperly before this Court; therefore, the Court should dismiss it.

2. **If the court interprets her claim as medical negligence, it fails on the merits because she does not have an expert.**

In order for a Plaintiff to establish medical negligence, she must present evidence as to the standard of care recognized by the medical community, the defendant's failure to meet that standard and a direct causal connection between this failure and the Plaintiff's injury. *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 130, 346 N.E.2d. 673 (1976).

The standard for medical negligence in Ohio is set forth in *Bruni* and states that: "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." See *Bruni*, at 131. A physician or surgeon is "required to exercise the average degree of skill, care and diligence exercised by members of the same medical specialty community in similar situations." See *Bruni,* at 130.

The Ohio Supreme Court set the requisite burden of proof in medical negligence claims by holding that a party must proffer the testimony of medical experts to prove a case of medical negligence. See *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 130, 346 N.E.2d. 673 (1976) ("Proof of the recognized standards must necessarily be provided through expert testimony."). Simply stated, only medical experts can establish what standard of care applies to a given treatment and whether there was a deviation from that standard. *Id.* Because the standards of the medical community are not common knowledge, the Plaintiff must prove duty, breach and proximate cause through expert medical testimony. *Roberts v. Ohio Permanente Medical Group, Inc.*, 76 Ohio St.3d 483, 1996-Ohio-375, 668 N.E.2d 480 (1996); *Shumaker v. Oliver B. Cannon & Sons, Inc.*, 28 Ohio St.3d 367, 504 N.E.2d 44 (1986). The failure to prove that the recognized standards of the medical community were not met or to prove that the failure to meet those minimum standards proximately caused the injury is fatal to a claim of medical malpractice. *Kestel v. Brakel,* 10th Dist. No. 06AP-253, 2007-Ohio-495, ¶¶ 26, 32.

Here, Plaintiff cannot prove her claim of medical negligence inasmuch as she has failed to produce expert testimony addressing the issues of standard of care, breach, and proximate cause.

(Affidavit of Jacobus, Exhibit A.) In fact, she does not have an expert to testify about the standard of care and proximate cause and she will not have such testimony at trial. There is no dispute that she has not retained any expert witness to opine that DRC committed a breach of the standard of care or that such a breach proximately caused her harm. To the extent she wants to call DRC or OSU medical providers as her expert witnesses, they cannot be forced to testify as an expert. *Stacey Miller v. Dept. of Rehab.& Corr.*, Case NO. 2018-00760, Entry April 3, 2019, p. 4.("[A] party is not permitted to solicit expert testimony on an involuntary basis.") Thus, it must be concluded that Plaintiff cannot prevail on a claim of medical negligence and DRC is entitled to summary judgment as a matter of law.

3. The alleged excessive force on December 13, 2019 was not excessive force but an appropriate use of force in response to Plaintiff spitting on a correctional officer and threatening to spit on another.

Plaintiff cannot sustain a claim for assault, battery, or negligence, because Lt. Bennett's use of OC was justified and reasonable.

"To prove assault under Ohio law, plaintiff must show that the defendant willfully threatened or attempted to harm or touch the plaintiff offensively in a manner that reasonably placed the plaintiff in fear of the contact. To prove battery, the plaintiff must prove that the intentional contact by the defendant was harmful or offensive. Ohio courts have held that, in a civil action for assault and battery, the defendant has the burden of proving a defense of justification, such as the exercise of lawful authority." (Citations omitted.) *Miller v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 12AP-12, 2012-Ohio-3382, ¶ 11.

For a claim based on negligence, a plaintiff must prove by a preponderance of the evidence that the defendant breached a duty owed to him and that he sustained an injury proximately caused by the breach. *Ensman v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 06AP-592, 2006-Ohio-

4. **Plaintiff alleges the excessive force exacerbated her previous injury to the right eye; however, she has no medical expert to prove exacerbation (and thus cannot prove injury).**

Defendant's use of force was justified, but even if it wasn't, Plaintiff cannot prove her claim of negligence because she does not have an expert to testify about the cause of her injury.

A claim for negligence had four elements: duty, breach, causation and injury. Plaintiff's alleged injury from the use of force was an exacerbation of her previous right eye injury. She cannot prove the causation element of her claim, however, because she does not have an expert to testify to the alleged exacerbation. *Darnell v. Eastman*, 23 Ohio St.2d 13,, 13, 261 N.E.2d 114 (1970) ("[T]he issue of causal connection between an injury and a specific subsequent physical disability involves a scientific inquiry and must be established by the opinion of medical witnesses competent to express such opinion.") Thus, her claim for excessive force fails as a matter of law.

Respectfully submitted,

DAVE YOST
Ohio Attorney General

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LAUREN D. EMERY (0095955)
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