

STATE OF SOUTH CAROLINA
COUNTY OF McCORMICK

) IN THE COURT OF COMMON PLEAS
) ELEVENTH JUDICIAL CIRCUIT

Terron Dizzley, #359480,

) C/A NO. 2018-CP-35-00058

Plaintiffs,

) ORDER

vs.

) RECEIVED

South Carolina Department of
Corrections,

) JUL 01 2019

Defendants.

) SC Court of Appeals

This matter is before the court on Defendant’s Motion for Summary Judgment. A hearing was held on this matter on December 3, 2018 at which time Steven M. Pruitt, Esquire, appeared on behalf of Defendant and Plaintiff appeared pro se. The court grants Defendant’s Motion and dismisses Plaintiff’s action.

Plaintiff is an inmate incarcerated within the South Carolina Department of Corrections (hereinafter referred to as “SCDC”). In his Complaint, Plaintiff claims that he went to the dental clinic at McCormick Correctional Institution (hereinafter referred to as “MCCI) on February 23, 2017 and the dentist, Dr. Krebs, gave him a shot and then verbally abused him without providing treatment. Defendant moved for summary judgment on several grounds.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant first argued that it cannot be held liable for the actions of an individual who is not an employee of SCDC. The court agrees. Plaintiff stated in his Complaint that he filed this action pursuant to the South Carolina Tort Claims Act. Section 15-78-60(20) of the Act states that “[t]he governmental entity is not liable for a loss resulting from: . . . (20) an act or omission of a person other than an employee including but not limited to the criminal actions of third persons . . .” S.C. Code Ann. § 15-78-60(20) (2017). Plaintiff in his Complaint complains about the actions

of Dr. Krebs, the dentist he saw at MCCI. Defendant submitted the affidavit of Dr. William Akerman, the Director of Dental Services for SCDC, who stated that Dr. Krebs works for SCDC under a contract and is not an employee of SCDC.

Plaintiff in his oral argument stated that it was Dr. Krebs who gave him a shot in his mouth and then refused to provide further treatment. The language in S.C. Code Ann. § 15-78-60(20) (2017) is clear that SCDC cannot be held liable for the actions of a third person who is not an employee. As shown by the affidavit of Dr. Akerman, Dr. Krebs is not an employee of SCDC. Therefore, the Plaintiff's action against SCDC is dismissed pursuant to S.C. Code Ann. § 15-78-60(20) (2017).

Defendant also argued in the alternative that Plaintiff's action should be dismissed for failure to show gross negligence. The court agrees that Plaintiff failed to show gross negligence. The South Carolina Tort Claims Act states that “[t]he State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein.” *Id.* § 15-78-40 (2017). Section 15-78-60 of the South Carolina Tort Claims Act states:

The governmental entity is not liable for a loss resulting from: . . .
 (25) responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner

Id. § 15-78-60 (25) (2017) (emphasis added).

The court agrees that Plaintiff has failed to assert any facts which would imply gross negligence on the part of the Defendant. The South Carolina Court of Appeals has held that the South Carolina Tort Claims Act “removes the common law bar of sovereign immunity in certain

circumstances, but only to the extent mandated by the Act.” Summers v. Harrison Constr., 298 S.C. 451, 454, 381 S.E.2d 493, 495 (Ct. App. 1989). The Court of Appeals went on to state that “the provisions relating to limitations on and exemptions to liability are to be liberally construed in favor of limiting the liability of the state.” Id.; see also S.C. Code Ann. § 15-78-20(f) (2017) (“The provisions of this chapter establishing limitations on and exemptions to the liability of the State, its political subdivisions, and employees, while acting within the scope of official duty, must be liberally construed in favor of limiting the liability of the State.”).

Gross negligence has been defined as, “‘the failure to exercise slight care’; ‘the intentional, conscious failure to do something which it is *incumbent* upon one to do or the doing of a thing intentionally that one ought not to do’; and ‘a relative term’ meaning ‘the *absence of care that is necessary under the circumstances.*’” Duncan v. Hampton County Sch. Dist. No. 2, 335 S.C. 535, 544, 517 S.E.2d 449, 453 (Ct. App. 1999) (emphasis in original) (quoting Hollins v. Richland County Sch. Dist. One, 310 S.C. 486, 490, 427 S.E.2d 654, 656 (1993)). When the evidence regarding gross negligence supports but one reasonable inference, the question becomes a matter of law for the court to resolve. Clyburn v. Sumter County Sch. Dist. No. 17, 317 S.C. 50, 53, 451 S.E.2d 885, 887-88 (1994).

Plaintiff states in his Complaint that he reported to the dental office at MCCI on February 23, 2017 for a filling. He claims that the dentist performed x-rays, gave him a shot to numb the affected area, but then refused to provide treatment and made Plaintiff leave without treatment. Defendant submitted the affidavits of Brandi Burgess and Dr. William Akerman to its Memorandum. Ms. Burgess is a Dental Assistant at MCCI, and she stated that she recalls Plaintiff and has also reviewed his medical records. Ms. Burgess stated that Plaintiff was seen in the dental clinic again on February 23, 2017, pursuant to his request. Plaintiff had been informed previously

that he had cavities in several teeth that needed to be filled. At the beginning of the appointment, they took x-rays which confirmed Plaintiff had cavities in teeth numbers 21, 28, and 29 and that one tooth, number 4, may have to be extracted. Ms. Burgess stated Dr. Krebs showed Plaintiff the x-rays and explained what needed to be done. Plaintiff refused any treatment of tooth number 4 after he was informed of the possible need for extraction of the tooth if the nerve was exposed during attempted restorative treatment. Dr. Krebs explained to him that it could cause additional problems if the tooth was not either repaired or extracted, but Plaintiff still refused to allow any work to be done on tooth number 4.

After refusing treatment on tooth number 4, Plaintiff stated that he wanted to have a filling done on tooth number 21, and Dr. Krebs gave him an injection at the area of this tooth so that the work could be performed. After Dr. Krebs completed the injection, Plaintiff stated that he wanted a white filling instead of silver, which had been used in filling his other teeth. Dr. Krebs explained to Plaintiff that he did not place white or composite fillings in posterior teeth, but only used silver or amalgam filling. Dr. Krebs also explained to Plaintiff why he used amalgam filling. Dr. Krebs explained to Plaintiff that the amalgam filling works better in posterior teeth such as the one in question and further informed Plaintiff that he did not have the appropriate equipment to do the white/composite filling in the tooth.

Ms. Burgess stated that at that point, Plaintiff became very agitated and argumentative with Dr. Krebs and refused to allow him to put the silver/amalgam filling in the tooth. Dr. Krebs explained to Plaintiff several times the reasons for using the amalgam filling, but Plaintiff remained agitated and continued to get louder and more argumentative. Ms. Burgess informed the Plaintiff several times that he needed to calm down and to stop arguing with Dr. Krebs or he would be escorted out of the medical department. Ms. Burgess stated she instructed the Plaintiff to calm down at least three times.

Plaintiff then stated to Ms. Burgess that he was the one sitting in the dental chair and that he would not be quiet or leave because it was his mouth and he could say what he wanted. At that point, Ms. Burgess stated she had given Plaintiff at least three warnings to calm down, but he had continued to refuse to do so. As the Plaintiff continued to remain agitated and argumentative, she went to the officer in the front of the medical department and asked the officer to escort Plaintiff out of the dental clinic. She determined that the Plaintiff needed to be removed at that time in order to de-escalate the situation because he was becoming more agitated and Ms. Burgess was concerned about their safety. In addition, Plaintiff's continued arguments had taken the majority of the time for his appointment and they had other inmates who had appointments and were to be seen.

Ms. Burgess stated that she does not recall Plaintiff being seen again in the dental clinic since this incident, but stated if Plaintiff submitted a request, he would be seen in the dental clinic and necessary dental work would be completed.¹ However, tooth number 21 as well as other posterior teeth will be filled with silver/amalgam and not white/composite filling.

Dr. Akerman stated in his affidavit that he has not seen Plaintiff personally, but has reviewed his records. Dr. Akerman stated that he became aware of this issue because Plaintiff filed a complaint with the Dentistry Board of South Carolina. The complaint was forwarded to SCDC and to his attention because he is the Director of Dental Services. After receiving the complaint, he spoke with Dr. Krebs and Ms. Burgess. Dr. Krebs informed him that he did an injection to numb the area in order to do a restoration on tooth number 21. After administering the injection, Plaintiff stated that he wanted a "white filling" in the tooth. Dr. Krebs explained to him that this would not be the best treatment for a posterior tooth, but Plaintiff became argumentative and aggressive. Due to the aggressive and argumentative nature of Plaintiff, the appointment was ended and Plaintiff was

¹ The court would note that Plaintiff stated he was no longer housed at MCCI. Therefore, any further treatment would be at the institution where he is currently housed.

removed from the dental clinic.

Dr. Akerman stated it is his understanding the Dentistry Board found no merit in relation to Plaintiff's complaint. He further stated that in his opinion, it was appropriate for Dr. Krebs to inform the Plaintiff that an amalgam/silver filling would be used in tooth number 21 because it is a posterior tooth and amalgam fillings are more effective in posterior teeth. Furthermore, he stated that Dr. Krebs did not have all of the equipment necessary to complete a composite or "white" filling in the tooth. Dr. Akerman stated in his opinion, Dr. Krebs acted appropriately in informing Plaintiff that an amalgam filling would be used and it was appropriate to terminate the appointment because of the aggressive and argumentative nature of Plaintiff. He further stated that in his opinion, the Plaintiff did not experience any harm as a result of this appointment because all that was done was the administration of a local anesthetic. Furthermore, the local anesthetic was injected prior to Plaintiff demanding that a "white filling" be done.

The court agrees Plaintiff has failed to show gross negligence or the failure to exercise slight care. Dr. Krebs examined the Plaintiff on February 23, 2017, including taking x-rays. He determined what treatment was needed and explained this to Plaintiff. Plaintiff refused to allow any work on tooth number 4 after being informed it may need to be extracted, but agreed to restorative treatment on tooth number 21. Dr. Krebs gave Plaintiff the injection after the Plaintiff agreed for them to work on tooth number 21, but stated after the injection was given that he wanted a white filling. The appointment had to be ended because Plaintiff became agitated and argumentative even though Dr. Krebs explained why he could not do a white/composite filling. Defendant certainly exercised at least slight care because Plaintiff was offered treatment and was given an explanation of why this form of treatment was preferred. Plaintiff fails to show gross negligence and his action must be dismissed.

Finally, Defendant argued that Plaintiff's action should also be dismissed because he has failed to provide expert testimony. The South Carolina Court of Appeals stated "[in] medical malpractice cases, the plaintiff must establish by expert testimony both the standard of care and the defendant's failure to conform to the standard. . . ." See Tumblin v. Ball-Incon Glass Packaging, Corp., 324 S.C. 359, 365, 478 S.E.2d 81, 84 (Ct. App. 1996) (citing Pederson v. Gould, 288 S.C. 141, 341 S.E.2d 633 (1976) and Jernigan v. King, 312 S.C. 331, 440 S.E.2d 379 (Ct. App. 1993)).

This issue was also addressed by the Court of Appeals in Botehlo v. Bycura, 282 S.C. 578, 320 S.E.2d 59 (Ct. App. 1984). The court in Bycura stated the general rule that a plaintiff must establish by expert testimony both the required standard of care and the defendant's failure to conform to that standard. The Court went on to state "[t]he reason for requiring expert testimony is that matters of proper diagnosis and treatment ordinarily involve technical knowledge beyond the ken of layman." Id. at 62. The Bycura court found that in a motion by the defendant for summary judgment, "there will usually be no genuine issue of material fact unless the plaintiff presents expert testimony on the standard of care and its breach by the defendant." Id. at 62-63 (citing Sheppard v. Kimbrough, 282 S.C. 348, 318 S.E.2d 573 (Ct. App. 1984)).

Plaintiff has also failed to provide expert testimony that any acts of Defendant were the proximate cause of any injury to Plaintiff. Plaintiff failed to provide expert testimony that he has any type of injury because of the alleged actions or inactions of Defendant. The South Carolina Supreme Court stated in Tumblin that "[e]xpert testimony is also generally required to establish proximate cause in a medical malpractice case." Tumblin, 324 S.C. at 65, 478 S.E.2d at 84 (citing Bramlette vs. Charter-Medical-Columbia, 302 SC 68, 393 S.E.2d 914 (1990)). Plaintiff claims that the inadequate dental care has caused him injury, but has failed to provide any expert

testimony establishing that any action or inaction on the part of the Defendant was the proximate cause of any injury to the Plaintiff.

Though Plaintiff has failed to provide expert testimony, Defendant has provided the expert opinion of Dr. Akerman who has been a practicing dentist for 40 years. Dr. Akerman stated that in his opinion, it was appropriate for Dr. Krebs to inform the Plaintiff that an amalgam/silver filling would be used in tooth number 21. He stated that in his opinion Dr. Krebs and Ms. Burgess acted appropriately and there was no harm to the Plaintiff in relation to the February 23, 2017 appointment. The law is clear that expert testimony is required to establish the standard of care, breach of the standard, and proximate cause of injury. Plaintiff has failed to set forth expert testimony on any of these issues, and his action is dismissed.

The court would also note that Plaintiff had filed Motions to Appoint Counsel and for Outside Dental Care, which were also heard at the hearing before the court on December 3, 2018. The court finds that because it has granted Defendant's Motion for Summary Judgment, Plaintiff's aforementioned motions are rendered moot.

THEREFORE, based on the above, Defendant's Motion for Summary Judgment is granted and Plaintiff's action, including his aforementioned motions, is dismissed.

IT IS SO ORDERED.

[ELECTRONIC SIGNATURE PAGE TO FOLLOW]



McCormick Common Pleas

Case Caption: Terron Dizzley VS South Carolina Department Of Corrections

Case Number: 2018CP3500058

Type: Order/Summary Judgment

So Ordered

s/Walton J. McLeod, 2765

Common Pleas

CASE HISTORY FOR CASE 2018CP3500058

Terron Dizzley VS South Carolina Department Of Corrections

FILED DATE: 7/16/2018

CASE TYPE: CP/Personal Injury 350

STATUS: Dismissed

ASSIGNED JUDGE: Mcleod, Walton J IV

DISPOSITION JUDGE: Mcleod, Walton J IV

CASE PARTIES:

Plaintiff Dizzley, Terron
Lci Po Box 205, Ridgeville, SC 29472

Defendant South Carolina Department Of Corrections

Defendant Attorney Pruitt, Steven Michael
PO Box 1547, Greenwood, SC 29648

Plaintiff Pro Se Dizzley, Terron
Lci Po Box 205, Ridgeville, SC 29472

CASE HISTORY FOR CASE 2018CP3500058

Dizzley, Terron
Lci Po Box 205

Age: Unknown
DL#:

DOB: Unknown
SSN: 000-00-0000

Ridgeville, SC 29472

COST	ORIGINAL	BALANCE DUE	DISBURSED	PAY PRIORITY
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Total:

DATE	TIME	EVENT DESCRIPTION
8/28/2017	2:42 PM	Filing recorded: Summons & Complaint
1/30/2018	2:54 PM	Motion/Motion to Object to Change Venue
1/30/2018	2:55 PM	Filing recorded: Service/Certificate Of Service
6/6/2018	2:59 PM	Order/Order of Transport and Roster Scheduling
6/11/2018	3:05 PM	Filing recorded: Request/Request for Interrogatories
6/11/2018	3:06 PM	Filing recorded: Service/Certificate Of Service
6/13/2018	3:07 PM	Motion/Appointment of Counsel
6/13/2018	3:07 PM	Filing recorded: Service/Certificate Of Service
6/28/2018	3:10 PM	Filing recorded: Request/Request For Physical Examination
6/28/2018	3:11 PM	Filing recorded: Service/Certificate Of Service

Print Date: 06/10/2019

Print Time: 9:41:08AM

Requested By: C35BHODGES

CaseHistory.rpt V6.1

Page 1 of 2

CASE HISTORY FOR CASE 2018CP3500058

6/28/2018	3:12 PM	Filing recorded: Filing/Letter Requesting Subpoena's
6/28/2018	3:13 PM	Filing recorded: Service/Certificate Of Service
7/16/2018	3:14 PM	Filing recorded: Filing/Certificate of Transmittal
8/20/2018	10:33 AM	Filing recorded: Filing/Letter for Address to COC
8/20/2018	10:34 AM	Filing recorded: Filing/Plaintiff Moves for Ordering Discovery
10/1/2018	1:41 PM	Motion/Motion to Receive Outside Dental Care
10/1/2018	1:41 PM	Filing recorded: Service/Certificate Of Service
10/8/2018	3:50 PM	Filing recorded: Filing/Letter
10/8/2018	3:51 PM	Filing recorded: Service/Certificate Of Service
10/8/2018	3:52 PM	Filing recorded: Filing/Letter
10/8/2018	3:53 PM	Filing recorded: Filing/Plaint Memor in Support of Motion for SJ
10/8/2018	3:54 PM	Filing recorded: Affidavit/Affidavit of Terron Dizzley
10/8/2018	3:55 PM	Filing recorded: Filing/Old Affidavits from case 2017CP4005165
10/8/2018	3:56 PM	Filing recorded: Service/Certificate Of Service
10/8/2018	3:57 PM	Filing recorded: Filing/Paperwork with Ex.'s
10/26/2018	10:31 AM	Filing recorded: Filing/Roster and Notice for Court Mailed
11/9/2018	3:55 PM	Order/Order of Transport
12/4/2018	12:00 AM	C35BHODGES recorded the following Case Note: 12/04/2018 All Motions Heard and taken Under Advisement by Judge McLeod.
12/10/2018	12:00 AM	C35BHODGES recorded the following Case Note: Order/Summary Judgment
12/10/2018	8:33 AM	Order/Summary Judgment
12/10/2018	8:34 AM	Filing recorded: NEF(12-10-2018 08:33:53 AM) Order/Summary Judgment
2/11/2019	2:48 PM	ADR/Alternative Dispute Resolution (Workflow)
5/6/2019	3:09 PM	Motion/Motion Renew Motion to Receive Outside Dental Care
5/8/2019	2:08 PM	Order/Electronic Form 4
5/8/2019	2:08 PM	Filing recorded: NEF(05-08-2019 02:08:31 PM) Order/Electronic Form 4
5/8/2019	12:00 AM	C35BHODGES recorded the following Case Note: Order/Electronic Form 4