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COURT OF CLAIMS
OF OHIO

IN THE COURT OF CLAIMS OF OHIO

2014 JUL 21 PM 2:59

LYNDSEY HOWELL

CASE NO. 2013-00001

Plaintiffs

MAGISTRATE HOLLY T. SHAVER

v.

OHIO UNIVERSITY POLICE
DEPARTMENT

Defendants

DEFENDANT'S OBJECTION TO MAGISTRATE RECOMMENDATION

Defendant Ohio University Police Department respectfully objects to the recommendation of the Magistrate in this matter, finding the University liable for a fracture to the plaintiff's thumb when she was arrested for drunk driving on an icy night.

The Decision of the Magistrate purports to find the University liable under negligence, but fails to show how the crucial element of breach was satisfied by the plaintiff in this case. The Magistrate wrongly concluded that because the plaintiff felt pain at the time she was cuffed, that the cuffing must have caused the injury and therefore the University is liable. This is not supported by the law or the record of this matter first because there is no evidence of breach, i.e., what the arresting officer did wrong.

Accordingly, the recommendation of the Magistrate in this matter must be rejected.

I. Facts

The facts of this case are not in dispute, only the legal conclusion made by the Magistrate.

Plaintiffs Lyndsey Howell was pulled over for suspicion of driving under the influence of alcohol on January 21, 2012. Decision of the Magistrate, at p. 1. It is not disputed that Ms. Howell had indeed consumed some alcoholic beverages that night, and the Magistrate found

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that Ms. Howell was not entirely honest about her alcohol consumption. Decision at 4-5. She was driving at night, unaware that her headlights were not illuminated. Decision at 2; Trial Transcript at 87-88, 102. She failed several sobriety tests before refusing to continue, and later refused an alcohol breath-test. Tr. at 102-111.

Ms. Howell testified that she did not experience any pain in her hand until she was cuffed by Lt. Hoskinson. Tr. at 85. But she did not present any evidence of what it is he was supposed to have done wrong, how he cuffed her improperly, or even in what manner he handled her such that it caused a fracture in her thumb. Tr. at 85. Furthermore, though not cited in the Magistrate's decision, the evidence in this case clearly established that such minor, non-displaced fractures can often occur without the injured person being aware of it at the time. Tr. at 36-37

II. Law and argument

The Magistrate in this case found the University liable for the injury without a finding of breach, and therefore the Decision is in error and an abuse of discretion.

"To establish actionable negligence, a plaintiff must show the existence of a duty, the breach of that duty, and injury resulting proximately therefrom." *Rowe v Pseekos*, 10th Dist. No. 13AP-889, 2014-Ohio-2024, ¶ 6, citing *Rutber v Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, ¶ 16. The plaintiff in this case did not present evidence of the breach of duty, and the Magistrate skipped an essential step of the negligence analysis in making that finding.

The existence of an injury is not proof of negligence without a showing of a breach of duty. The Magistrate in this case essentially applied a *res ipsa loquitur* analysis without meeting the requirements to do so, and in improper circumstances because neither the evidence nor the Magistrate's findings actually include anything about what it is the arresting officer was supposed to have done wrong. The only evidence to this point is that the plaintiff felt pain at the time, but

the uncontroverted evidence in this case clearly establishes that people often experience injuries without being aware at the time, only to feel pain later. The doctrine of *res ipsa loquitur*—applied by the Magistrate in this case in substance if not in name—is one which allows the finder of fact to “infer both negligence and causation from the mere occurrence of the event and the defendant's relation to it.” *Wittensoldner v Ohio Dept. of Transp.*, 10th Dist. No. 13AP-475, 2013-Ohio-5303, ¶ 20. But before the doctrine is applied, the plaintiff must meet certain criteria which were not met here.

Before the inference of the defendant's negligence may arise under *res ipsa loquitur*, the plaintiff must establish the following: (1) the instrumentality causing the injury was, at the time of the injury, or at the time of the creation of the condition causing the injury, under the exclusive management and control of the defendant, and (2) that the injury occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed. *Id.* “The doctrine *does not apply* when the facts are such that *an inference* that the accident was due to a cause other than defendant's negligence *could be drawn as reasonably as that it was due to his negligence.* *Loomis v Toledo Rys. & Light Co.*, 107 Ohio St. 161, 170, 140 N.E. 639 (1923).” *Id.* at ¶ 21 (emphasis added). In other words, the doctrine cannot be applied if another reasonable inference is available. The Magistrate erred as a matter of law in the de facto application of the doctrine in this case.

In this case, Lt. Hoskinson was not at all times exclusively controlling Ms. Howell's thumb, particularly in light of the uncontroverted testimony that such injuries often go unnoticed. Moreover, the Magistrate did not even find that Lt. Hoskinson touched her thumb, but repeatedly refers only to his “pulling on her fingers” without indicating how pulling on fingers is proximately related to an injury to the thumb. Decision at 4. Ms. Howell was intoxicated enough not to notice that she was driving at night without her headlights on, and

was incapable of completing several sobriety tests. Most important, she was incapable of maintaining her balance. As the evidence established, feeling pain is not always synchronous with the event of injury, and without finding that Lt. Hoskinson grabbed, pulled, bent twisted or otherwise mishandled Ms. Howell's thumb, it was not reasonable for the Magistrate to infer breach.

Furthermore, this is an error of law because the Magistrate contravened the well-settled rule that the existence of an injury is not itself proof of negligence. *Mercer v Wal-Mart Stores, Inc.*, 10th Dist. No. 13AP-447, 2013-Ohio-5607. "No presumption or inference of negligence arises from the mere occurrence of an accident or from the mere fact that an injury occurred. *Dickerson*, citing *Green v Castronova*, 9 Ohio App.2d 156 (7th Dist.1966)." *Id.* at ¶ 13. The Magistrate in this case presumed that Lt. Hoskinson must have been negligent but simply does not identify what it is he did wrong, just as Ms. Howell does not identify what he did wrong. The fact that she felt pain during cuffing is proof that she was injured at some point, but not proof that Lt. Hoskinson did something improper. The Magistrate in this case abused her discretion by filling in the gap in the record with a legal conclusion.

The inference in this case is not one of conduct, because the Magistrate did not even purport to reach a factual conclusion of what it is Lt. Hoskinson is supposed to have done wrong. Rather, it is a legal conclusion of liability by improperly relieving the plaintiff of the burden of proving breach of duty in this case. Because the circumstances of this case do not warrant such an inference, the Magistrate's recommendation must be disregarded and judgment entered for the University.

Finally, the Magistrate made a factual finding that had no support in the record at all. The Magistrate found that "it is more probable than not that Lt. Hoskinson's actions of pulling plaintiff's fingers downward behind her back while placing handcuffs on her resulted in the

injury to her left hand.” There are two problems with this. First, there is no possible causal connection between pulling on the *fingers* and an injury to *the thumb*. The Magistrate did *not* find that Lt. Hoskinson grabbed or twisted her thumb and Ms. Howell could not even say whether he had or not. Tr. at 85. Second, there is nothing in the record even to show that he pulled with excessive force on her fingers, let alone with force sufficient to break a bone that he was not pulling on. This shows the leap of logic that is the error in this case; the Magistrate found that pulling on fingers caused pain in the thumb, which must have caused an injury at that moment, which could only be the result of a breach of duty, and therefore the plaintiff proved breach. Each of those links is unsupported, and the chain thus created is not sufficient for a finding of liability in this case.

And as to credibility, the Magistrate was wrong to state that Lt. Hoskinson should not be believed because he stated the road conditions included ice and snow. Decision at 5. The Magistrate discounted Lt. Hoskinson’s testimony because he wrote on the police report that the conditions included ice and snow, even though the area where he conducted the sobriety tests was clear. Decision at 5. But Ms. Howell herself also testified that it was an icy, snowy night. Transcript at 50. Thus, the Magistrate chose not to believe Lt. Hoskinson based on testimony that was absolutely consistent with what the plaintiff said, and that obviously contributed to the resulting error of law wherein the Magistrate simply filled in the gaps in the record to find for the plaintiff.

III. Conclusion

The Magistrate’s improper legal inference of liability in this case must be disregarded. The plaintiff has failed to present evidence meeting her burden of proof and therefore judgment must be entered in favor of the University pursuant to Civ.R. 53.

Respectfully submitted,

MICHAEL DEWINE
Ohio Attorney General

A handwritten signature in black ink, appearing to read 'C. Conomy', written over a horizontal line.

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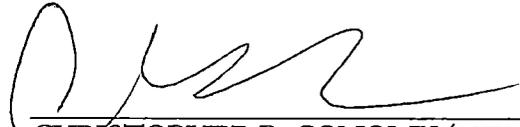
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CERTIFICATE OF SERVICE

On July 21, 2014, a copy of this document was served via regular mail on the following:

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