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Court of Claims of Ohio

The Ohio Judicial Center
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Columbus, OH 43215
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ROY BUCHANAN

Plaintiff

v.

DEPARTMENT OF REHABILITATION AND CORRECTION

Defendant

Case No. 2013-00671

Magistrate Robert Van Schoyck

DECISION OF THE MAGISTRATE

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Plaintiff, an inmate in defendant's custody and control at the Southeastern Correctional Complex, Hocking Unit (Hocking), brought this action claiming that defendant was negligent in forcing him to use an upper bunk bed and is liable for injuries he sustained in a fall from the bunk on December 8, 2012. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

Plaintiff, who was 80 years old at the time of the accident, testified that he was assigned to an upper bunk in "C-Dorm," which is a large open space containing rows of bunk beds. Plaintiff was unable to remember how long he had been incarcerated at Hocking, but he stated that as far as he could recall he had always been assigned to upper bunks up to the time of the accident. Plaintiff testified that it was difficult for him to get into an upper bunk in that it hurt his back to climb up the bed frame, which did not have a ladder attached to it, and he had difficulty pulling himself up to the top. Plaintiff also stated that he is afflicted with a hernia that predates the accident. Additionally, plaintiff expressed an awareness to his having developed some kind of memory loss.

According to plaintiff, several years earlier he asked the medical staff for an order restricting him to a lower bunk, but his request was turned down. Plaintiff testified that, in any event, in his experience it seemed the medical staff would issue such restrictions on their own when they saw fit to do so, and he thought it would do no good to ask again. Plaintiff also testified that, around the time of the accident, he was visiting the prison

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medical department weekly to get his blood pressure checked, and he made additional visits there for one reason or another at least once a month.

Regarding the accident itself, plaintiff recalled little more than waking up on the floor in pain, particularly in the back of his head, and then being transported to the medical department, where he was treated and kept for observation.

Clyde McKinney, an inmate at Hocking, testified that plaintiff had been assigned to a bunk across the aisle from his bunk in C-Dorm for about three months before the accident. McKinney testified that plaintiff appeared outwardly to be in about average health for a man his age, but he also stated that he did not know plaintiff well and did not often watch plaintiff climb in and out of his bunk. McKinney related that he is assigned to an upper bunk himself, and that in order to get into his bunk, he steps onto his metal footlocker, grabs ahold of the bed frame, and pulls himself up.

McKinney testified that he was asleep when the accident occurred and was startled awake by a loud noise. McKinney stated that he looked over and saw a commotion and, though it was dark and he did not have his eyeglasses on, he could see a person lying on the floor a few feet away. McKinney stated that after someone yelled "man down," a corrections officer came running to the scene.

Gregory Yamek, also an inmate at Hocking, testified that he too lived in C-Dorm, across the aisle from plaintiff at the time of the accident. Yamek related that he saw plaintiff around the dormitory from time to time and did not know of any specific physical problems with him, but he stated that he did not pay much attention to how plaintiff got in and out of his bunk. With regard to the means by which inmates generally climb into upper bunks at Hocking, Yamek explained that in his experience inmates customarily step onto their footlocker first, and then step onto a foot peg that is welded onto the bed frame before pulling themselves the rest of the way up.

Robert Turner, another inmate at Hocking, testified that he and plaintiff had both been living in C-Dorm for approximately six to eight months before the accident, and that

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his bunk was about eight or ten bunks away from plaintiff's. Turner testified that he and plaintiff had both lived in B-Dorm for a year or two before being moved to C-Dorm, and that he had seen plaintiff having difficulty getting in and out of an upper bunk. Turner acknowledged having seen plaintiff in the recreation area at times, but he stated that plaintiff merely performed stretching exercises and did not lift weights. Turner also stated that he had a work assignment in the library and that plaintiff often started conversations with him there, and, based on their interactions in the library and the dormitories, he was familiar with plaintiff and observed that plaintiff suffered from what seemed to be some form of dementia.

Turner recalled that he was lying in bed when the accident occurred. According to Turner, someone hollered out "Roy just fell, man down," and then he looked over and saw inmates crowding around plaintiff's bed. Turner, who recalled that the lights were either already on or were turned on immediately after the accident, testified that he stayed at his own bunk, and that the inmates assembled around plaintiff were told to disperse by the corrections officer who responded to the scene. Turner stated that medical personnel arrived about three to five minutes later and transported plaintiff away.

Toni Lee Basse, Assistant Healthcare Administrator for the Southeastern Correctional Complex, testified that she began working for defendant in 1996 as a corrections officer, and that she has worked at Hocking in her current role for about two years. Basse testified that she has not administered medical care or treatment to plaintiff but is familiar with defendant's medical record-keeping practices and she authenticated a portion of plaintiff's medical file. (Plaintiff's Exhibit 1.)

Basse also testified that defendant has a set of guidelines in place, known as Protocol B-19, for the evaluation and ordering of medical restrictions, and she authenticated a copy of the guidelines. (Plaintiff's Exhibit 2.) As defined in Protocol B-19, a "medical restriction" is "[a] medical accommodation written by a physician or other

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advanced health care provider, used to address a serious medical need." The document further provides, in part:

"IV. Directive:

"A. Medical Restrictions

"1. Medical restrictions are written only to address health problems that are likely to cause severe or life threatening consequences if the restriction is not implemented immediately.

"2. Medical restriction orders shall be ordered by the institution physician or other advanced medical provider to address functional limitations. [Defined elsewhere in the guidelines, 'functional limitation' means: 'A physical impairment, not expected to improve within 6 months, that substantially limits the inmate's ability to perform a major life activity.'] Such medical concerns may include, but are not limited to:

"a. Medical conditions that may cause or result in a sudden loss of consciousness (i.e. Type 1 Diabetes);

"b. Documented epilepsy that is under current treatment;

"c. Chronic, progressive and incapacitating neuromuscular disorders;

"d. Paralysis;

"e. Severe, permanent musculoskeletal defects that limit mobility; and/or

"f. Advanced age - >70 years old.

"* * *

"5. Some types of medical restrictions include, but are not limited to:

"a. Long term low bunk and/or low range restrictions;

"b. Short-term low bunk or low range restrictions;

"c. Temporary medical work restrictions (Medical Lay-ins); or

"d. Standing, lifting and other ergonomic restrictions."

Through her testimony, Basse authenticated a series of medical restriction orders that were written for plaintiff, with the earliest of those offered into evidence dating to

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April 28, 2011. (Plaintiff's Exhibit 1, p. 135.) That order, which was to be effective for one year, provided for a 10-pound lifting restriction and "no shovelling [sic], buffing or ladders"; underneath those provisions are the words "top bunk OK – and no mopping see prior restrictions," along with the date "6/6/11" and the initials "SC," which Basse explained to be those of a former Healthcare Administrator. The signature of a Dr. Righi, who according to Basse used to work at Hocking, appears at the bottom, dated April 28, 2011; the signature of another individual, also dated April 28, 2011, appears elsewhere on the form.

Another medical restriction order, dated October 13, 2011, which was also to be effective for one year, provided for a 10-pound lifting restriction and "no shovelling [sic], buffing, mopping or ladders no job requiring reading or writing"; later, on September 4, 2012, the words "add elevator pass" were added. (Plaintiff's Exhibit 1, p. 134.) Basse stated that a set of corresponding progress notes dated October 13, 2011, which includes a reference to plaintiff having "early dementia," was signed by Dr. Righi. (Plaintiff's Exhibit 1, p. 112.) With respect to dementia, other medical records specifically refer to plaintiff having Alzheimer's disease. (Plaintiff's Exhibit 1, pp. 59, 71.)

The last medical restriction order issued before the accident is dated October 17, 2012, and was to be effective for one year. (Plaintiff's Exhibit 1, p. 133.) The order, which Basse stated was signed by Dr. Righi, provided for a 10-pound lifting restriction, and "no shovelling [sic], buffing, mopping, ladders or job requiring reading or writing[,] E-pass[.]" This order, like those preceding it, has boxes that may be checked to indicate particular restrictions. One of those boxes is for a low bunk restriction. On this order, that box is checked with a notation written above stating "Added 12/8/12," which was the date of the accident. Basse testified that she does not know who added the notation. Unlike the medical restriction order that preceded it, Basse could not locate any progress notes that correspond to the October 17, 2012 order.

Regarding the low bunk restriction, Basse testified that a nursing assessment prepared by the nurse who cared for plaintiff after the fall, which was reported to have

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occurred at approximately 7:15 a.m., shows that Dr. Righi was reached by telephone about two hours after the accident and ordered a low bunk restriction for plaintiff at that time. (Plaintiff's Exhibit 1, pp. 71-72.) Basse also testified that Dr. Righi signed a corresponding "physician's order" for the low bunk restriction when he later arrived at the prison. (Plaintiff's Exhibit 1, p. 47.)

According to Basse, medical restrictions are not ordered for inmates at Hocking unless an inmate requests one, and she explained that inmates may initiate such requests by signing up for "nurse's sick call." Basse stated that she reviewed plaintiff's medical file and did not find any record of him requesting a low bunk medical restriction. In fact, Basse identified only one instance in the medical records where plaintiff made any kind of request for a medical restriction, being the October 13, 2011 progress notes, which among other things state that plaintiff was unable to perform the tasks associated with a new work detail to which he had been assigned and therefore wanted a "new work restriction"; these progress notes also refer to plaintiff's hernia. (Defendant's Exhibit A; Plaintiff's Exhibit 1, unnumbered page between pp. 31 and 32.) The medical records admitted into evidence also include a number of "Health Services Request" forms that were submitted in plaintiff's name and pertain to matters other than medical restrictions, although most simply requested medication refills, and the varied handwriting styles suggest that plaintiff did not prepare all of them himself.

"To recover on a negligence claim, a plaintiff must prove by a preponderance of the evidence (1) that a defendant owed the plaintiff a duty, (2) that a defendant breached that duty, and (3) that the breach of the duty proximately caused a plaintiff's injury." *Ford v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 05AP-357, 2006-Ohio-2531, ¶ 10. "In the context of a custodial relationship between the state and its prisoners, the state owes a common-law duty of reasonable care and protection from unreasonable risks." *Woods v. Ohio Dept. of Rehab. & Corr.*, 130 Ohio App.3d 742, 744-745 (10th Dist.1998). "The state, however, is not an insurer of inmate safety and owes the duty of ordinary care

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only to inmates who are foreseeably at risk." *Franks v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 12AP-442, 2013-Ohio-1519, ¶ 17. "Reasonable care is that degree of caution and foresight an ordinarily prudent person would employ in similar circumstances, and includes the duty to exercise reasonable care to prevent an inmate from being injured by a dangerous condition about which the state knows or should know." *McElfresh v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 04AP-177, 2004-Ohio-5545, ¶ 16.

Upon review of the evidence adduced at trial, the magistrate finds that at approximately 7:15 a.m. on December 8, 2012, plaintiff fell while negotiating the bed frame that he used to climb in and out of the upper bunk to which he was assigned, causing him to be injured. The magistrate finds that at the time of the accident, plaintiff suffered from infirmity associated with his advanced age, back problems, and a hernia, his ability to climb in and out of the upper bunk was substantially limited, and indeed his physical limitations caused him to fall. The magistrate further finds that plaintiff, who clearly exhibited some memory loss and confusion at trial, has a form of dementia that predates the accident.

The magistrate finds that climbing in and out of the upper bunk posed an unreasonable risk of harm to plaintiff. The magistrate also finds that, while there was essentially no evidence presented as to the manner by which plaintiff was assigned to the upper bunk and it was not established that the prison officials responsible for plaintiff's bunk assignment had notice of the danger in his using an upper bunk, defendant did have notice of the danger to the extent that its agents or employees previously evaluated him for medical restrictions. Plaintiff's age was plainly identifiable from his medical file, and the guidelines for the evaluation and ordering of medical restrictions, Protocol B-19, specify that restrictions "shall be ordered" to address functional limitations, with advanced age, defined as greater than 70 years old, being one of the six enumerated conditions that may necessitate restrictions. (Plaintiff's Exhibit 2.) The magistrate finds that, upon evaluating plaintiff, it was recognized that plaintiff in fact had various functional limitations as shown by the medical restrictions that were ordered, including prohibitions on climbing ladders

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and lifting more than ten pounds, and issuing him a pass to use an elevator rather than the stairs between the ranges (obviating any need for a "low range" restriction), and the significance of his functional limitations is shown in part by the instruction in Protocol B-19 that such restrictions are ordered "only to address health problems that are likely to cause severe or life threatening consequences if the restriction is not implemented immediately."

Insofar as defendant argues that the words "top bunk OK" on the medical restriction orders issued April 28, 2011, show that it was not hazardous for plaintiff to use an upper bunk, the magistrate finds that it cannot be determined who wrote the words nor when they were written, and the significance of those words appearing on the document was not sufficiently established. Additionally, the medical records demonstrate that plaintiff subsequently underwent additional evaluations for medical restrictions, and the orders that followed do not include such language. Furthermore, despite the express instruction in Protocol B-19 that advanced age may necessitate restrictions, nowhere in the medical records is there any indication why those who evaluated plaintiff declined to issue him a low bunk restriction or that they took his age into consideration, nor did defendant offer testimony either from anyone who evaluated him or from a medical expert to explain why he need not have had a low bunk restriction under Protocol B-19. Plaintiff, on the other hand, presented credible evidence demonstrating that it was unreasonably dangerous for him to use an upper bunk and that he was eligible for a low bunk restriction under Protocol B-19. Even though plaintiff did not present the sort of expert testimony required of a medical malpractice claim, where an examination, such as those prescribed under Protocol B-19, "is conducted as a precondition to obtaining a benefit or to obtain information concerning a person's eligibility for a benefit, that examination is distinguishable from one occurring in the diagnosis, care or treatment of a person, as requisite to a medical claim." *Foster v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 12AP-503, 2013-Ohio-912, ¶ 34.

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Although defendant asserts that any fault in this case must be attributed to plaintiff for not requesting a low bunk medical restriction, the magistrate finds that despite Basse's testimony that medical restrictions are only ordered when inmates request them, plaintiff was evaluated for and was issued medical restrictions without such requests, Protocol B-19 basically identifies just three types of restrictions that may issue from such evaluations (i.e., low bunk, low range, and work/ergonomic), and, given the information about plaintiff that those examining him knew or should have known, ordering a low bunk restriction could, and indeed should, have occurred whether he requested one or not. While it is true that inmates in general owe a duty to exercise reasonable care for their own safety, *see Taylor v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 11AP-1156, 2012-Ohio-4792, ¶ 15, it is also true that defendant owes a duty of reasonable care to inmates who are foreseeably at risk. *Franks*, 10th Dist. Franklin No. 12AP-442, 2013-Ohio-1519, at ¶ 17. Plaintiff recalled requesting a low bunk restriction several years earlier; but the magistrate finds that it was not established with reasonable certainty when that occurred, nor was it proven that he should have been restricted to a low bunk when that occurred, and there is no evidence that plaintiff ever again requested a lower bunk. Nevertheless, considering plaintiff's cognitive impairment, the magistrate finds that the evidence weighs against apportioning fault to him. Rather, the magistrate finds that the risk of harm to plaintiff was foreseeable, that defendant breached its duty of care by not restricting plaintiff to a low bunk prior to the accident, and that the injuries plaintiff sustained in the fall proximately resulted from defendant's breach.

Based upon the foregoing, the magistrate concludes that plaintiff has proven his claim of negligence by a preponderance of the evidence. Accordingly, judgment is recommended in favor of plaintiff.

A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other

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party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).

ROBERT VAN SCHOYCK
Magistrate

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