

[Cite as *Scudder v. Dept. of Rehab. & Corr.*, 2018-Ohio-3655.]

KEVIN SCUDDER

Plaintiff

v.

OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION

Defendant

Case No. 2016-00630JD

Magistrate Gary Peterson

DECISION OF THE MAGISTRATE

{¶1} Plaintiff, an inmate in the custody and control of defendant, brought this action for negligence arising out of injuries he sustained on two separate occasions where he fell while attempting to transfer from his wheelchair to the toilet. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} At trial, plaintiff testified that he has been assigned to the Franklin Medical Center (FMC) for the previous seven years and that at all times relevant to this case, he was assigned to 3 North A Hall, room 302. Plaintiff stated that the room is capable of housing five inmates, but only two inmates are typically assigned to the room. Plaintiff acknowledged, however, that other inmates have also periodically been assigned to the room. Plaintiff maintained that he cannot be housed at other institutions due to his medical needs and stated that he does not wish to leave FMC. Plaintiff explained that he is a level P paraplegic, paralyzed from the waist down and that he has a tube in his stomach.

{¶3} Regarding the bathroom, plaintiff testified that the inmates in room 302 share a bathroom and that it is the only one that he can enter with his wheelchair and close the door. Plaintiff believed, however, that the bathroom lacked an appropriate sink, toilet, and grab bars and maintained that other institutions where he has been have such accommodations. Plaintiff added that his wheelchair does not fit between

the sink and the toilet, meaning, as he asserted, that it is not possible for him to use the wheelchair to pry the grab bar away from the wall. Nevertheless, plaintiff explained that the bathroom had two grab bars for him to use when transferring from his wheelchair to the toilet: one on the side of the toilet and one behind the toilet. Plaintiff testified that the grab bars have three eyelet screws that fasten the grab bar to a plate that is attached to the wall with two screws. Plaintiff believed that no regular maintenance had been performed on the grab bars while he was assigned to room 302.

{¶4} According to plaintiff, prior to June 3, 2016, the grab bar was loose, and he reported the loose grab bar to corrections officer Shriver, head of nursing Jeff Mathis, Ms. Silvas, and several other corrections officers. Plaintiff testified that on April 5, 2016, he submitted an informal complaint resolution (ICR) regarding the loose grab bar to the maintenance department. (Plaintiff's Exhibit 3). Plaintiff stated that he is familiar with the dispute resolution process and has no hesitation reporting issues to staff members. Plaintiff asserted that he reported the loose grab bar to Shiver on multiple occasions including two or three days before he fell on June 3, 2016, but conceded that he did not have any written notes documenting such complaints. Plaintiff added that in the morning of June 3, 2016, he again reported the loose grab bar to Jeff Mathis who shook the grab bar and noted that it was loose. Plaintiff believed that Shriver submitted a work order to repair the loose grab bar, but he maintained that no one fixed the grab bar prior to him falling.

{¶5} Plaintiff testified that on June 3, 2016, at approximately 1:00 p.m., he proceeded to the bathroom to use the toilet. Plaintiff explained that he takes medication to use the restroom on a scheduled basis, and as he was transferring from the wheelchair to the toilet, the grab bar above the toilet broke away from the wall. Plaintiff asserted that he did not believe that the grab bars were safe but nevertheless he used them and did not ask anyone for assistance transferring from his wheelchair to the toilet. Plaintiff stated that he subsequently fell and hit his head, breaking a tooth in the

process. Plaintiff testified that he eventually got the attention of his roommate, inmate Kenny Smith, who then informed corrections officers that plaintiff had fallen. Nurses eventually arrived and plaintiff received medical care. Plaintiff stated that someone from the maintenance department worked on the grab bars later that day.

{¶6} Following the incident, on June 5, 2016, plaintiff submitted an ICR wherein he stated that he has previously complained about the loose grab bars and that it was not repaired prior to his fall. Plaintiff, however, acknowledged in the ICR that the grab bar “was fixed” following his fall. (Plaintiff’s Exhibit 4). In the response from the maintenance department, it was noted that “someone had pried on it,” but plaintiff denied prying on the grab bar. Plaintiff added that he does not have any tool that he could use to pry on the grab bar. On June 9, 2016, plaintiff filed another ICR wherein he again stated that he has complained about the grab bars being loose. (Plaintiff’s Exhibit 5). On June 22, 2016, plaintiff filed a notification of grievance wherein he again noted that he previously complained about the loose grab bars. Plaintiff also acknowledged that the grab bar that broke was put back on the wall but requested that the other bar be tightened. (Plaintiff’s Exhibit 6). Plaintiff testified that after he filed the grievance, someone from the maintenance department tightened the screw on the grab bar but did not fix what he believed to be the underlying problem regarding the screw. Plaintiff conceded that the grab bar behind the toilet was tight after the maintenance department performed work on the bar but maintained that the grab bar gradually loosened over time.

{¶7} Plaintiff testified that on December 16, 2016, he entered the bathroom to use the toilet and as he was transferring from his wheelchair to the toilet, the grab bar above the toilet broke away from the wall. Plaintiff stated that he knew the grab bar was loose prior to falling in December but conceded that he did not file any written complaints following the repair performed during the summer and prior to his fall on December 16, 2016. Plaintiff added that after the grab bar broke, he fell and hit his

head on the toilet. Plaintiff stated that he subsequently received medical attention for his fall.

{¶8} On December 16, 2016, plaintiff submitted an ICR complaining that the grab bar that broke was the same one that previously broke. Plaintiff added that the grab bar was never properly repaired even though maintenance department members attempted to fix the problem. (Plaintiff's Exhibit 12). Plaintiff testified that following the second fall, the maintenance department members drilled another hole in the plate and anchored the grab bar to the wall. Plaintiff reported that he has not had any problems with the grab bar since this repair.

{¶9} Bruce Wayne Hardesty testified that at the time of trial he had been employed by defendant at FMC for 15 years. Hardesty stated that on June 3, 2016, he was assigned to plaintiff's unit. According to Hardesty, prior to plaintiff falling on June 3, 2016, plaintiff never complained to him about the grab bar being loose. Hardesty testified that inmate Smith alerted him that plaintiff had fallen in the bathroom. Hardesty stated that he did not enter the bathroom but did see plaintiff on the ground and the grab bar hanging down as well. Hardesty subsequently contacted both the medical department and the maintenance department. Hardesty stated that he completed a work order regarding the broken grab bar (Plaintiff's Exhibit 10) and an incident report (Plaintiff's Exhibit 2). Hardesty testified that he also spoke with Randall Romans regarding the grab bar. Hardesty added that he does not know when the grab bar was repaired. According to Hardesty, plaintiff complained about many things but did not complain about the grab bar after he fell on June 3, 2016 and before he fell on December 16, 2016. Hardesty stated that if plaintiff had stated he did not feel safe using the grab bars, he would have requested that someone from the medical department assist him.

{¶10} Robert Cosby testified that he is employed as a corrections officer at FMC and was in that same position in 2016. Cosby stated that he became aware that plaintiff

fell several days after it had occurred. According to Cosby, plaintiff believed that he had completed a work order regarding the grab bars prior to his fall. Cosby stated that he could not recall completing a work order but agreed to check his paperwork, which is maintained on the computer system. Cosby testified that after checking his paperwork, he concluded that he never completed a work order regarding the grab bars prior to his fall on June 3, 2016. Cosby added that he does not recall plaintiff complaining about the grab bar being loose. Cosby stated that plaintiff also said he would be filing a lawsuit; Cosby believed that plaintiff was hinting that he would share the proceeds of a lawsuit with him if he won his case. Cosby acknowledged that he did not document that conversation.

{¶11} Cosby testified that if plaintiff would have complained about transferring from the wheelchair to the toilet, he would have contacted the medical department to assist him. Cosby added that if plaintiff would have complained about the grab bar being loose, he would have completed a work order and contacted the maintenance department. Cosby also recalled an incident where plaintiff became angry and punched the commissary box, hurting his hand; however, he could not recall when that incident occurred. Lastly, Cosby stated that during shakedowns of plaintiff's room, he would only look at the areas of clutter and did not search the bathroom for contraband.

{¶12} John McGahee testified that he was formerly employed by defendant at FMC as the investigator and inspector, although he now works for the Department of Youth Services. McGahee explained that as the investigator, he receives a copy of the ICRs submitted by the inmates and a copy of the responses completed by staff members and logs the information into an electronic record keeping system. McGahee added that if an inmate is not satisfied, the next step is to file a notification of grievance, which then triggers his investigation. McGahee testified that he became involved following plaintiff's grievance filed on June 22, 2016. (Plaintiff's Exhibit 6). McGahee explained that he spoke with plaintiff, reviewed the work orders, viewed the grab bars,

and concluded that the repair was completed in a timely manner. (Plaintiff's Exhibit 11). McGahee further noted that he did not see pry marks on the bathroom wall but cautioned that he would not have entered the bathroom until July when he became involved. McGahee asserted that he never talked with plaintiff about the grab bars being loose prior to June 3, 2016.

{¶13} Regarding the ICR plaintiff claimed to have submitted on April 5, 2016 (Plaintiff's Exhibit C; Defendant's Exhibit H), McGahee testified that the first time he saw the document was during the course of this litigation. McGahee maintained that he has no records from plaintiff regarding the bathroom grab bars being loose prior to June 3, 2016, despite plaintiff extensively availing himself of the dispute resolution procedure. (Defendant's Exhibit A). McGahee asserted that he sees every ICR and their responses and that he would remember the one presented as Plaintiff's Exhibit 3 because it indicates that the ICR was not responded to properly. McGahee added that the ICR identified as Plaintiff's Exhibit 3 is not logged in the system and that he never received a grievance following up on plaintiff's ICR. McGahee acknowledged, however, that he is aware of ICRs being lost. McGahee further testified that he agreed to compensate plaintiff for his broken glasses regardless of any claimed wrongdoing by the department. (Defendant's Exhibit L). Finally, McGahee testified that prior to December 16, 2016, he did not receive any ICRs from plaintiff about the loose grab bars other than the ones plaintiff filed immediately following his fall on June 3, 2016.

{¶14} Kenny Smith testified that he has been an inmate at FMC since March 2011 and that he has lived in the same room as plaintiff for most of that time. Smith asserted that prior to the June 3, 2016 incident, plaintiff wrote kites about the grab bars and complained to people about the grab bars. Smith testified that the grab bars were loose but admitted that he did not complain to anyone about them. Smith stated that on June 3, 2016, he heard a noise from the bathroom and subsequently discovered that plaintiff was on the ground. Smith added that he believed the grab bar was fixed the

following week and that the grab bar remained in a state of disrepair all weekend. Smith maintained that plaintiff continued to complain about the grab bars leading up to the fall on December 16, 2016.

{¶15} Steven Sroufe testified that he is employed as the business administrator at FMC and was so employed in 2016. Sroufe stated that his duties previously included, among other things, supervising Romans. Regarding the grab bars, Sroufe testified that there are grab bars like the ones in plaintiff's bathroom throughout FMC. Sroufe explained that there are two anchor plates attached to the wall and a flange that protrudes from the anchor plate. Sroufe stated that the bar sits out over the flange with set screws to keep the bar from pulling away from the wall. Sroufe was unable to recall any issues at FMC with any other grab bars that pulled away from the wall while being used.

{¶16} Sroufe stated that he became aware of plaintiff's fall after learning of plaintiff's ICR dated June 9, 2016. (Plaintiff's Exhibit 5). Sroufe added that he did not know if Romans had responded at that time and wanted to allow him an opportunity to respond. Sroufe testified that he personally inspected the grab bars on two or three occasions including after he received an email from McGahee asking if the bars are secure. (Plaintiff's Exhibit 8). Sroufe asserted that after checking on the grab bars in plaintiff's bathroom in July 2016, he determined that they were both secure. Sroufe added that following the December incident, he put his entire weight on the bar to ensure that it was secure. Sroufe added that FMC is inspected monthly by the health and safety inspector and that there are quarterly and periodic accreditation inspections as well.

{¶17} Sroufe testified that he did not receive any complaints about the grab bars prior to receiving the ICR on June 9, 2016 and that he was unaware of any complaints regarding plaintiff's grab bars. Sroufe added that following his inspection of plaintiff's grab bars in July 2016, he did not receive any complaints regarding the grab bars.

Lastly, Sroufe stated that he had not seen Plaintiff's Exhibit 3/Defendant's Exhibit H prior to this litigation and that such a document would have stood out because the response is not appropriate.

{¶18} Terry Barns testified that he is employed by defendant at FMC in the maintenance department. Barns stated that he was asked to fix the grab bar in plaintiff's bathroom following the June 3, 2016 incident. Barns explained that the bar by the toilet was broken and that there was a mark on the wall that resembled a pry mark. Barns believed that the mark on the wall was from plaintiff's wheelchair pushing on the grab bar. Barns maintained that plaintiff tampered with the grab bar. Barns explained that the grab bar is designed to withstand downward force but not a force that pulls it away from the wall.

{¶19} Barns testified that on June 3, 2016, he went to plaintiff's bathroom to determine what needed to be done to fix the grab bar. Barns concluded that he needed an Allen wrench capable of performing a 90 degree turn and a set screw and that he returned to the maintenance department, obtained the materials, and returned to the bathroom to complete the repair. Barns added that the work was completed on June 3, 2016, and that the other grab bar was also secure.

{¶20} Randall Romans testified that he is employed by defendant as a building maintenance superintendent and was in that same position in 2016. Romans asserted that he saw Plaintiff's Exhibit 3/Defendant's Exhibit H for the first time during the course of this litigation when it was presented to him during his deposition. Romans testified that it was not signed by him and that it is not his handwriting at the bottom of the document. Regarding the work order dated June 2, 2016, Romans asserted that it was completed by Mr. Yu on June 2, 2016. Romans explained that when a work order is submitted, it gets a triage number and that a work order regarding a handicap grab bar is considered an urgent matter. Romans added that there is a database that tracks

completed work orders and that the work order was entered into the database on June 9, 2016.

{¶21} Romans testified that on June 3, 2016, he received the work order to repair plaintiff's broken grab bar. Romans stated that he initially assigned the work order to Mr. Yu, but he had to reassign it to Barns. Romans maintained that the work was completed that same day and that he personally inspected Barns' work to ensure that all the grab bars were secured. Romans did not recall receiving any kites or complaints about the grab bars prior to this incident.

{¶22} Romans testified that between June 3, 2016 and December 16, 2016, he did not receive any kites or complaints regarding plaintiff's grab bars. Romans stated that he became aware of the December 16, 2016 incident and that it involved the same grab bar as before. Romans stated that he assigned the work to Trisler and that he followed up to ensure that the work was completed. Romans explained that following the second incident, the grab bar was sunk into the wall with mollies and now has a cap that twists and locks. Romans added that he wanted to ensure that the grab bar never came off again. Romans believed that someone had manipulated the grab bar and added that he was unaware of any other similar grab bar issues. Romans clarified that the loose shower bar referenced in Plaintiff's Exhibit 16 is not a similar issue.

{¶23} "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.

{¶24} "Typically under Ohio law, premises liability is dependent upon the injured person's status as an invitee, licensee, or a trespasser. * * * However, with respect to custodial relationships between the state and its inmates, the state has a duty to exercise reasonable care to prevent prisoners in its custody from being injured by

dangerous conditions about which the state knows or should know.” *Cordell v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 08AP-749, 2009-Ohio-1555, ¶ 6; see also *Moore v. Ohio Dept. of Rehab. & Corr.*, 89 Ohio App.3d 107, 112 (10th Dist.1993).

{¶25} “Notice may be actual or constructive, the distinction being the manner in which the notice is obtained rather than the amount of information obtained.” *Watson v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 11AP-606, 2012-Ohio-1017, ¶ 9. “Actual notice is notice obtained by actual communication to a party.” *Powers v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 03AP-504, 2003-Ohio-6566, ¶ 10. “Constructive notice is that notice which the law regards as sufficient to give notice and is regarded as a substitute for actual notice.” *Hughes v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 09AP-1052, 2010-Ohio-4736, ¶ 14.

{¶26} Upon review of the evidence, the magistrate finds that plaintiff proved his claim regarding the fall that occurred on June 3, 2016, but plaintiff did not prove his claim regarding the fall that occurred on December 16, 2016. The magistrate further finds that on June 3, 2016, plaintiff, who is a paraplegic confined to a wheelchair, proceeded to his bathroom in room 302 at FMC. The bathroom is equipped with grab bars: one above the toilet and one on the wall by the toilet. As plaintiff was attempting to transfer from his wheelchair to the toilet, the grab bar above the toilet broke away from the wall causing plaintiff to fall. Plaintiff collided with the toilet as he fell and damaged a tooth. On December 16, 2016, plaintiff again attempted to transfer from his wheelchair to the toilet. The grab bar above the toilet broke away from the wall causing plaintiff to fall and sustain injuries.

{¶27} Defendant argues that it had no notice that the grab bar was loose prior to plaintiff’s fall on June 3, 2016. However, the magistrate finds that prior to June 3, 2016, plaintiff complained to Shriver, who then submitted a work order stating that the “Handicap bars in restroom need tightened.” (Plaintiff’s Exhibit 9). The work order further provides that the work is necessary to “Insure the safety of inmate when

transferring from wheelchair to toilet and back.” *Id.* The work order was submitted on June 2, 2016—one day prior to plaintiff’s fall. The work order was assigned to Mr. Yu and is documented as having been completed on June 2, 2016. *Id.* There is a second notation on the document that states work order completed June 9, 2016; however, the evidence established that the June 9, 2016 date referred to when the work order was entered into a database. Even though defendant attempted to repair the grab bar, the magistrate finds that the repair was not successful as the following day, plaintiff fell while using the grab bar to transfer from the wheelchair to the toilet.

{¶28} Defendant argues that plaintiff pried the grab bar off the wall resulting in his injury. However, the magistrate was not persuaded that plaintiff pried the grab bar off the wall. It was not shown that plaintiff was physically capable or had the tools necessary to pry the grab bar off the wall. Plaintiff testified that his wheelchair does not fit between the toilet and the sink. Plaintiff asserted that his wheelchair, by its design, is not capable of reaching the bar such that he could pry the grab bar off the wall. Plaintiff added that the handlebars to his wheelchair are plastic and that his wheelchair will not fold, making it impossible to pry the grab bars off the wall. Defendant’s argument is premised on a theory postulated by members of its maintenance department who stated that the grab bar is designed to withstand downward force rather than a force pulling it away from the wall and an alleged scuff mark on the wall. Without evidence demonstrating that plaintiff had the ability and opportunity to pry the grab bar off the wall, the magistrate cannot conclude that plaintiff was responsible for the grab bar breaking away from the wall.

{¶29} Defendant argues that plaintiff released any claim regarding the June 3, 2016 fall when he signed a document titled “Release of Claim.” (Defendant’s Exhibit L.) However, it was established that the release was in exchange for replacement prescription glasses. Furthermore, the release states that it applies to “damage to

property” and references Ohio Adm.Code 5120-9-32 which is captioned “Inmate property claims.” Therefore, the release does not bar plaintiff’s personal injury claim.

{¶30} Regarding the fall that occurred on December 16, 2016, the magistrate finds that defendant did not have prior notice that the grab bar was likely to break away from the wall. Following plaintiff’s fall on June 3, 2016, Hardesty submitted another work order to repair the grab bar. (Plaintiff’s Exhibit 10). The work was initially assigned to Mr. Yu; however, Barns performed the work. The repair was completed on June 3, 2016. Barns credibly testified that he ensured that the grab bar was secured to the wall. McGahee, Sroufe, and Romans all credibly testified that after plaintiff fell on June 3, 2016, they each ensured that the grab bar was secured to the wall. Romans further credibly testified that he inspected Barns’ work of the repair to ensure that it was properly done. Sroufe ensured that the grab bar was secured to the wall in July, a month after plaintiff fell, and well after plaintiff’s ICRs that were filed immediately following the June 3, 2016 fall. Accordingly, defendant reasonably assumed that Barns successfully repaired the grab bar following plaintiff’s fall on June 3, 2016.

{¶31} Other than the ICRs plaintiff submitted immediately after he fell on June 3, 2016, plaintiff did not submit any other complaints about loose grab bars prior to December 16, 2016. None of defendant’s employees who testified recalled any complaints regarding loose grab bars after the June fall and before the December fall. In short, after the grab bar was repaired in June 2016, a repair that was confirmed by multiple of defendant’s employees, and there is no documentation or credible evidence that defendant knew or should have known that the grab bar was unsafe prior to December 16, 2016. Plaintiff argues that the fact that defendant subsequently altered the design of the grab bar is a tacit admission that the original design was faulty; however, it was established that there are grab bars like the ones in plaintiff’s bathroom throughout FMC and that no other grab bars had similar issues. It is reasonable for defendant to assume that following the repair on June 3, 2016, which was inspected

and ensured by multiple individuals on different occasions, and considering the passage of time between June and December, that the repair successfully resolved the issue of a loose grab bar initially identified on June 2, 2016.

{¶32} The magistrate further finds that plaintiff's testimony lacked credibility regarding the complaints he claimed to have made concerning loose grab bars to various corrections officers, maintenance department members, and medical care providers. Other than inmate Smith, no one who testified could recall plaintiff complaining about the grab bars being loose. Plaintiff testified that he told Cosby about the loose grab bars, but Cosby credibly testified that no such conversation ever occurred. Plaintiff claimed to have repeatedly reported the loose grab bars, but there is no written documentation of such complaints even though it was established that plaintiff frequently uses the grievance process to address a wide variety of issues. (Defendant's Exhibit A). Plaintiff did not produce any ICRs, grievances, or kites that he authored wherein he reported that the grab bar in the bathroom was loose. That plaintiff frequently uses the grievance process to address his numerous complaints, and that there is no record of complaints regarding the loose grab bars, undermines his credibility regarding allegedly complaining to employees at FMC.

{¶33} Importantly, following the June 3, 2016 fall, plaintiff acknowledged in an ICR that "the bar that broke was fixed." (Plaintiff's Exhibit 4). In an additional ICR, written days later, plaintiff contradicted himself claiming that neither grab bar was securely attached. (Plaintiff's Exhibit 5). At trial, plaintiff maintained that the bar was initially tightened but gradually loosened. Furthermore, despite his claims that the grab bar was unsafe, plaintiff continued to use the grab bar and never requested assistance from the medical department even though his bowel movements occur at scheduled times due to his medication. Inasmuch as plaintiff's position on whether the grab bar was fixed following his June 3, 2016 fall has shifted and that plaintiff failed to produce

written evidence of such complaints, the magistrate finds that plaintiff's testimony lacks credibility regarding alleged complaints he claimed to have made to employees at FMC.

{¶34} The ICR plaintiff presented to the magistrate allegedly authored on April 5, 2016 further undermines plaintiff's credibility inasmuch as such a document must have been forged. Plaintiff testified that he submitted the ICR and received the following response from Romans: "I have a whole institution to maintain. I'll get someone up there when I can." (Plaintiff's Exhibit 3). Romans, however, credibly testified that he never saw this ICR prior to this litigation and that the signature at the bottom is not his. Furthermore, all ICRs are logged in a tracking system, and McGahee, who reviews and tracks every ICR, credibly testified that he determined that there was no ICR entered into the system matching the one offered by plaintiff. McGahee added that he had not seen the claimed ICR prior to this litigation. The magistrate finds that the document plaintiff offered to support his claims, must have been forged.

{¶35} Defendant argues that plaintiff was contributorily negligent regarding his fall on June 3, 2016 inasmuch as he continued to use the grab bar despite believing it was unsafe to use. However, the magistrate believes it is more likely that plaintiff did not know the grab bar was unsafe for use, and as stated above, the magistrate does not believe plaintiff repeatedly complained regarding loose grab bars. Additionally, the grab bar was repaired on June 2, 2016, a day prior to his fall, and plaintiff could have reasonably assumed that the repair was successful even though it proved to be ineffective.

{¶36} Plaintiff argues that defendant was required to inspect the grab bars to ensure their safe use for the inmates. It was established at trial that inspections are conducted but it was not established what the parameters of the inspections should have included, or actually did include, or how often they must occur. Finally, it is noted that in defendant's brief filed after the trial, there is a reference to what inmate Ferrari would have testified had the record been held open to obtain his testimony; however, he

was not available to testify at trial, his deposition was not offered as an exhibit, and the parties did not agree to leave the record open to obtain his deposition testimony. Accordingly, such speculation will not be considered.

{¶37} Based upon the foregoing, the magistrate recommends that judgment be entered in plaintiff's favor concerning the fall on June 3, 2016 and that judgment be entered in defendant's favor for the fall that occurred on December 16, 2016.

{¶38} *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 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).*

GARY PETERSON
Magistrate