

[Cite as *Schuetzman v. Dept. of Rehab. & Corr.*, 2018-Ohio-3657.]

DAVID SCHUETZMAN

Plaintiff

v.

OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION

Defendant

Case No. 2016-00890JD

Magistrate Holly True Shaver

DECISION OF THE MAGISTRATE

{¶1} Plaintiff brought this action alleging negligence. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} At all times relevant, plaintiff was an inmate in the custody and control of defendant pursuant to R.C. 5120.16. On March 23, 2016, plaintiff was part of an Ohio Penal Industries (OPI) construction crew that was assigned to work at the Multi-County Juvenile Detention Center (MCJDC) in Lancaster, Ohio. Plaintiff sustained personal injury when he fell from a ladder during his job assignment. Plaintiff asserts that he was given a direct order to use a ladder for a job that required the use of a scissor lift, and that his supervisor was negligent for allowing him to perform the job in an unsafe manner.

{¶3} The project involved removing a four-foot-high metal railing from the second tier of a housing pod and replacing it with metal railing that went from floor to ceiling. Installation of the new railing required the use of an arc welder, a piece of machinery that emitted fumes. The fumes were to be released outside via an exhaust fan that was attached to a conduit which ran through the existing ventilation system. To place the conduit, the existing wall vents had to be removed. Earlier in the day, other members of the work crew had successfully used a scissor lift to reach and remove the wall vents in another pod.

{¶4} Plaintiff's injuries occurred after the crew moved from Unit A to Unit B. Instead of using the scissor lift, plaintiff used a 12-foot stepladder to access the vent, which was located more than 12 feet above the floor. This was the first time that plaintiff had attempted to remove a wall vent. Plaintiff climbed the ladder and used a disc grinder to cut the welds on the metal vent cover that was attached to the wall. When the last weld was cut, plaintiff pulled on the vent to release it from the wall. However, the weight of the vent was more than plaintiff expected, and he lost his footing on the ladder and fell, breaking both of his heels and ankles. The issues to be decided at trial were whether plaintiff was ordered to use the ladder or voluntarily chose to do so, and whether plaintiff's supervisor was negligent when he allowed plaintiff to use the stepladder to perform that task.

{¶5} Ron Baker testified that he was a maintenance superintendent for MCJDC. Baker stated that his normal work shift ended at 3 p.m., and that the OPI work crew was still at MCJDC when he left for the day. Baker stated that the work crew was finishing Unit A and moving the tools to Unit B. Baker testified that he had used a scissor lift in Unit A to reach the wall vents for removal. Baker described the vents as being welded to the ductwork inside the walls, and also being secured with a sealant/adhesive. Baker used a hand grinder and pry bars to remove the vents that he worked on.

{¶6} Baker testified that he used a scissor lift to access the vents that he removed in Unit A and to "catch" the vents once the welds were cut. Baker stated that he did not use a ladder to remove the vents because the vents weighed between 60 and 80 pounds. Baker stated that the vent shown in Plaintiff's Exhibit 2 is a replacement vent, which was much lighter than the original vents. Baker estimated that the replacement vents weighed approximately six to eight pounds because they were made of lightweight metal. The original vents were solid steel. Baker added that he would not authorize someone to use a stepladder for that task.

{¶7} According to Baker, the scissor lift was left in the sally port at the end of his shift, and he planned to move the scissor lift to Unit B and remove the vent the following morning. Baker testified that he told the work crew that he would perform that task the next day, but he was not sure whether plaintiff heard him make that remark. Baker also testified that inmate workers had loaded the old vents from Unit A on a cart and expressed surprise about how heavy they were. However, Baker did not know whether plaintiff was one of the inmates who had picked up a vent. Baker acknowledged that if the OPI crew wanted to remove the scissor lift from the sally port, the crew would have to get special permission from the control room and a supervisor.

{¶8} Tony Richards testified that at the time of the incident, he was a Corrections Officer, and he was supervising the OPI crew at MCJDC. Richards testified that on the day in question, after the crew had finished moving their tools from Unit A, he told them that the work day would end early because the vent had not been removed in Unit B. Richards told the crew that they would stop for the day and return tomorrow. According to Richards, plaintiff then stated to him, "Well, I can take care of it, boss." Richards then told plaintiff that if plaintiff could do it safely, "go ahead." Richards denied giving plaintiff a direct order to use the ladder to remove the vent. Richards testified that it was his understanding that the scissor lift was not available because Baker had secured it in the sally port and had left for the day. Richards stated that he thought Baker was the only person who could have moved the scissor lift from the sally port.

{¶9} Richards admitted that he could have told plaintiff not to use the ladder to remove the vent, and that part of his job was to supervise inmates to prevent them from being hurt on the work crew. When asked whether he thought it was a dangerous task to cut welds while standing on a ladder, Richards testified that plaintiff stated that he could do it safely. Richards stated that he had not seen or handled a wall vent of that weight until the day of the incident, and that he was not aware of the weight of the vent until after plaintiff fell. Richards testified that he was "in and out" of Unit B performing

other tasks when plaintiff was working on removing the vent. Richards stated that if he had known how much the vent weighed he would not have allowed plaintiff to use a ladder to remove it.

{¶10} Plaintiff testified that he worked on the OPI work crew for approximately one year before the incident. Prior to incarceration, plaintiff worked in the construction field for approximately 30 years. According to plaintiff, when the work crew went to Unit B, Richards told him that the crew needed to take the vent out. Plaintiff testified that he asked if they were going to use the scissor lift, and Richards told him to use the ladder.

{¶11} Plaintiff testified that as he was setting up the ladder, Richards was working on paperwork in the same room. Plaintiff testified that the ladder was too short for the job, and he referred to Plaintiff's Exhibit 1 to show the size of the ladder and the location of the vent. Plaintiff testified that he repeatedly ascended and descended the stepladder successfully, holding a disc grinder at times and a pry bar at times. Plaintiff stated that he had to change discs on the cutting wheel of the grinder because the welds were solid and "ate up" the cutting wheel. Plaintiff stated that it took him "awhile" to cut the welds. Plaintiff testified that when he cut the top two welds, he stood on the very top step of the ladder, and that when he cut the two welds on the lower corners of the vent, he stood on the second step from the top of the ladder. Even though he had cut all four welds, the vent remained stuck in the wall. Plaintiff noticed what he suspected was silicone that was preventing the vent from being released. According to plaintiff, he was swinging the vent back and forth to try to release it from the silicone, while standing on the second step from the top of the ladder. The vent became loose, and the weight of the vent made plaintiff lose his balance on the ladder and fall. Plaintiff testified that he was not aware of the weight of the vent until he removed it from the wall. Plaintiff explained that when he was working on the crew in Unit A, he was painting the railings. Plaintiff did not lift any of the old vents and did not hear any conversations of others describing how heavy the old vents were.

{¶12} Plaintiff admitted that he signed Exhibit A, a document captioned “Inmate Training,” and that one of the items specifically listed is “ladder safety.” Plaintiff acknowledged that the top step of any ladder has a warning that states not to step on the top step. Plaintiff admitted that Richards did not direct him to step on the top step of the ladder. Plaintiff testified that other inmate workers, Bessey and Conway, were on the work crew with him, and that Bessey was on the other side of the vent when he fell. According to plaintiff, Richards never intervened and told him to stop using the ladder, and plaintiff never told Richards that he did not want to use the ladder to remove the vent.

{¶13} Carl Bessey testified via deposition. Bessey was an inmate on the OPI work crew at the time of the incident. Bessey testified that he, plaintiff, and Inmate Conley had all been working together in Unit A on the scissor lift to do touch-up painting of the bars that were installed. Bessey also testified that he and plaintiff had both used the stepladder safely in Unit A to do touch-up painting and to drill screws into plates located on the second tier of Unit A.

{¶14} Bessey testified that he saw that plaintiff had set up the ladder to do the work in Unit B after Bessey had finished carrying in equipment from Unit A. It was Bessey’s understanding that the plan was to use a scissor lift like the crew had used in Unit A; however, the lift was not moved into Unit B. Bessey testified that he asked plaintiff why he was setting up the ladder, and that plaintiff told him that he was going to remove the vent. Bessey testified that plaintiff asked him to go upstairs and move the “lay flat” ducting, which is a lightweight plastic material used for temporary ventilation projects located inside the ductwork, and try to loosen the vent from the other side of the wall. Bessey testified that he went upstairs, moved the lay flat, and opened a six-inch by six-inch cover near the vent so that he could see plaintiff on the other side of the vent. Bessey described the hole that he looked through as a six-inch hole approximately two feet away from the vent. Bessey thought that plaintiff was sitting on

a rung of the ladder, but from the angle where Bessey was, he could only see plaintiff's face, not his feet. After Bessey reached in and tapped the vent with the end of a hammer, he watched plaintiff move the vent from side to side to attempt to loosen it. When the vent came loose, he saw plaintiff's eyes widen and then plaintiff fell off the ladder. Bessey ran to assist plaintiff.

{¶15} Bessey testified that he did not hear Richards tell plaintiff to use the ladder to remove the vent. According to Bessey, plaintiff was a "kind of do it yourself guy." (Deposition, p. 17, line 5.) After plaintiff was taken to medical transport, Bessey picked up the vent that had fallen. He described it as a louvered vent, and estimated its weight as between 50 and 80 pounds. Bessey testified that he did not know how heavy the vent was until after the accident. As Bessey stated, he "never dreamed it would be that heavy." (Deposition, p. 22, line 6.)

{¶16} "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. "While the state is not an insurer of the safety of inmates, the state generally owes a duty of reasonable care and protection from harm to inmates under its custody." *Price v. Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 14AP-11, 2014-Ohio-3522, ¶ 9. "Prisoners, however, are also required to use reasonable care to ensure their own safety." *Nott v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 09AP-842, 2010-Ohio-1588, ¶ 8. "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. A duty arises when a risk is reasonably foreseeable. *Menifee v. Ohio Welding Prods.*,

Inc., 15 Ohio St.3d 75, 77 (1984). Such a duty includes the responsibility to exercise reasonable care to protect inmates against those unreasonable risks of physical harm associated with institutional work assignments. *Boyle v. Ohio Dept. of Rehab. & Corr.*, 70 Ohio App.3d 590, 592 (10th Dist.1990). “Where an inmate also performs labor for the state, the state’s duty must be defined in the context of those additional factors which characterize the particular work performed.” *Barnett v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 09AP-1186, 2010-Ohio-4737, ¶ 18.

{¶17} Upon review of the evidence, the magistrate finds that plaintiff failed to use reasonable care to ensure his own safety. First, the evidence shows that plaintiff took it upon himself to remove the vent by using a 12-foot stepladder, knowing that the vent was higher in the wall than the ladder, not knowing how heavy the vent was, and knowing that a scissor lift that had been used in Unit A for that task was not available. Plaintiff asked Bessey to go to the other side of the vent to tap on it with a hammer to loosen it, while he stood on a stepladder without anyone steadying it for him. After the welds had been cut, the vent was still stuck inside the wall by some adhesive. Plaintiff moved the vent back and forth while he stood on the second step of the stepladder. Plaintiff also admitted that he stood on the very top step of the ladder when he was cutting welds, and that he knew that ladders have warnings not to step on the top step. Plaintiff had also signed a form acknowledging that he had received ladder safety training. The magistrate finds that although plaintiff asserts that he was ordered to use the stepladder to remove the vent, plaintiff’s assertion was not credible. The greater weight of the evidence shows that vent removal was the first order of business in Unit B, and that Richards was willing to wait until the next day so that Baker could remove the vent, but plaintiff volunteered to use the ladder so that they could continue to work. Given these facts, the magistrate finds that plaintiff failed to use ordinary care for his own safety.

{¶18} In addition, the magistrate finds that Richards had the authority to order plaintiff not to use the stepladder, and to wait for Baker to remove the vent with the scissor lift the next day, but, instead, he chose to allow plaintiff to use the stepladder in an unsafe manner. Defendant owes a duty of reasonable care and protection from known risks to inmates under its custody. Although Richards did not know how much the vent weighed, the magistrate finds that once plaintiff set up the stepladder and began work, a reasonably prudent person would have discovered that the location of the vent, as shown in Plaintiff's Exhibit 1, coupled with the height of the ladder, resulted in a dangerous condition about which the state should have known. The magistrate finds that the stepladder was not an appropriate tool for plaintiff to access the vent, because it was too short for plaintiff to access the vent safely. Indeed, the evidence shows that Richards allowed plaintiff to use a disc grinder and a pry bar above his head repeatedly while standing on a stepladder. The magistrate further finds that defendant breached its duty of reasonable care when Richards allowed plaintiff to use a stepladder to access the vent and pry the vent loose from the wall. The magistrate finds that it is foreseeable that pulling a vent loose from a wall while standing near the top of a stepladder would present a significant risk of falling. The magistrate finds that plaintiff's eagerness to remove the vent, coupled with Richards' poor judgment in allowing plaintiff to use a stepladder that was too short to safely access the vent, was the proximate cause of plaintiff's injuries. The magistrate finds that although neither plaintiff nor Richards knew how much the vent weighed, the act of pulling a vent out of a wall above one's head, while standing on a stepladder presented a foreseeable risk of injury. Accordingly, the magistrate recommends judgment in favor of plaintiff, with a 40 percent reduction in damages for plaintiff's own negligence.

{¶19} *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).

HOLLY TRUE SHAVER
Magistrate

Filed June 14, 2018
Sent to S.C. Reporter 7/9/18