[Cite as *Nott v. Ohio Dept. of Rehab. & Corr.*, 2011-Ohio-5489.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Jack Nott,	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-1079 (C.C. No. 2005-07950)
Ohio Department of Rehabilitation and Correction,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on October 27, 2011

Swope and Swope, and *Richard F. Swope*; *John C. Bucalo*, for appellant.

Michael DeWine, Attorney General, and *Eric A. Walker*, for appellee.

APPEAL from the Court of Claims of Ohio

CONNOR, J.

{¶1} Plaintiff-appellant, Jack Nott ("appellant"), appeals from a judgment rendered by the Court of Claims of Ohio in favor of defendant-appellee, Ohio Department of Rehabilitation and Correction ("ODRC"), with respect to his negligence claim. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} This is the second time this matter has presented to this court. See *Nott v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 09AP-842, 2010-Ohio-1588. The record

indicates that on August 19, 2003, appellant was an inmate in the Grafton Correctional Institution, was a chronic diabetic, and had severe circulatory problems. On that date, appellant and another inmate, Johnny McCarter, were transported to the Corrections Medical Center in Columbus to procure prescription eyeglasses. During the trip, the inmates were restrained by handcuffs, leg shackles, and stomach-chains. They were dressed in orange jumpsuits and were given orange canvas shoes. Apparently, appellant's left shoe did not fit properly and fell off numerous times. He notified the corrections officers and repeatedly put the shoe back on. Eventually, however, one of the officers instructed appellant to simply carry the shoe. Accordingly, appellant walked with a bare left-foot during part of the trip. Also, during the trip, appellant's leg shackles caused an abrasion on his right ankle that required medical treatment.

{¶3} On June 30, 2005, appellant filed a complaint, which presented allegations of negligence. The allegations concerned injuries that purportedly resulted from being forced to walk without a shoe on his left foot, in addition to the abrasion from the shackling of his legs. On October 27, 2006, the matter proceeded to a bifurcated trial to determine ODRC's liability. The trial court found in favor of ODRC, and appellant filed a timely appeal to this court. We affirmed in part and reversed in part. See *Nott* at ¶25. Specifically, we affirmed with respect to the injuries to appellant's left foot but reversed and remanded the matter for consideration of whether ODRC was negligent in shackling appellant's legs.

{¶4} Upon remand, a magistrate of the trial court found in favor of ODRC on the issue of its liability. Appellant filed timely objections to the magistrate's decision. The trial court overruled appellant's objection and adopted the magistrate's decision as its own.

Judgment was rendered by the trial court on October 10, 2010. Appellant has timely appealed and presents the following assignments of error:

ASSIGNMENT OF ERROR NO. 1:

THE TRIAL COURT AND THE MAGISTRATE ERRED IN FAILING TO CONSIDER THE MEDICAL EVIDENCE THAT PLAINTIFF-APPELLANT WAS A CHRONIC DIABETIC AND EXTREME CAUTION HAD TO BE TAKEN TO PREVENT INJURY TO APPENDAGES.

ASSIGNMENT OF ERROR NO. 2:

THE MAGISTRATE AND TRIAL COURT ERRED IN RULING IT WAS NECESSARY TO HAVE A MEDICAL RESTRICTION TO PROTECT AN INMATE, WITH A CHRONIC DIABETIC CONDITION AND WITH SEVERE CIRCULATORY AND HEART CONDITIONS, FROM INJURY WHEN THERE WAS A STANDARD OF CARE ADOPTED BY APPELLEES FOR JAILS THAT REQUIRES CARE IN USE OF SHACKLES.

ASSIGNMENT OF ERROR NO. 3:

THE MAGISTRATE AND TRIAL COURT ERRED WHEN THEY RULED THERE WAS NO TESTIMONY THAT SUPPORTED A CLEAR DANGER CAUSED BY INJURIES TO APPENDAGES OF A CHRONIC DIABETIC.

ASSIGNMENT OF ERROR NO. 4:

THE TRIAL COURT AND MAGISTRATE ERRED IN FAILING TO RECOGNIZE AND CONSIDER PLAINTIFF-APPELLANT NOTT'S MEDICAL CONDITIONS WHICH REQUIRED EXTREME CAUTION AND PREVIOUS RESTRICTIONS ISSUED BY DEFENDANT-APPELLEE.

ASSIGNMENT OF ERROR NO. 5:

THE TRIAL COURT'S AND MAGISTRATE'S RULING IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND IS NOT SUPPORTED BY THE EVIDENCE.

{¶5} Appellant's assignments of errors are interrelated and present the general position that the trial court's judgment is against the manifest weight of the evidence.[1] As a result, we will address appellant's assignments of error together.

{¶6} Judgments supported by some competent credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Const. Co*. (1978), 54 Ohio St.2d 279, syllabus. "Credibility issues are not resolved as a matter of law, but are left to the trier of fact to determine." *Ciccarelli v. Miller*, 7th Dist. No. 03 MA 60, 2004-Ohio-5123, ¶35, citing *Lehman v. Haynam* (1956), 164 Ohio St. 595. When conducting a manifest weight of the evidence review, all reasonable presumptions must be construed in favor of the trial court's judgment and findings of fact. *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 19.

{¶7} The essential elements of a negligence claim require an injured plaintiff to demonstrate the existence of a duty, a breach of that duty, and an injury proximately caused by the breach. *Menifee v. Ohio Welding Products, Inc*. (1984), 15 Ohio St.3d 75, 77. In regard to the custodial relationship between the state and its prisoners, the state owes a common law duty of reasonable care and protection from unreasonable risks. *McCoy v. Engle* (1987), 42 Ohio App.3d 204, 207. Indeed, the relationship amongst the state and its prisoners "does not expand or heighten the duty of ordinary reasonable care." *Woods v. Ohio Dept. of Rehab. & Corr*. (1998), 130 Ohio App.3d 742, 745, cause dismissed (1999), 85 Ohio St.3d 1414, citing *Scebbi v. Ohio Dept. of Rehab. & Corr*. (Mar. 21, 1989), Ct.Cl. No. 87-09439. Reasonable care is defined as the degree of

[1] During oral argument, counsel conceded that the assignments of error only present manifest weight challenges.

caution and foresight that an ordinarily prudent person would employ in similar circumstances. *Woods* at 745.

{¶8} The extent of the duty owed to a plaintiff necessarily depends upon the circumstances of a case and the foreseeability of injury. Id., citing *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, and *Clemets v. Heston* (1985), 20 Ohio App.3d 132. Indeed, "the state is not an insurer of inmate safety and owes the duty of ordinary care only to inmates who are foreseeably at risk." Id. citing *McAfee v. Overberg* (Ct.Cl. 1977), 51 Ohio Misc. 86.

{¶9} In the instant matter, the trial court concluded that appellant failed to prove that ODRC was negligent in shackling his legs on August 19, 2003. As a result, our review is limited to determining if competent credible evidence supports the trial court's judgment.

{¶10} In appellant's assignments of error, he argues that the shackling of his legs caused him injury. He argues that he should have been placed in soft restraints, instead of hard shackles. He argues that the shackles were too tight around his ankles. Finally, he argues that the Ohio Administrative Code establishes minimum standards for jails that require corrections officers to check on inmates in shackles every ten minutes. According to appellant, prison inmates should be treated no differently than inmates in jails.

{¶11} We find appellant's arguments to be unpersuasive because competent credible evidence supports the trial court's judgment. Appellant makes much ado about the combination of maladies from which he suffered. He references the testimony of two nurses, which generally indicated that chronic diabetics must be concerned about injuries to their appendages. However, we refuse to make the leap that appellant suggests by

referencing this testimony. ODRC's standard protocol for restraining an inmate's legs is to use hard shackles. Soft restraints are used only when a physician has issued a medical restriction for an inmate. Appellant did not have a soft-restraint restriction in place on August 19, 2003. Moreover, he failed to present any evidence indicating that such a restriction should have been in place. Without a soft-restraint restriction, there is no indication that the corrections officers had reason to treat appellant any differently than any other inmate during the trip on August 19, 2003.

{¶12} Furthermore, appellant was seemingly confused as to when he complained to corrections officers about his shackles. He described numerous trips to the Corrections Medical Center and/or to the Ohio State University Medical Center with no specific particularity. When asked about the facts giving rise to this litigation, he indicated that he believed it was on the "second trip." Then, appellant and counsel engaged in the following exchange:

> [Counsel]: Did you complain to the guards about the hard restraints?
>
> [Appellant]: Yes, I did, and I even went to the doctor.
>
> [Counsel]: Okay. Did you complain on the day that you were transported that second time about it?
>
> [Appellant]: I don't remember.

(Tr. 28-29.) It is unclear whether appellant complained during the trip on August 19, 2003 or after he returned. However, in our review, we must construe this ambiguity in a manner that supports the trial court's judgment. See *Karches* at 19. As a result, we find no error in the trial court's conclusion that the corrections officers had no reason to know of the potential danger created by using hard shackles to restrain appellant's legs. The

same can be said on the issue of whether the officers had reason to know that the shackles were too tight. With no reason to know of these dangers, the foreseeability of injury was lacking. Absent such foreseeability, we cannot find that ODRC breached its duty to provide reasonable care in shackling appellant's legs on August 19, 2003. See *Woods* at 745.

{¶13} Finally, we turn to appellant's argument pertaining to the applicability of Ohio Adm.Code 5120:1-8-03(B), which provides in relevant part:

> Each full service *jail* shall have written policies and procedures, and practices which evidence, that the following minimum standards are maintained:
>
> * * *
>
> (8) Prisoners in physical restraints shall be personally checked by staff every ten minutes.

(Emphasis added.) The Ohio General Assembly distinguishes amongst jails and prisons. See R.C. 2929.01. Specifically, that section provides:

> (R) "Jail" means a jail, workhouse, minimum security jail, or other residential facility used for the confinement of alleged or convicted offenders that is operated by a political subdivision or a combination of political subdivisions of this state.
>
> * * *
>
> (AA) "Prison" means a residential facility used for the confinement of convicted felony offenders that is under the control of the department of rehabilitation and correction but does not include a violation sanction center operated under authority of section 2967.141 of the Revised Code.

{¶14} There is no dispute as to where appellant was confined. He was confined at Grafton Correctional Institution, which is a prison that is under the control of ODRC.

{¶15} This court has previously refused to insert terms into the administrative code. See *State ex rel. Glunt Indus. v. Indus. Comm.*, 10th Dist. No. 09AP-260, 2010-Ohio-4600, ¶8, citing *State ex rel. Blair v. Indus. Comm*., 10th Dist. No. 04AP-1134, 2005-Ohio-4351 (generally holding that a court will not encroach upon an administrative tribunal's rulemaking authority by inserting new terms into code sections). Appellant has given us no persuasive reason why Ohio Adm.Code 5120:1-8-03(B)(8) should apply to prisons. As a result, we refuse to insert the term "prison" into Ohio Adm.Code 5120:1-8-03(B)(8), and accordingly, find that Ohio Adm.Code 5120:1-8-03(B)(8) does not apply to the facts of this case. We reject appellant's contention to the contrary.

{¶16} Based upon the foregoing, we overrule appellant's five assignments of error and affirm the judgment rendered by the Court of Claims of Ohio.

Judgment affirmed.

BRYANT, P.J. and KLATT, J., concur.

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