

[Cite as *Forester v. Ohio Dept. of Rehab. & Corr.*, 2011-Ohio-6296.]  
IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

John W. Forester,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 11AP-366
v.	:	(C.C. No. 2009-08357)
	:	
Ohio Department of Rehabilitation and	:	(REGULAR CALENDAR)
Correction,	:	
	:	
Defendant-Appellee.	:	
	:	

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D E C I S I O N

Rendered on December 8, 2011

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*Swope and Swope – Attorneys at Law, and Richard F. Swope*, for appellant.

*Michael DeWine, Attorney General, and Kristin S. Boggs*, for appellee.

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APPEAL from the Court of Claims of Ohio.

FRENCH, J.

{¶1} Plaintiff-appellant, John W. Forester ("Forester"), appeals the judgment of the Court of Claims of Ohio, which overruled his objections and adopted a magistrate's decision in favor of defendant-appellee, the Ohio Department of Rehabilitation and

Correction ("ODRC"), on Forester's negligence claim. For the following reasons, we affirm.

## I. BACKGROUND

{¶2} At all relevant times, Forester has been an inmate in the custody of ODRC at the London Correctional Institution ("LCI"), where he was assigned to work in the kitchen. On April 20, 2009, while working in the dish room of the LCI kitchen, Forester cut his left index finger on the jagged edge of a pan, which he was trying to separate from another pan to load into the dishwasher. Forester maintains that ODRC was negligent in not removing defective pans and by failing to adequately supervise and train kitchen staff.

{¶3} Forester filed this action on October 21, 2009. The trial court bifurcated the issues of liability and damages, and the issue of liability was tried to a magistrate, who issued a decision on January 4, 2011, in which he recommended that judgment be entered in favor of ODRC. The magistrate specifically found that Forester failed to establish that ODRC breached its duty of care to Forester. He stated, "[w]hile the training [Forester] received may have been minimal, the fact that [Forester] had worked in the kitchen of at least one other correctional institution prior to arriving at LCI, and had worked in the LCI kitchen for at least a year before being injured establishes that he was, or should have been, familiar with the operational and safety procedures of the kitchen." The magistrate also stated that, "[g]iven [Forester's] knowledge of the danger that the pan presented, and his choice to ignore it, \* \* \* [Forester's] lack of care was the sole proximate cause of his injury."

{¶4} Forester filed objections to the magistrate's decision, along with an affidavit of evidence and an affidavit of indigency. Civ.R. 53(D)(3)(b)(iii) provides that objections to a magistrate's factual findings "shall be supported by a transcript of all the evidence submitted to the magistrate relevant to [those] finding[s] or an affidavit of that evidence if a transcript is not available." This court has held that a transcript is unavailable for purposes of Civ.R. 53(D) where an objecting party is indigent and cannot afford to procure it. See *Gill v. Grafton Correctional Inst.*, 10th Dist. No. 09AP-1019, 2010-Ohio-2977. Although ODRC objected to Forester's affidavit of evidence, the trial court accepted the affidavit as proper under Civ.R. 53(D)(3)(b)(iii). On March 14, 2011, the trial court overruled Forester's objections, adopted the magistrate's decision, and entered judgment in favor of ODRC.

## II. ASSIGNMENTS OF ERROR

{¶5} Forester filed a timely notice of appeal and now assigns the following as error:

[I.] THE MAGISTRATE AND TRIAL COURT ERRED IN RULING INMATES RECEIVED ADEQUATE TRAINING BECAUSE OF [FORESTER'S] PRIOR SERVICE IN PRISON FOOD SERVICES.

[II.] THE MAGISTRATE AND TRIAL COURT ERRED IN FINDING [FORESTER'S] KNOWLEDGE OF DEFECTIVE PANS WAS EVIDENCE OF [HIS] NEGLIGENCE, IN SPITE OF HIS STATUS AS AN INMATE AND THE REPERCUSSION OF STOPPING THE LINE TO FIND A COORDINATOR.

[III.] THE TRIAL COURT AND MAGISTRATE ERRED IN FAILING TO FIND [ODRC'S] INSPECTION AND REMOVAL PRACTICE WAS EVIDENCE OF [ODRC'S] NEGLIGENCE.

[IV.] THE TRIAL COURT AND MAGISTRATE ERRED IN NOT CONSIDERING [ODRC'S] FAILURE TO PROPERLY SUPERVISE, OBSERVE ONGOING KITCHEN ACTIVITIES AND BEING READILY AVAILABLE FOR WARNING OF DANGEROUS CONDITIONS AS EVIDENCE OF NEGLIGENCE.

[V.] THE TRIAL COURT'S AND MAGISTRATE'S RULINGS ARE NOT SUPPORTED BY THE EVIDENCE AND [ARE] AGAINST THE WEIGHT OF THE EVIDENCE.

These assignments of error mirror Forester's five objections to the magistrate's decision below.

### III. DISCUSSION

{¶6} In accordance with Civ.R. 53, the trial court reviews a magistrate's decision de novo. *Mayle v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 09AP-541, 2010-Ohio-2774, ¶15. In reviewing objections to a magistrate's decision, the trial court must make an independent review of the matters objected to in order "to ascertain [whether] the magistrate has properly determined the factual issues and appropriately applied the law." Civ.R. 53(D)(4)(d). An appellate court, by contrast, applies an abuse-of-discretion standard when reviewing a trial court's adoption of a magistrate's decision. *Mayle* at ¶15. An abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Claims of error by the trial court must be based on the trial court's actions, rather than on the magistrate's findings. *Mayle* at ¶15. Therefore, we may reverse the trial court's adoption of the magistrate's decision only if the trial court acted unreasonably, arbitrarily or unconscionably. *Id.*

{¶7} It is well-established that an inmate who is injured while working in prison may assert a cause of action for negligence. *McElfresh v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 04AP-177, 2004-Ohio-5545, ¶15. To prevail on a negligence claim, a plaintiff must establish the existence of a duty of care, the defendant's breach of that duty, and an injury to the plaintiff proximately caused by the breach. *Briscoe v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 02AP-1109, 2003-Ohio-3533, ¶20. Forester, as the plaintiff, had the burden to prove each element of his negligence claim by a preponderance of the evidence. See *Parsons v. Washington State Community College*, 10th Dist. No. 05AP-1138, 2006-Ohio-2196, ¶24.

{¶8} It is undisputed that ODRC owes prison inmates a duty of reasonable care and protection from unreasonable risks of physical harm. *McElfresh* at ¶16, citing *Woods v. Ohio Dept. of Rehab. & Corr.* (1998), 130 Ohio App.3d 742, 745. Reasonable care is the "degree of caution and foresight that an ordinarily prudent person would employ in similar circumstances." *Id.* Where an inmate provides labor for the state, the state's duty must be defined in the context of those additional factors that characterize the inmate's particular work. *McCoy v. Engle* (1987), 42 Ohio App.3d 204, 208 (holding that the state had a duty to protect an inmate from unreasonable risks of harm associated with his duties as a farmhand on a prison farm). The state is not an insurer of inmate safety, but, "once it becomes aware of a dangerous condition[,] it must take reasonable care to prevent injury to the inmate." *Brisco* at ¶20, citing *Williams v. Ohio Dept. of Rehab. & Corr.* (1991), 61 Ohio Misc.2d 699. An inmate is likewise required to

use reasonable care to ensure his or her own safety. *Brisco* at ¶20, citing *Macklin v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 01AP-293, 2002-Ohio-5069.

{¶9} The magistrate and the trial court focused primarily on whether Forester established the second element of his claim—a breach of duty by ODRC. Forester contends that ODRC breached its duty of reasonable care by not adequately training inmates regarding the dangers of sharp pans, by failing to remove pans with sharp edges from service, and by failing to properly supervise inmates in the dish room. Forester's first, third, and fourth assignments of error relate to those contentions, and we address those assignments of error first.

#### A. FIRST ASSIGNMENT OF ERROR

{¶10} Under his first assignment of error, Forester argues that the magistrate and trial court erred by finding no breach of ODRC's duty of care as a result of inadequately training inmates. Forester contends that his training should have included notice that an inmate may delay his work to notify a supervisor of dangerous instrumentalities, such as pans with sharp edges, without threat of disciplinary action. ODRC responds that the magistrate and the trial court properly found that Forester received adequate training to satisfy ODRC's duty of care.

{¶11} The record contains conflicting testimony with respect to the training provided to inmates generally and to Forester in particular. According to the affidavit of evidence, Forester testified that he received no formal training when he was assigned to the LCI kitchen in 2007, but he admitted that he attended a session where training forms were presented to inmates to read and sign. Forester acknowledged that he was

required to sign training forms before he was permitted to work in the kitchen, although those forms are not included in the record. Forester also testified that he previously worked in the kitchens at Noble Correctional Institution, where he was required to view a safety video regarding each area of the kitchen, and at Southeastern Correctional Institution.

{¶12} Timberly Minor, the Correctional Food Service Manager 2 in charge of food service at LCI, offered a different view of inmate training. Minor testified that she supervised food service coordinators, who, in turn, trained and supervised inmates. Minor testified that LCI now shows inmates working in the kitchen a safety training video, a procedure implemented as a result of Forester's recommendation. Minor testified that on-the-job training was previously provided by inmates, under the supervision of food service coordinators, and that one of the food service coordinators trained Forester. According to the magistrate, Minor testified that all inmates working in the kitchen go through training and are told to bring any concerns to the kitchen staff's attention.

{¶13} The magistrate found that Forester's minimal formal training, coupled with his kitchen work experience prior to his injury, establishes that he was, or should have been, familiar with the operational and safety procedures of the kitchen. Implicitly, the magistrate determined that Forester's training was sufficient to meet ODRC's duty of reasonable care. The trial court reviewed the affidavit of the evidence and agreed with the magistrate's determination.

{¶14} The magistrate, as the trier of fact, was in the best position to assess the credibility of the witnesses and to determine the weight to give the testimony. See *Mayle* at ¶26, 32. The magistrate was free to believe Minor's testimony that Forester, like all inmates working in the LCI kitchen, was trained by a food service coordinator and to consider Forester's own testimony that he was provided and signed training forms as a prerequisite to his kitchen work at LCI. Forester nevertheless argues that there is no evidence of the substantive content of his training or evidence to support the conclusion that his past kitchen experience provided him with knowledge to safely deal with sharp pans. Even in the absence of the detailed evidence Forester maintains is required, however, we conclude that competent, credible evidence supports the magistrate's finding that ODRC did not breach a duty of care to Forester by failing to provide additional training. The trial court, therefore, did not abuse its discretion by overruling Forester's objection in that regard. See *Wilson v. Whitmore*, 8th Dist. No. 94720, 2010-Ohio-5489, ¶17-18, 20 (holding that the trial court did not abuse its discretion by adopting a magistrate's decision that was supported by competent, credible evidence). For these reasons, we overrule Forester's first assignment of error.

#### B. THIRD ASSIGNMENT OF ERROR

{¶15} Forester next maintains, in his third assignment of error, that the magistrate and the trial court erred by failing to find that ODRC's procedure for inspecting and removing damaged pans amounted to evidence of negligence. The magistrate addressed Minor's testimony regarding ODRC's inspection and removal procedures, but concluded that the evidence did not establish that ODRC breached its

duty of care to Forester. The trial court, upon independent review of the affidavit of evidence, concluded that the magistrate properly weighed the evidence to determine that Forester failed to establish a breach of ODRC's duty of care, based on inadequate inspection and removal procedures.

{¶16} The magistrate noted Minor's recognition that pans become sharp and jagged with use, but also cited her testimony that when a kitchen staff member is made aware that a pan is in that condition, the pan is immediately removed from service and discarded. Inmate Robert Chinn likewise testified that "when staff was told about the pans [having jagged, sharp edges], he believed they were removed." (Affidavit at ¶E.3.) According to the magistrate, Minor testified that the kitchen staff also inspects the pans for damage on weekends and removes and discards any pans that are deemed dangerous. Finally, the magistrate recognized Minor's testimony that heavy, rubber gloves are available, upon request, to inmates who work in the kitchen. Forester has acknowledged this testimony in the affidavit of evidence and in his appellate brief. On the other hand, the affidavit of evidence sets forth Forester's testimony that he discussed the dangerous pans with Minor and another supervisor and that, although some pans were removed, others remained in use.<sup>1</sup> Forester also testified that neither he nor other dish room workers were issued rubber gloves.

{¶17} Forester argues that Minor's testimony demonstrates that weekly inspections were insufficient to protect inmates from the risks associated with working

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<sup>1</sup> In his reply brief on appeal, Forester also states that pans that had been removed as dangerous or defective were subsequently placed back into service. This statement is not supported by the affidavit of evidence or the statement of trial testimony in the magistrate's decision.

with sharp pans, but the magistrate was not required to make the same inference. As noted by the trial court, the magistrate, as the trier of fact, was in the best position to weigh the testimony and assess its credibility. In light of Minor's testimony that dangerous pans are removed immediately when the kitchen staff is notified of their presence and that the kitchen staff inspects and removes dangerous pans each weekend, competent, credible evidence supports the magistrate's decision that ODRC's inspection and removal procedures did not constitute a breach of ODRC's duty of reasonable care to Forester. Accordingly, the trial court did not abuse its discretion in overruling Forester's third objection, and we overrule Forester's third assignment of error.

#### C. FOURTH ASSIGNMENT OF ERROR

{¶18} In his fourth assignment of error, Forester argues that the magistrate and the trial court erred by not considering the lack of supervision as evidence of ODRC's breach of its duty to Forester. The Court of Claims has previously considered a failure by ODRC to supervise inmate kitchen workers a breach of ODRC's duty of reasonable care. See *Martin v. Ohio Dept. of Rehab. & Corr.*, Ct.Cl. No. 2003-04899, 2005-Ohio-4461, ¶13.

{¶19} The affidavit of evidence reflects Forester's testimony that no supervisor was present in the dish room at the time of his injury, despite Minor's testimony that a food service coordinator was assigned to the dish room. The magistrate found that Forester chose not to notify a supervisor of the sharp pan edge, in spite of instruction to bring any concerns to the attention of the kitchen staff, because stopping to notify a

supervisor would have caused a backup in the dish room. In the affidavit of evidence, Forester states, "[a]s I began to separate [the pans,] I noticed they had sharp jagged edges, but because of the pressure to keep up and not cause a back up [sic] by calling a supervisor, as I separated them, my hand was caught by the sharp edge and my left index finger was severely cut." (Affidavit at ¶A.9.)

{¶20} The magistrate found no breach of ODRC's duty of care based on the alleged lack of supervision, and the trial court agreed with the magistrate's finding. The facts of this case are distinguishable from the facts in *Martin*, where an inmate was injured while using a plastic container to transport boiling water. There, the supervisor testified that it was improper to transport water in that way and that ODRC employees should not have allowed the plastic containers to be used in that manner. The court found that ODRC knew of the practice and that the practice created a foreseeable and unreasonable risk of harm. Based on the evidence here, the magistrate could have rationally and reasonably concluded that ODRC's duty of reasonable care did not extend to require constant supervision of inmates working in the dish room. Here, the risk of harm was far less than in *Martin*, and the evidence established various safeguards in place by ODRC, including the availability of rubber gloves for workers and the inspection and removal practices utilized by LCI kitchen staff. Accordingly, we discern no abuse of discretion in the trial court's decision to overrule Forester's objection regarding lack of supervision, and we overrule Forester's fourth assignment of error.

#### D. SECOND ASSIGNMENT OF ERROR

{¶21} We now turn to Forester's second assignment of error, in which he asserts that the magistrate and the trial court erred by considering Forester's prior knowledge of the pan's sharp edge as evidence of his own failure to exercise reasonable care to protect himself from harm. The affidavit of evidence establishes that Forester was well aware that the pans can develop sharp edges with use. Forester noticed sharp, jagged edges when he was first assigned to the LCI kitchen in December 2007 and had discussed the sharp edges with his supervisors on multiple occasions. Forester testified that, after notifying his supervisors of the sharp pan edges, some, but not all, of the pans were removed. He stated, "I was required to work with the damaged pans, using caution since they were not removed or warnings placed on the defective pans to give notice of the ones that were damaged." (Affidavit at ¶A.6.) Before cutting his finger, Forester noticed the sharp edges on the pans he was separating, but did not locate and inform a supervisor about the pans. Instead, he continued to separate them.

{¶22} Forester argues that his decision to proceed despite his awareness of the sharp edge does not demonstrate a lack of reasonable care, based on his status as an inmate laborer. Forester cites a case from the Supreme Court of Louisiana, which stated that an inmate is not in a position to refuse to perform a dangerous job because he is subject to disciplinary measures if he refuses to comply. See *Bridgewater v. Louisiana* (La.1983), 434 So.2d 383, 385. In that case, an inmate was told to use a metal shearing machine, with its finger guard removed, to cut a material not intended to

be cut on the machine. The court found no negligence on the part of the inmate, whom it stated was not in a position to refuse his orders.

{¶23} At trial, Forester testified about pressure to keep up and stated that he could not refuse to do his job without subjecting himself to discipline and losing his job. While Forester's refusal to do his job could undoubtedly subject him to discipline, there is no evidence that briefly delaying the dish line to locate and inform a supervisor of a dangerous condition would render Forester susceptible to disciplinary action, even in light of his vague reference to the pressure to keep pace with his work. Forester, who had witnessed other inmates cut themselves on sharp pan edges and understood the need to work with caution regarding the sharp edges, had previously and repeatedly reported pans with sharp, jagged edges to his superiors. Moreover, the magistrate cited Minor's testimony that inmates are instructed to bring any concerns to the attention of kitchen staff. Competent, credible evidence, as stated in the magistrate's decision and in the affidavit of evidence, supports the magistrate's finding that Forester's actions demonstrated a failure to act with reasonable care to ensure his own safety. The trial court, therefore, did not abuse its discretion in overruling Forester's objection regarding his failure to act with reasonable care. Moreover, the issue of Forester's use or lack of reasonable care is moot in light of the magistrate and the trial court's finding that Forester failed to establish a breach of duty by ODRC. Where a court finds no negligence on the part of the defendant, questions of comparative negligence are immaterial. *Zitron v. Sweep-A-Lot*, 10th Dist. No. 09AP-1110, 2010-Ohio-2733, ¶19. For these reasons, we overrule Forester's second assignment of error.

## E. FIFTH ASSIGNMENT OF ERROR

{¶24} Finally, in his fifth assignment of error, Forester maintains that the magistrate's decision, and the trial court's adoption of that decision, are against the manifest weight of the evidence. 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 Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. When conducting a manifest-weight review, an appellate court must make all reasonable presumptions in favor of the trial court's findings of fact and judgment. *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 19.

{¶25} Here, where the trial court concluded that Forester failed to establish that ODRC breached its duty of care, our review is limited to determining if competent, credible evidence supports the trial court's judgment. Making all reasonable presumptions in favor of the trial court's findings of fact and judgment, and for the aforesaid reasons, we conclude that competent, credible evidence supports the trial court's determination that ODRC did not breach its duty of reasonable care toward Forester. Therefore, we overrule Forester's fifth assignment of error.

## IV. CONCLUSION

{¶26} Having overruled each of Forester's assignments of error, we affirm the judgment of the Court of Claims of Ohio.

*Judgment affirmed.*

TYACK and CONNOR, JJ., concur.

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