[Cite as *Powers v. Ohio Dept. of Rehab. & Corr.*, 2003-Ohio-233.]

IN THE COURT OF CLAIMS OF OHIO

SCOTT POWERS	:	
Plaintiff	:	CASE NO. 99-11841
v.	:	MAGISTRATE DECISION
DEPARTMENT OF REHABILITATION AND CORRECTION	:	Steven A. Larson, Magistrate
Defendant	:	

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{¶1} Plaintiff brought this action against defendant alleging negligence. The case was tried to a magistrate of the court on the issue of liability.

{¶2} At all times relevant hereto, plaintiff was an inmate at defendant's Marion Correctional Institution (MCI). On September 17, 1998, while cleaning tables in the café, plaintiff slipped and fell to the floor, injuring his back and left arm. Plaintiff further alleges that in late September or October 1998, he slipped in the café a second time, twisting his back and aggravating his original injury.

{¶3} Plaintiff testified that he was transferred from Trumbull Correctional Institution (TCI) to MCI in June or July 1998. On August 13, 1998, during his initial nursing assessment at MCI, plaintiff claimed that he had been on medical idle at TCI because he suffered from chronic back pain and was unable to work. Although plaintiff had periods of medical idle at TCI, the medical staff at MCI had determined that he was not on medical idle when he arrived. On August 24, 1998, Martin Akusoba, M.D., Medical Director at MCI, assessed plaintiff and placed him on temporary medical restriction. In Dr. Akusoba's opinion, plaintiff had degenerative disc disease that warranted medical restriction, but not medical idle. Dr. Akusoba ordered a bottom bunk restriction, no excessive standing or

walking, and no lifting of more than 20 pounds. Plaintiff was assigned light-duty work in the café wiping tables.

{¶4} Dr. Akusoba testified that he referred plaintiff to Corrections Medical Center (CMC) in Columbus for an orthopedic consultation with a doctor from The Ohio State University Orthopedic Clinic (OSU). After evaluating plaintiff on September 3, 1998, the orthopedist concurred with the opinion that plaintiff's medical condition required medical restriction but not medical idle.

{¶5} The café contains nine or ten rows of tables with five tables in each row. Plaintiff's job was to wipe ten to fifteen tables in the west end of the café during each meal. Plaintiff testified that he carried a three-to-five gallon bucket containing water and solvent to clean the table tops, and that he also had to sweep and mop the floor around the tables. A corrections officer (CO) stationed at the front door of the café recorded the time each inmate arrived for work and the time each left. When plaintiff finished his job, he was required to return to his cell to await the next meal. Plaintiff testified that his job required carrying water, bending and twisting, all of which aggravated his injured back.

{¶6} Plaintiff testified that on September 17, 1998, during the noon meal he emptied his bucket of water and solvent at the porter's closet located in the back left corner of the west side of the café, and that while he was returning to his work station, he slipped and fell to the floor. Plaintiff testified that the floor was slick and littered with butter packets because pancakes and waffles with butter had been served during the meal. He claimed that the floor was made of ceramic tile with grouting, which was usually slippery during meals. Plaintiff asserted that he slipped on a butter packet and fell on his left elbow and back, striking his head on the floor. Plaintiff denied that a sign reading "caution slippery when wet" was posted on the walls at the time of his fall.

{¶7} Plaintiff was removed from the café on a backboard and taken to the infirmary where he was evaluated by Robert Kessack, a physician's assistant. Kessack testified that plaintiff appeared to be in pain, and that because a doctor was not on duty at

MCI, he ordered plaintiff to be transported to the emergency room at Marion General Hospital for treatment. At the hospital, plaintiff was diagnosed as having a "lumbar back contusion" and an "elbow contusion" for which he was prescribed a pain medication and directed to follow up with the prison doctor. (Plaintiff's Exhibit 3.) Plaintiff was given a medical "lay-in" until he could be seen by the doctor.

{¶8} Dr. Akusoba re-evaluated plaintiff on September 22, 1998, and again denied plaintiff's request for medical idle. Plaintiff was cleared to return to work in the café with restrictions. Plaintiff confirmed that he went back to work in about one week but claimed that his back pain persisted.

{¶9} On September 23, 1998, plaintiff visited Kessack in his office complaining of severe pain from his back injury and asserting that he should be on medical idle. Kessack told plaintiff that Dr. Akusoba had the final word regarding his medical status. Kessack testified that plaintiff walked into his office with an altered gait or shuffle, but that he observed plaintiff walking down the hall in a normal manner as he left his office.

{¶10} CO Gary Heberlin testified that he was working as the "clip board officer" in the café on September 17, 1998. He was stationed at the front door of the café to assure that all inmate workers signed "in" and "out" on a sign-in sheet. (Defendant's Exhibit A.) Heberlin testified that according to the sign-in sheet, plaintiff arrived for work on September 17, at 6:40 a.m. He signed out at 8:37 a.m. after working the morning meal and did not return to work for the noon meal.

{¶11} Although plaintiff testified that he fell during the noon meal, the Unusual Incident Report prepared by defendant on September 18, 1998, recorded the time of the incident as 9:22 a.m. on September 17. (Defendant's Exhibit A.) Heberlin explained that if plaintiff's fall had occurred at 9:22 a.m., he should have already returned to his cell, and that if plaintiff either remained in the café or returned after signing out, he would have been in violation of prison rules for being out of place.

{¶12} On October 22, 1998, plaintiff was observed for more than one hour by CO Terry Orr doing strenuous exercises on weight training machines in violation of his medical restrictions. Orr testified that plaintiff was doing several exercises using weight in excess of 100 pounds. Orr filed a Conduct Report charging plaintiff with a Class II rule violation alleging that plaintiff violated a direct order by "lifting weights well over the limit that medical staff allowed." (Defendant's Exhibit B.) On October 26, 1998, Dr. Akusoba lifted all of plaintiff's medical restrictions after learning that plaintiff was found guilty of the charges. (Plaintiff's Exhibit 6.)

{¶13} Plaintiff testified that he slipped a second time in the café some time in late September or October 1998. He asserted that while mopping between tables in the café he slipped in some water and caught his elbow on a seat, thereby twisting his back. Plaintiff claimed that he was taken from the café in a wheelchair after the incident and was subsequently placed on medical idle.

{¶14} The only documentation presented to corroborate plaintiff's claim of a second fall is a February 24, 1999, Unusual Incident Report wherein plaintiff states: "I was mopping the west end area of the chow-hall against all my medical restrictions and once again I wrenched it by trying to maintain my balance while swinging a mop on a wet floor." (Plaintiff's Exhibit 21.) There is nothing in the report to show that plaintiff was taken from the café in a wheelchair or that he received medical treatment.

{¶15} In order for plaintiff to prevail upon his claim of negligence, he must prove by a preponderance of the evidence that defendant owed him a duty, that it breached that duty, and that the breach proximately caused his injuries. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282.

{¶16} Defendant owed plaintiff the common-law duty of reasonable care. *Justice v. Rose* (1957), 102 Ohio App. 482. Reasonable care is that which would be utilized by an ordinarily prudent person under similar circumstances. *Smith v. United Properties, Inc.* (1965), 2 Ohio St.2d 310. Although defendant is not an insurer of the safety of its

prisoners, once it becomes aware of a dangerous condition in the prison, it is required to take the reasonable care necessary to prevent injury to a prisoner. *Clements v. Heston* (1985), 20 Ohio App.3d 132. However, plaintiff bears the burden of proof to demonstrate that defendant was on notice or aware of the condition of the floor where plaintiff fell. *Presley v. Norwood* (1973), 36 Ohio St.2d 29.

{¶17} The legal concept of notice is of two distinguishable types: actual and constructive.

{¶18} "The distinction between actual and constructive notice is in the manner in which notice is obtained or assumed to have been obtained rather than in the amount of information obtained. Wherever from competent evidence the trier of the facts is entitled to hold as a conclusion of fact and not as a presumption of law that information was personally communicated to or received by a party, the notice is actual. Constructive notice is that which the law regards as sufficient to give notice and is regarded as a substitute for actual notice." *In re Fahle's Estate* (1950), 90 Ohio App. 195, paragraph two of the syllabus.

{¶19} Plaintiff has failed to demonstrate that defendant had actual notice or knowledge that the café floor was slippery or littered with butter packets on September 17, 1998.

{¶20} To find constructive notice there must be some evidence that the hazardous condition existed on the floor long enough prior to the fall that defendant should have known about it and removed it. *Banks v. Quay* (Aug. 29, 1989), Franklin App. No. 89AP-390. Plaintiff contends that the café floor was usually slippery during meals and that, therefore, defendant was aware of a hazard. Herberlin acknowledged that food and other items often are spilled onto the floor during meals, but that inmate porters with mops were stationed throughout the café to clean up spills as soon as they have occurred. There is no evidence that the porters were not properly maintaining the floors when plaintiff fell.

Thus, plaintiff has failed to prove by a preponderance of the evidence that defendant had constructive notice of the condition of the floor where plaintiff fell.

{¶21} Should defendant be aware that debris or water often falls on the floor during meals, then defendant has a duty to warn plaintiff of the hazardous condition. *Jackson v. Kings Island* (1979), 58 Ohio St.2d 357, 359. The warning of the potentially dangerous condition must be adequate under the circumstances. *Felder v. Victory Fitness Center* (July 16, 1998), Franklin App. No. 97APE12-1648.

{¶22} The credibility of witnesses is a significant issue in this case, as there is conflicting testimony whether any caution signs were posted when plaintiff fell. Plaintiff testified that the signs were posted after he fell. Inmates Joseph Derenzo and Charles Williams both testified that they were in the café when plaintiff fell and that the caution signs were not posted at the time. However, Heberlin testified that he was absolutely sure that the caution signs were posted in September 1998. Heberlin, who transferred from MCI shortly after plaintiff fell and had not been back in the café since his transfer, was able to specify the exact number of signs posted in the café and their location. Upon review of the evidence, including viewing the signs posted in the café, and considering the credibility of the witnesses, the court concludes that three caution signs were posted on the west wall at the time plaintiff fell. Therefore, defendant adequately warned plaintiff of the hazard of a slippery floor in the café.

{¶23} Finally, plaintiff has failed to prove by a preponderance of the evidence that he slipped and fell a second time. Plaintiff testified that he slipped on some water on the floor and caught his elbow on a seat, which resulted in his twisting his back. He testified that the second fall occurred in late September or October 1998, and that he was taken away in a wheelchair; however, there is no evidence to substantiate plaintiff's claim that he slipped in late September or October 1998, or that he was ever taken away in a wheelchair. In February 1999, an Unusual Incident Report was filed wherein plaintiff stated that he slipped while mopping the floor. Heberlin testified that plaintiff's job was wiping the

table tops, not mopping floors. In sum, plaintiff has failed to present any witnesses or evidence, other than his own statement, to support his claim that he slipped and fell a second time.

{¶24} Based upon the evidence presented, plaintiff has failed to establish either of his claims by a preponderance of the evidence. Accordingly, judgment is recommended in favor of defendant.

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STEVEN A. LARSON
Magistrate

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SAL/cmd
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