[Cite as *Elam v. Ohio Dept. of Rehab. & Corr.*, 2014-Ohio-5983.]

Court of Claims of Ohio
The Ohio Judicial Center
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CHRISTOPHER ELAM

Plaintiff

v.

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION

Defendant

Case No. 2013-00191

Magistrate Robert Van Schoyck

DECISION OF THE MAGISTRATE

{¶1} Plaintiff brought this action for negligence arising from injuries he suffered in a fall from a top bunk at the Mansfield Correctional Institution (ManCI) on October 7, 2012, when he was an inmate in the custody and control of defendant. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} Plaintiff testified that as a result of a conviction for felonious assault, he entered defendant's custody in 2007 at the Lorain Correctional Institution (LorCI). Plaintiff, who is now 51 years old, stated that he underwent a medical examination while being processed at LorCI and that during this examination he related that his medical history included, among other things, a history of seizures dating back to childhood, and according to plaintiff, the last seizure up to that point had occurred in 2006. A screening form prepared by LorCI medical staff in conjunction with that examination, dated June 26, 2007, includes references to plaintiff's seizures. (Joint Exhibit H.) On the following day, June 27, 2007, LorCI medical staff issued a Medical Restriction Statement providing that plaintiff was to be assigned to a "low bunk" on a "low range." (Joint Exhibit E.) According to this document, the restrictions were designated as "long

term," as opposed to "short term" restrictions of 6 months or less, and in the field marked "Start Date," instead of a calendar date the letters "PERM" were typed.

{¶3} Plaintiff testified that in July 2007, defendant transferred him to the Richland Correctional Institution (RiCI), where he continued to be assigned to a bottom bunk. According to plaintiff, defendant transferred him to the Chillicothe Correctional Institution (CCI) in May 2008, and throughout his time there he was assigned to a bottom bunk. The medical staff at CCI issued several Medical Restriction Statements for plaintiff during his time there, each of which he received a copy of, including a 30-day low bunk restriction issued upon his arrival on May 23, 2008; a low bunk and low range restriction of no specified duration issued on June 7, 2008, with the word "seizure" handwritten on the document; a long-term low bunk restriction issued on February 2, 2009, having a "Start Date" of February 2, 2009, and a "Review Date" of February 2, 2010; a long-term low bunk and low range restriction issued on February 23, 2010, with the word "seizures" handwritten on the document, having a "Start Date" of February 23, 2010, and a "Review Date" of February 23, 2011; and, a long-term low bunk restriction issued on January 19, 2011, having a "Start Date" of January 19, 2011, and a "Review Date" of January 19, 2012. (Joint Exhibit E.) Plaintiff stated that he felt a seizure coming on at least once at CCI, prompting him to the go to the clinic, and progress notes dated July 20, 2011, confirm that plaintiff was seen in the clinic for seizure "activity." (Plaintiff's Exhibit 3.).

{¶4} Plaintiff testified that on July 29, 2011, defendant transferred him to ManCI and that upon arrival he underwent a routine medical examination. On August 1, 2011, the ManCI medical staff issued a Medical Restriction Statement for plaintiff that provided for long-term low bunk and low range restrictions, with a "Start Date" of August 1, 2011, and a "Review Date" of August 1, 2012; a handwritten note on the document states: "copied count office[,] 1B unit mgr." (Joint Exhibit E.) Plaintiff testified that he was initially assigned to a bottom bunk in Unit 1 and stayed there until June 2012, when

he received a new work assignment in the kitchen and was consequently moved to a cell block reserved for kitchen workers, Unit 4.

{¶5} Plaintiff stated that when he arrived at his new cell, he found that the bottom bunk was occupied by inmate Dan Day, who walked with a cane and represented that he had a low bunk restriction. According to plaintiff, he told an older, white male corrections officer at that time that he too had a low bunk restriction, but after going off to investigate, the officer returned and said that there was no record of plaintiff having such a restriction.

{¶6} Plaintiff stated that he followed up with the same corrections officer multiple times and was told each time that there was no record. Plaintiff admitted though, that he did not inquire into the matter with his unit manager or any other employee, whether in person or by way of a Health Services Request form, a kite (an institutional form of written correspondence), or the grievance process, even though during this timeframe he did submit Health Services Request forms to the medical department in regard to other medical issues (Joint Exhibit D, pp. 29-32) and he was also seen by clinicians for appointments during this time, although some visits were for mental health issues. Plaintiff also admitted that he was supposed to go to "pill call" every day to take Dilantin, a prescription anti-seizure medication, but he stated that he only went three or four days a week, although he added that he had found this level of medication to be effective.

{¶7} Plaintiff stated that while asleep in the top bunk on the morning of October 7, 2012, he fell off the bed and onto the floor, causing pain throughout his body, and that Day told him immediately afterward that he seemed to have had a seizure. The electronic log book kept by corrections officers in Unit 4 that day includes an entry from 8:50 a.m. reflecting that plaintiff reported falling out of the bunk, and that he was sent to the clinic. (Joint Exhibit T.) A nurse performed an assessment of plaintiff at the clinic and prepared a corresponding assessment form. (Joint Exhibit R.) Plaintiff testified that the nurse told him at that time that his bottom bunk restriction had "expired" on

August 1, 2012, which plaintiff stated that he was not aware of. A new Medical Restriction Statement was issued afterward providing for a long-term low bunk restriction starting on October 7, 2012, the date of the accident, with a review date of October 7, 2013, and the words "history of seizures" are handwritten on the document. (Joint Exhibit E.) Subsequently, plaintiff complained about the bunk problem through the institutional grievance process. (Joint Exhibits U, V, X.)

{¶8} Dan Day testified by way of deposition that in 2012 he and plaintiff indeed shared a cell in Unit 4, and that he had occupied the bottom bunk of that cell since December 2009. Day recalled plaintiff telling him that he had a history of seizures and had a bottom bunk in his previous cell, and that they had conversations about how plaintiff should not have been assigned to a top bunk, but Day stated that he has no knowledge whether plaintiff complained about the bunk situation to a corrections officer.

{¶9} Day testified that on October 7, 2012, at about 4:00 or 4:30 a.m., he was "half asleep" when he felt the bed shaking, then heard a thud, and turned to see that plaintiff had fallen and was lying flat on his back. Day stated that plaintiff told him he had suffered a seizure and that plaintiff initially declined an offer of assistance, but that eventually he went and helped plaintiff back into the top bunk. Day related that plaintiff started to complain of pain throughout his body a little later and at some point told a corrections officer who sent him to the clinic.

{¶10} Marilyn Christopher testified that she served as the Health Care Administrator for ManCI at the time of plaintiff's fall, and through her testimony she authenticated a copy of defendant's Protocol B-19, which establishes guidelines for the evaluation and ordering of medical restrictions. (Plaintiff's Exhibit 1.) Protocol B-19 provides, in part, that "[m]edical restrictions are written only to address health problems that are likely to cause severe or life threatening consequences if the restriction is not implemented immediately."

{¶11} Protocol B-19 also provides, in part:

{¶12} "B. Evaluation, prescription and tracking of medical restrictions

{¶13} "* * *

{¶14} "2. All medical restriction orders must be submitted to the Health Care Administrator for administrative review and tracking.

{¶15} "C. Review and renewal of medical restrictions

{¶16} "1. No active long-term medical restriction may be terminated without evaluation by an institution advanced medical provider.

{¶17} "2. The institution physician shall review each long-term medical restriction at least annually for continued need."

{¶18} Later, Protocol B-19 also states that "[a]t the time the restriction is implemented, the medical staff shall instruct the inmate about," among other things, "[h]ow the restriction must be renewed."

{¶19} Christopher testified that the long-term low bunk restriction issued for plaintiff on August 1, 2011, was never renewed and therefore "expired" one year later on August 1, 2012, after plaintiff had moved to Unit 4 but before his fall. Christopher stated that ManCI did not have any system in place to track medical restrictions so as to alert staff to the fact that a restriction was coming up for renewal. Christopher explained that if medical staff happened to review a medical chart during a clinic visit or otherwise become aware that a medical restriction was coming up for renewal, their practice was to set up an appointment to have the inmate assessed for renewal. According to Christopher, though, renewals were typically obtained only when an inmate contacted the medical department and requested an appointment to be reevaluated. According to Christopher, there was no formal rule in place at ManCI instructing inmates to do this, but it was common practice.

{¶20} Christopher testified that when a medical restriction was ordered for an inmate, medical staff would orally tell the inmate the duration of the restriction, but she stated that it was the policy at ManCI to not furnish the inmate with a copy of the

Medical Restriction Statement. Christopher added that if an inmate could not remember the duration of a medical restriction, the inmate could send a kite to the medical department and request this information.

{¶21} Christopher also testified that prior to the accident, plaintiff had been prescribed a daily anti-seizure medication, Dilantin (or a generic equivalent), but that records from the daily pill call show that plaintiff was not compliant in taking the medication, doing so only eight times in August 2012, four times in September 2012, and twice in the first six days of October 2012. (Joint Exhibits M, N, O.)

{¶22} Amanda Selvage is a unit manager at ManCI and she stated that in June 2012 she managed Unit 1. Selvage testified that records show that she, in coordination with the ManCI count office, arranged for plaintiff to move from Unit 1 to Unit 4 on or about June 12, 2012, so that he would reside in the cell block for kitchen workers. (Joint Exhibit S.) Selvage stated that when a Medical Restriction Statement is written, a copy is usually, but not always, sent to unit staff. Regardless, Selvage testified that she did not check to see if there was a low bunk restriction on file for plaintiff before reassigning him. Selvage also testified that plaintiff never told her he had a low bunk restriction.

{¶23} Erica Bradley testified that she is a corrections officer at ManCI, more particularly a “relief officer” who is posted to various locations throughout the institution as needed. Bradley testified that she remembers plaintiff but does not recall him ever complaining to her about a bunk issue, and she explained that it is her practice to immediately call the medical department or notify a supervisor when this kind of issue is brought to her attention. Bradley stated that she believes she did receive an order one day while working in Unit 1 to deliver a slip of paper to plaintiff which notified him that he was being moved to another housing unit, but she stated that she did not escort plaintiff to the new unit.

{¶24} Dellno First testified that he too is employed as a relief officer at ManCI. First stated that he remembers plaintiff only in a general sense and knows nothing about any dispute over a bunk assignment, and First also stated that he does not know where he was stationed to work in June 2012. First related that on the few occasions over the years when bunk restriction issues have been brought to his attention, he has called the medical department and been able to quickly verify whether a bunk restriction exists.

{¶25} Sharon Berry testified that during the relevant time period, she was employed as the Institutional Inspector for ManCI. Berry stated that when she received a Notification of Grievance that plaintiff filed after the fall (Joint Exhibit V), she opened an investigation. Berry stated that in the course of her investigation, she found no evidence to substantiate that plaintiff told any employee about a problem with his bunk assignment prior to the fall.

{¶26} "[I]n order to establish actionable negligence, one seeking recovery must show the existence of a duty, the breach of the duty, and injury resulting proximately therefrom." *Strother v. Hutchinson*, 67 Ohio St.2d 282, 285 (1981); *see also Foster v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 12AP-503, 2013-Ohio-912, ¶ 38. "In the context of a custodial relationship between the state and its prisoners, the state owes a common-law duty of reasonable care and protection from unreasonable risks." *Woods v. Ohio Dept. of Rehab. & Corr.*, 130 Ohio App.3d 742, 744-745 (10th Dist.1998). "The state, however, is not an insurer of inmate safety and owes the duty of ordinary care only to inmates who are foreseeably at risk." *Franks v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 12AP-442, 2013-Ohio-1519, ¶ 17. "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. "Prison inmates must also exercise reasonable care to ensure their own safety." *Taylor v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 11AP-1156, 2012-Ohio-4792, ¶ 15.

{¶27} Upon review, the magistrate finds that plaintiff had a history of seizures and received ongoing treatment for the same from defendant's medical professionals. The magistrate finds that under defendant's guidelines on the issuance of medical restrictions, Protocol B-19, "[m]edical restrictions are written only to address health problems that are likely to cause severe or life threatening consequences if the restriction is not implemented immediately." Consistent with that language, and the fact that defendant's medical professionals repeatedly issued low bunk restrictions for plaintiff throughout his incarceration, particularly one issued on or about the day he entered ManCI in 2011, the magistrate finds that it was hazardous for plaintiff to occupy a top bunk and that defendant had notice of this hazard.

{¶28} The magistrate finds that plaintiff's unit manager and the ManCI count office failed to exercise reasonable care in assigning plaintiff to a top bunk on or about June 12, 2012, when a low bunk restriction was in effect, and when both the unit manager and the count office were supposed to have been copied on the Medical Restriction Statement. The magistrate also finds both that plaintiff was credible in testifying that he told a corrections officer he had a low bunk restriction when he moved to the new housing unit, testimony that is corroborated by statements plaintiff made in grievance documentation after the accident, and that defendant failed to exercise reasonable care by not consequently moving plaintiff to a low bunk at that time. However, the magistrate finds that plaintiff failed to exercise reasonable care for his own safety by not notifying anyone else of the problem once his initial complaints to the corrections officer proved to be futile, as it is clear there were several ways he could have raised the issue with others but he failed to do so for an unreasonable length of time.

{¶29} To the extent defendant argues that the long-term low bunk restriction proceeded to "expire" before plaintiff's fall, on August 1, 2012, the magistrate finds that under Protocol B-19 the restriction was not supposed to "be terminated without evaluation by an institution advanced medical provider," and the guidelines further state that the "institution physician shall review each long-term medical restriction at least annually for continued need," but in this case defendant failed to conduct such an evaluation or review even though it knew or should have known when the restriction was up for renewal. Regardless, even if it were possible to construe the guidelines in a way that would allow for a long-term medical restriction to simply "expire" on its own without a physician or other advanced medical provider evaluating the inmate, as defendant urges, the magistrate finds that the evidence in this case demonstrates that the risk associated with plaintiff's assignment to the top bunk remained unchanged, and, as previously stated, that both parties had notice of this risk and had a responsibility to act. Also, while defendant emphasizes that plaintiff failed to consistently take his anti-seizure medication, the magistrate finds that this does not obviate defendant's duty of care, and, furthermore, that based upon the evidence adduced at trial, one can only speculate as to any causative effect attributable to plaintiff's level of medication.

{¶30} Finally, the magistrate finds that on October 7, 2012, plaintiff suffered a seizure and consequently fell out of a top bunk, and that he sustained injuries proximately caused by negligence on the part of both parties, with the degree of fault attributable to each party being 50 percent.

{¶31} Based upon the foregoing, the magistrate finds that plaintiff has proven his claim of negligence by a preponderance of the evidence. It is recommended that judgment be entered in favor of plaintiff, with a 50 percent diminishment in any award for compensatory damages.

{¶32} *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).*

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ROBERT VAN SCHOYCK
Magistrate

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