

[Cite as *Phelps v. Ohio Dept. of Rehab. & Corr.*, 2015-Ohio-5653.]

OLISSEO J. PHELPS

Plaintiff

v.

OHIO DEPARTMENT OF  
REHABILITATION AND CORRECTION

Defendant

Case No. 2013-00587

Judge Patrick M. McGrath

DECISION

{¶1} On August 12, 2015, the magistrate issued a decision recommending judgment in favor of defendant. On August 19, 2015, plaintiff filed a motion for extension of time to file objections to the magistrate's decision, which the court granted. On October 1, 2015, plaintiff filed his objections. On October 19, 2015, defendant filed a response. Lastly, on October 26, 2015, plaintiff filed a response.

{¶2} Civ.R. 53(D)(3)(b)(i) states, in part: "A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i)." When ruling on objections to a magistrate's decision, a "court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law." Civ.R. 53(D)(4)(d).

{¶3} Based on the record, the facts of the case are as follows: during early morning on January 8, 2013, plaintiff alerted corrections officers (COs) in the segregation housing unit of the Chillicothe Correctional Institution that he was experiencing stomach pain. A CO arranged for him to go to the infirmary. While getting ready, plaintiff felt weak and struggled to get dressed. He eventually arrived at the

infirmary with some assistance from COs. Pursuant to defendant's policies regarding inmates in segregation, plaintiff was placed in restraints before he left his cell.

{¶4} Plaintiff was taken to the "emergency room" area of the infirmary, and at some point was administered intravenous therapy. During this time, plaintiff was able to get up and use the bathroom on several occasions without assistance. He was eventually seen by Nurse Practitioner Gary Artrip, who discharged him. However, Artrip asked plaintiff to return to the infirmary around 6:00 a.m. the next day to give blood and urine samples for diagnostic purposes.

{¶5} The following morning, on January 9, 2013, plaintiff was placed in restraints and escorted to the infirmary by CO Harold. Plaintiff walked under his own power to the infirmary, an estimated distance of about 200 feet, although he had to stop for a moment along the way. Plaintiff was escorted to the phlebotomist, who drew a blood sample. Around this time, plaintiff had a spell of lightheadedness which led him to lean against a wall and slide down to the ground. An inmate, Antonio Bonner, as well as CO Harold, helped him stand up. CO Harold then took plaintiff to the "emergency room" area of the infirmary, where he was seen by Nurse Conley, the triage nurse.

{¶6} Conley briefly assessed plaintiff and decided to admit him in the segregation patient room, with the intention of evaluating plaintiff further once he had an opportunity to see his other patients and to review plaintiff's medical chart. CO Harold then escorted plaintiff from the emergency room to the segregation patient room.

{¶7} A few minutes after plaintiff entered the segregation patient room, he got up and went to the attached bathroom to produce a urine sample with a cup that the phlebotomist had previously issued to him. Plaintiff put the cup on the windowsill above the radiator and got ready to urinate, but then he felt faint and started to fall down. Plaintiff's legs got twisted up in the leg irons and he fell in such a way that his right arm swung down violently onto the valve stem of the radiator, cutting into and burning his skin. Plaintiff then exited the bathroom and pressed a call button, whereupon Conley

and one or more COs entered the patient room and attended to him. Shortly thereafter, once Artrip arrived for work and assessed the situation, plaintiff was transported to OSUMC. There he was diagnosed with a bleeding ulcer and received treatment both for that ailment and the wound to his arm.

{¶8} Plaintiff forwarded two claims for relief. First, he alleged that defendant was “negligent in delaying medical treatment for [his] injuries.” Second, plaintiff alleged that defendant’s employees were negligent in “failing to assist him or prevent him from falling in his condition,” which he pled as claim for ordinary negligence, as opposed to medical malpractice. Plaintiff’s Complaint, ¶ 2-3.

{¶9} The magistrate found that to the extent plaintiff’s claims challenged Artrip’s or Conley’s professional judgment, all allegations would sound in medical malpractice and therefore require expert testimony to establish the standard of care and a breach of that standard—testimony that was not presented in this case. *See Gordon v. Ohio State Univ.*, 10th Dist. Franklin No. 10AP-1058, 2011-Ohio-5057, ¶ 67. With respect to the alleged delays in plaintiff’s medical care, the magistrate found that the evidence did not support a claim sounding in ordinary negligence concerning the actions of non-medical personnel, because COs promptly arranged for plaintiff to go to the infirmary after being notified of his medical issues early on January 8, 2013 and they timely escorted him to the infirmary the following day for his appointment for lab work.

{¶10} The magistrate also found that the evidence did not weigh in plaintiff’s favor as to the ordinary negligence claim based upon the failure to assist him or otherwise prevent him from falling. Conley’s actions were reasonable because he did not observe plaintiff’s bout of weakness in the morning; he saw plaintiff ambulate and understood plaintiff had walked to the infirmary under his own power; he understood plaintiff had come to the infirmary for lab work rather than specifically for emergency care; plaintiff did not ask Conley to arrange for assistance with the urine sample; and the segregation patient room was equipped with a call button that plaintiff could have used if he needed

assistance. The magistrate also found the actions of the COs present in the infirmary that morning reasonable, in that plaintiff was left in the segregation patient room in accordance with both Conley's directions and the policy of leaving segregation patients in there with the door locked, and plaintiff did not subsequently ask for help or otherwise indicate that he needed assistance.

{¶11} Finally, the magistrate found that plaintiff was not entitled to recover under a theory of negligence based upon the condition of the radiator because it was not unreasonably dangerous and it was not foreseeable that an injury was likely to result from there being no handle on the valve stem. The capacity of the radiator to burn those who would touch it was a condition that was open and obvious to the inmates using the bathroom. Consequently, under the open and obvious doctrine, defendant owed plaintiff no duty relative to those conditions. *Williams v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 04AP-1193, 2005-Ohio-2669, ¶ 8.

{¶12} Plaintiff now presents eight objections. Each is discussed fully below.

**I. The magistrate erred in ruling defendant was not guilty of negligence in failing to assist, or take proper precautions to protect, an obviously weakened inmate from falling against a radiator which was without a protective shield and an exposed stem caused by a missing control knob.**

{¶13} In his first objection, plaintiff states that defendant, despite being aware of plaintiff's recurring loss of consciousness and weakness, placed him, unattended, in a room with an overhead radiator which did not have a cover. Plaintiff cites to two cases for the proposition that plaintiff should not have been left unattended. In the first, the inmate was diagnosed with Crohn's disease, suffered from severe muscle spasms, and underwent chemotherapy. These conditions made it difficult for him to climb stairs. When plaintiff was moved from a first-floor cell to a third-floor cell, he informed prison staff about his condition and visited the infirmary to secure a medical restriction. However, the nurse refused to issue the restriction and scheduled him to see a doctor

three days later. Before the inmate was seen by a doctor, he fell while attempting to negotiate stairs. *Franks v. Ohio Dept. of Rehab. & Corr.*, 195 Ohio App.3d 114, 2011-Ohio-2048 (10th Dist.). The Tenth District Court of Appeals held that defendant could be found liable because the decision to not issue a restriction was not made to preserve order or maintain security, and as such, defendant could not be afforded discretionary immunity from liability.

{¶14} In the next case cited by plaintiff, the inmate in question had an ambulatory impairment and a partial disability of the right hand. His condition was well-documented and he had been provided bottom-floor cell assignments, in addition to other accommodations, at three separate institutions during his incarceration. However, upon transfer to a fourth institution, the inmate did not receive a bottom-floor cell assignment and, as a result, fell while descending some stairs. This court held that defendant was negligent because plaintiff's physical limitations were unchanged throughout the time he was in defendant's custody and defendant knew or should have known that requiring him to climb up and down stairs posed an unreasonable risk of harm to the plaintiff. *Darrin Good v. Ohio Dept. of Rehab. And Corr.*, Ct. of Cl. No. 2012-00885 (January 31, 2014).

{¶15} Neither of the two cases cited by plaintiff are instructive in the case at hand. Here, the record reflects that plaintiff had no prior, documented history of internal bleeding or ulcers, the ultimate cause of his weakness and the fainting spell. The day before his accident, January 8, 2013, plaintiff was able to get up and use the bathroom on several occasions without assistance. On the day of his accident, January 9, 2013, plaintiff walked under his own power to the infirmary. Plaintiff did not voice any concerns and did not request assistance when he was requested to provide a urine sample in the segregation patient room. Moreover, the segregation patient room was equipped with a call button that plaintiff could have utilized if he needed assistance. Lastly, as fully explained below, the radiator was not an unreasonably dangerous

condition and it was not foreseeable that an injury was likely to result from there being no handle on the valve stem. Consequently, plaintiff's first objection is **OVERRULED**.

- II. The magistrate erred in ruling defendant was not negligent in failing to provide adequate safe cover for the radiator and for allowing an exposed shaft of a control device caused by a missing knob.**
- III. The magistrate erred in finding there was no evidence showing the valve stem was unusually sharp.**
- IV. The magistrate erred in ruling the cause of the accident was not the undue heat of the radiator or the condition of the radiator, but because plaintiff fainted.**
- V. The magistrate erred in applying the open and obvious doctrine to the facts since the ability to observe the condition of the radiator was not caused by lack of observation, but by plaintiff's physical condition.**
- VI. The magistrate erred in ruling there was not actual or constructive notice of the danger created by the condition of the radiator.**

{¶16} In his next five objections, plaintiff essentially objects to the magistrate's finding that the radiator was not unreasonably dangerous. 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. *McCoy v. Engle*, 42 Ohio App.3d 204, 207 (10th Dist.1987). Reasonable care is defined as the degree of caution and foresight that an ordinarily prudent person would employ in similar circumstances. *Woods v. Ohio Dept. of Rehab. & Corr.*, 130 Ohio App. 3d 742, 745 (10th Dist.1998). The state is not an insurer of the safety of its prisoners, but once it becomes aware of a dangerous condition in the prison, it is required to take the reasonable steps necessary to avoid injury to prisoners. *Clemets v. Heston*, 20 Ohio App.3d 132, 136 (6th Dist.1985). Prisoners, however, are also required to use reasonable care to ensure their own safety. See, e.g., *Macklin v. Ohio Dept. of Rehab. & Corr.*, 10th Dist.

No. 01AP-293, 2002-Ohio-5069, ¶ 21. Additionally, the open and obvious doctrine, where warranted, may be applied in actions against defendant. *Williams v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 04AP-1193, 2005-Ohio-2669, ¶ 8.

{¶17} In his decision, the magistrate correctly concluded that the condition of the radiator was not unreasonably dangerous and it was not foreseeable that an injury was likely to result from there being no handle on the valve stem. Plaintiff, in his objections, cites to a case where an inmate was injured after falling on a defective step that had crumbled away for the proposition that “(l)ack of care of facilities that endangers prisoners cannot be justified by lack of funding or lack of care.” *Roberts v. Ohio Dept. of Rehab. & Corr.*, Ct. of Cl. No. 2011-05874 (Apr. 26, 2013); Plaintiff’s Objections, p. 9. However, plaintiff does not explain how a radiator located on one side of the bathroom, which did not obstruct plaintiff’s path in the same way a deteriorated step could, and which was easily avoidable, endangered plaintiff.

{¶18} Here, as the magistrate noted in his opinion, there was no evidence that anyone had ever before been injured on the radiator. The valve stem was made of standard piping materials and was not shown to be unusually sharp. The plaintiff did not show that the surface temperature of the valve stem was unusually high or any greater than that of the rest of the radiator. The handle that plaintiff argues should have been affixed to the valve stem is a device for opening and closing the valve, as opposed to a safety shield or guard. Furthermore, the fact that a radiator emits heat and the capacity of a radiator to burn those who touch it, was open and obvious to plaintiff and all inmates who used the bathroom in the segregation patient room. Defendant owed plaintiff no duty under these circumstances. See *Williams*, 2005-Ohio-2669, ¶ 8.

{¶19} Additionally, as the magistrate correctly determined, the proximate cause of plaintiff’s injury was not the radiator, but the fall he suffered on account of feeling faint, through which he could have been injured on any number of conditions that were not unreasonably hazardous to ordinary users of the bathroom, such as falling onto the

toilet or its exposed plumbing, onto the tile floor, into the window, or, as occurred here, onto the radiator. As such, the question of whether defendant had notice about the radiator's condition was irrelevant because the radiator's condition was not unreasonably dangerous. *Baldauf v. Kent State Univ.*, 49 Ohio App.3d 46, 50 (10th Dist.1988). Therefore, plaintiff's second, third, fourth, fifth, and sixth objections are OVERRULED.

**VII. The decision of the magistrate is against the manifest weight of the evidence and contrary to law.**

{¶20} As noted above, the magistrate properly determined that plaintiff had no prior, documented history of internal bleeding or ulcers and the radiator did not constitute an unreasonably dangerous condition. Consequently, defendant did not breach any duty of care by failing to assist or otherwise protect plaintiff while he was in the segregation patient room bathroom. Plaintiff's seventh objection is OVERRULED.

**VIII. The magistrate erred in utilizing a recording system that failed to record the entire proceeding.**

{¶21} In his last objection, plaintiff requests the court to order a new trial because necessary testimony was not recorded due to a malfunction with the recording instrument. When a party objects to a magistrate's factual findings, "whether or not specifically designated as a finding of fact \* \* \* [it] shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available." Civ.R. 53(D)(3)(b)(iii). "If an objecting party fails to submit a transcript or affidavit, the trial court must accept the magistrate's factual findings and limit its review to the magistrate's legal conclusions." *Triplett v. Warren Corr. Inst.*, 10th Dist. Franklin No. 12AP-728, 2013-Ohio-2743, ¶ 13; see also *Knapp v. Edwards Labs.*, 61 Ohio St.2d 197, 199-200 (1980) (noting that when portions of a



transcript cannot be transcribed, a party has various alternatives, including providing a narrative transcript or an agreed statement of the case in lieu of the record).

{¶22} Plaintiff has not filed an affidavit indicating why the lost testimony is essential to his case or even proffer what particular testimony was not transcribed. This would provide defendant an opportunity to oppose plaintiff's assessment of the lost testimony, if necessary. However, in his objections, plaintiff merely states: "[c]ounsel's notes are meager and are of no help." Plaintiff's Objections, p. 14. If the testimony that is missing from the recording is indeed indispensable in establishing that defendant's liability for plaintiff's injuries, then it is incumbent upon plaintiff to provide the court with this information, or an inkling of what it could be, via affidavit. Civ.R. 53(D)(3)(b)(iii); *See also Knapp*, at 199-200. As a result, without an affidavit, plaintiff has not demonstrated the need for a new trial. Consequently, plaintiff's eighth objection is **OVERRULED**.

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PATRICK M. MCGRATH  
Judge

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Plaintiff

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Defendant

Case No. 2013-00587

Judge Patrick M. McGrath

JUDGMENT ENTRY

{¶23} On August 12, 2015, the magistrate issued a decision recommending judgment for defendant.

{¶24} Civ.R. 53(D)(3)(b)(i) states, in part: “A party may file written objections to a magistrate’s decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i).” Plaintiff timely filed his objections.

{¶25} Upon review of the record, the magistrate’s decision and the objections, the court finds that the magistrate has properly determined the factual issues and appropriately applied the law. Therefore, the objections are **OVERRULED** and the court adopts the magistrate’s decision and recommendation as its own, including findings of fact and conclusions of law contained therein. Judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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PATRICK M. MCGRATH  
Judge

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**Filed December 29, 2015**  
**Sent To S.C. Reporter 2/24/16**