

[Cite as *Jackson v. Dept. of Rehab. & Corr.*, 2018-Ohio-4165.]

RUFUS JACKSON

Plaintiff

v.

OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION

Defendant

Case No. 2015-00136JD

Magistrate Holly True Shaver

DECISION OF THE MAGISTRATE

{¶1} Plaintiff brought this action alleging negligence. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.¹

{¶2} At all times relevant, plaintiff was an inmate in the custody and control of defendant at the Marion Correctional Institution (MCI). On March 28, 2014, plaintiff sustained personal injury when a piece of HVAC ductwork fell from a cart, striking him on the head, shoulders, and back. Prior to plaintiff's injury, the Department of Administrative Services (DAS) had entered into a contract with The K Company, an approved vendor of HVAC work through the National Joint Powers Alliance (NJPA), which allowed The K Company to perform work at MCI. (Defendant's Exhibits A and B.) On the day in question, two workers from The K Company, Steve Fox and Donald Heberlein, were on the premises at MCI to install air conditioning ductwork and to improve the heating system in Dorm 7. The K Company employees were provided an escort, Corrections Officer (CO) David Hildebrand. As the ductwork was being pulled on a cart through the day room, one of the pieces fell off the cart and struck plaintiff.

{¶3} Plaintiff asserts that defendant was negligent in two ways. First, plaintiff alleges that defendant failed to supervise inmate workers who loaded ductwork on the cart in an unsafe manner. Second, plaintiff alleges that defendant failed to supervise

¹At the close of plaintiff's evidence, defendant made a motion for dismissal pursuant to Civ.R. 41(B)(2). The magistrate took the motion under advisement, and it is DENIED.

the inmate worker who pulled the cart of ductwork past the inmates in the day room, allowing the ductwork to fall.

{¶4} Defendant asserts that plaintiff has failed to prove negligence. Defendant further argues that it cannot be held liable as a matter of law for any action or inaction of The K Company employees because The K Company was an independent contractor. Moreover, defendant argues that even if an inmate worker loaded and pulled the cart, any guidance on how to do so was provided by The K Company employees.

{¶5} Steve Fox testified that he has been a sheet metal worker for 16 years. On March 28, 2014, he was working for The K Company at MCI. Fox estimated that the HVAC project had been going on for approximately two weeks prior to plaintiff's incident. Fox's co-worker on the project was Donald Heberlein.

{¶6} According to Fox, three carts were used to transport materials and equipment from the maintenance area to the installation site. Fox pulled the first cart, which was filled with either his own tools or tools provided by The K Company. The second cart had ladders and extension cords on it and was pulled by Heberlein. The third cart had six large pieces of metal ductwork and was pulled by an inmate worker.

{¶7} Fox testified that each piece of ductwork measured 56.5 inches in length. The ends of the ductwork measured eight by ten inches. Fox stated that the pieces of ductwork were loaded on the cart such that they stood vertically to the 56.5-inch height. Fox estimated that each piece of ductwork weighed approximately 10 to 20 pounds. Fox described the cart as a "flatbed cart," and stated that it was low to the ground, approximately six inches above the floor. Fox testified that in his experience, the way that the ductwork was loaded on the cart, without being secured by bungee cords or straps, was a safe way to transport it because there was a one-and-three-quarter-inch metal flange around each end of the ductwork, making it stable to transport vertically. Fox drew a picture of the cart with ductwork on it and an overhead view of the pieces of ductwork on the cart while explaining his testimony. (Plaintiff's Exhibit 1.)

{¶8} Fox testified that he did not remember who loaded the ductwork on the cart that day. Fox stated that sometimes he and Heberlein loaded the carts, but his main priority was to keep an eye on the tools. Fox further testified that The K Company is not owned by the state of Ohio, and that he had worked at MCI solely regarding this project.

{¶9} Donald Heberlein testified via deposition that he was an employee of The K Company and that his duties included the installation of ductwork. (Plaintiff's Exhibit 3.) Heberlein stated that when the first load of material was delivered to the institution, inmates helped Fox and him unload the truck and place the material on the floor in a secure area. According to Heberlein, he and Fox would mark on the ductwork which pieces they needed and then CO Hildebrand would use his radio to direct inmate workers to deliver another load of material to the worksite. Heberlein testified that there was a verbal agreement with defendant that inmates would load the material onto carts and deliver the carts to the area where he and Fox were working. Heberlein did not supervise inmates loading the carts and he did not know whether any of defendant's employees supervised the inmates. Heberlein did not witness the accident because he was walking ahead of the cart from which the ductwork fell.

{¶10} Heberlein testified that the ductwork was made of galvanized sheet metal, and that the piece that struck plaintiff was approximately 4 feet long and weighed approximately 15 pounds. Heberlein testified that the material did not need to be secured on a cart because it was square, flat material that typically rode on a cart very well. Heberlein stated that loading the ductwork on carts did not require instruction because the material was "just metal squares" that would ride on a cart. When asked why the material was not secured on the cart, he stated that, "Never in my life of 25 years of installing ductwork have we ever secured any material to a cart, not once in my career." (Plaintiff's Exhibit 3, p. 20, lines 18-20.) Heberlein described the floor of the dayroom as being smooth concrete and stated that he did not see any defects in the

floor on the day of the accident. Heberlein testified that CO Hildebrand escorted Fox and him through the institution but did not advise them on how to install the ductwork.

{¶11} Plaintiff Rufus Jackson testified that on the day in question, he was sitting close to the entrance of the day room on a bench talking to a minister. Plaintiff testified that he remembered very little about the incident, although he recalled that the day room was crowded. Plaintiff felt something hit him on the back of the head, shoulders, and back. Plaintiff estimated that he was unconscious for about three to five minutes, then he regained consciousness and was taken to the infirmary in a wheelchair. Plaintiff testified that the impact made his head bleed, but he did not provide any medical documentation regarding his treatment. Plaintiff did not notice who was pulling the cart, and he did not know who had loaded the cart. Plaintiff had general knowledge that an HVAC project was occurring but did not observe any ductwork fall off a cart before the date of his injury.

{¶12} David Hildebrand testified that he has been a CO at MCI for 22 years. His job assignment on the day in question was to escort The K Company employees back and forth from the maintenance area to the job site. Hildebrand testified that he did not observe anyone load the carts, and that he did not instruct either inmates or The K Company employees on how to load the carts. Hildebrand testified that institutional staff are stationed in the maintenance room, which is a secure area, but he did not know who was working in the maintenance area on the day of the incident. Hildebrand did not remember at trial whether an inmate was pushing the cart with the ductwork but testified in his deposition that the cart was “probably” pushed by a maintenance inmate. Hildebrand testified that he was behind the cart when the ductwork fell, that the incident occurred suddenly without warning, and that prior to plaintiff’s incident, he had not witnessed any HVAC equipment fall from a cart.

{¶13} Hildebrand testified that his role as an escort was to keep the contractors safe during the project. When asked whether his duties also included protecting inmates

from harm, Hildebrand stated that his primary role that day was to escort the contractors through the building. However, if something occurred, such as a fight, his first duty would be to get the contractors to safety, and then go back to the area to assist inmates.

{¶14} Inmate Albert Lee Rembert testified via deposition that he was sitting with plaintiff playing cards when the ductwork suddenly fell on plaintiff, striking his head and back. (Plaintiff's Exhibit 2.) According to Rembert, company employees were pulling the cart that had the ductwork on it. (*Id.*, p. 7, line 8.) Rembert testified that after the ductwork fell on plaintiff, the workmen and guard waited for CO Zinn to arrive, then the medical department was called, and medical staff took plaintiff out of the day room in a wheelchair. Rembert testified that he was not certain whether an inmate or a company worker was pulling the cart, but that an inmate was with the company workers, as well as a CO escort. (*Id.*, p. 26).

{¶15} Rembert also testified that the project had been going on for seven to ten days prior to plaintiff's incident. When asked whether any of the material had fallen off the carts prior to plaintiff's incident, Rembert testified: "I believe it did, but it didn't hit nobody at the time, the one time it fell off." (*Id.*, p. 13, lines 16-17.) When questioned on cross-examination, Rembert stated that he heard something heavy hit the floor, that to him sounded like it was steel or heavy metal. He was later told that it was "stuff that fell off the cart." (*Id.*, pgs. 16-17.) Rembert did not notice whether the material that had fallen off the cart was the same type of ductwork that had fallen on plaintiff. Rembert stated that he heard the noise roughly two to three days after the project started, approximately one week prior to plaintiff's incident.

{¶16} Inmate Larry Cannon testified via deposition that he witnessed the accident; that one CO and two contractors were present; that the contractors moved the cart; and, that he had not witnessed equipment fall off the cart prior to plaintiff's incident. (Defendant's Exhibit F.) Inmate Christopher Maupin testified via deposition that there

were two contractors, a CO escorting them, and an inmate maintenance worker who were moving the ductwork through the day room that day, and that he had not witnessed ductwork fall off a cart prior to plaintiff's incident. (Defendant's Exhibit G.)

{¶17} Wayne McCulty testified that he is the deputy chief procurement officer for DAS. McCulty identified Defendant's Exhibit A as the agreement between NJPA and the state of Ohio for construction projects. McCulty testified that Defendant's Exhibit B is an agreement for the participation of contractors, and that page number 184 identifies the scope of the project. McCulty testified that The K Company was an approved vendor for HVAC services. McCulty identified Defendant's Exhibits C and D, other contract documents regarding the project. McCulty stated that he was not involved in the construction project and that he did not instruct The K Company on how to perform the HVAC work at MCI.

{¶18} Danny Yates testified that he was the procurement manager at DRC's central office. Yates identified Defendant's Exhibit E as the purchase order for air conditioning units at MCI with The K Company. Yates does not work at MCI and is not an employee of The K Company.

{¶19} "To recover on a negligence claim, a plaintiff must prove by a preponderance of the evidence (1) that a defendant owed the plaintiff a duty, (2) that a defendant breached that duty, and (3) that the breach of the duty proximately caused a plaintiff's injury." *Ford v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 05AP-357, 2006-Ohio-2531, ¶ 10. "While the state is not an insurer of the safety of inmates, the state generally owes a duty of reasonable care and protection from harm to inmates under its custody." *Price v. Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 14AP-11, 2014-Ohio-3522, ¶ 9. "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. A duty arises when a risk is reasonably foreseeable. *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77 (1984).

{¶20} “Generally, an employer or principal is vicariously liable for the torts of its employees or agents under the doctrine of respondeat superior, but not for the negligence of an independent contractor over whom it retained no right to control the mode and manner of doing the contracted-for work.” *Clark v. Southview Hosp. & Family Health Ctr.*, 68 Ohio St.3d 435, 438, 1994-Ohio-519 (1994). “The Ohio Supreme Court has set out a test to distinguish an agency relationship (sometimes also referred to as a master-servant relationship) from an employer-independent contractor relationship: ‘Did the employer retain control of, or the right to control, the mode and manner of doing the work contracted for? If he did, the relationship is that of principal and agent or master and servant. If he did not but is interested merely in the ultimate result to be accomplished, the relationship is that of employer and independent contractor.’” *Title First Agency, Inc. v. Xpress Closing Serv., Inc.*, 10th Dist. Franklin No. 03AP-179, 2004-Ohio-242, ¶ 11, quoting *Council v. Douglas*, 163 Ohio St. 292 (1955), paragraph one of the syllabus.

{¶21} “In determining whether an employer has the degree of control necessary to establish agency, courts examine a variety of factors, including: whether the employer or individual controls the details of the work; whether the individual is performing in the course of the employer’s business rather than in an ancillary capacity; whether the individual receives compensation from the employer, and the method of that compensation; whether the employer or individual controls the hours worked; whether the employer or individual supplies the tools and place of work; whether the individual offers his services to the public at large or to one employer at a time; the length of employment; whether the employer has the right to terminate the individual at will; and whether the employer and individual believe that they have created an

employment relationship.” *Wright v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 14AP-153, 2014-Ohio-4359, ¶ 10. “Given the amount of factors involved, determining whether a relationship is that of principal and agent or employer and independent contractor requires an intensive factual inquiry.” *Id.* at ¶ 11, citing *Bostic v. Connor*, 37 Ohio St.3d 144, 146-7 (1998). Liability will not be imposed upon the department of rehabilitation and corrections for any negligence on the part of its contractor’s employees. *Hughes v. Ohio Dept. of Rehab. & Corr.*, 2005-Ohio-4462, Ct. of Claims No. 2004-08120, ¶ 7.

{¶22} Upon review of the evidence, the magistrate finds that credible evidence has been provided to show that it is more likely than not that an inmate worker was moving the cart through the dayroom when the ductwork fell. Specifically, the magistrate finds credible Fox’s testimony that an inmate worker pulled the third cart. The magistrate further finds that credible testimony was provided that inmate workers in the secure area of the institution loaded the ductwork on the cart.

{¶23} However, the magistrate also finds that The K Company was an independent contractor of defendant. Specifically, the preponderance of the evidence shows that defendant did not retain control of, or the right to control, the mode and manner of doing the HVAC work. Specifically, the evidence shows that defendant provided a CO to escort The K Company employees through the institution, but that defendant did not retain control over the mode and manner of how to load the cart with the ductwork, how to move the ductwork, or how to install the ductwork at the work site. Therefore, although the magistrate finds that an inmate worker pulled the cart through the dayroom, the magistrate also finds that The K Company employees were responsible for directing that inmate worker on how to load and move the cart. Thus, the magistrate finds that defendant is not liable for any alleged failure of ordinary care of The K Company employees, or the inmate workers who assisted The K Company

employees in the HVAC project at MCI. The magistrate further finds that defendant did not breach a duty of reasonable care and protection from a known risk to plaintiff.

{¶24} Plaintiff provided the deposition testimony of Inmate Rembert to show that defendant had notice of material falling off a cart prior to plaintiff's incident. However, the magistrate finds that Rembert's testimony was neither credible nor persuasive. Rembert could not recall what fell off a cart, and he did not personally witness the action that resulted in the loud noise that he stated that he heard. In the final analysis, the magistrate finds that plaintiff has failed to prove, by a preponderance of the evidence, that defendant breached any duty of care it owed to him. Accordingly, judgment is recommended in favor of defendant.

{¶25} *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).*

HOLLY TRUE SHAVER
Magistrate