

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Ron Foster,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 12AP-503
v.	:	(Ct.Cl. No. 2011-10771)
	:	
Ohio Department of Rehabilitation and	:	(ACCELERATED CALENDAR)
Correction,	:	
	:	
Defendant-Appellee.	:	
	:	

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D E C I S I O N

Rendered on March 12, 2013

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*Shaw & Miller, Douglas W. Shaw and Joseph J. Kunkel*, for appellant.

*Michael DeWine*, Attorney General, *James P. Dinsmore* and *Ashley L. Oliker*, for appellee.

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APPEAL from the Court of Claims of Ohio

DORRIAN, J.

{¶1} Plaintiff-appellant, Ron Foster ("appellant"), appeals from a judgment of the Court of Claims of Ohio granting summary judgment in favor of defendant-appellee, Ohio Department of Rehabilitation and Correction ("ODRC"). Appellant, who is a prisoner in the custody of ODRC, filed an action claiming that ODRC had been negligent in assigning him to an upper bunk and was liable to him for personal injuries he suffered when he fell from the upper bunk. The trial court concluded that there were no questions of material fact and that ODRC was entitled to judgment as a matter of law. For the following reasons, and consistent with this court's judgment in *Franks v. Ohio Dept. of*

*Rehab. & Corr.*, 195 Ohio App.3d 114, 2011-Ohio-2048 (10th Dist.), we reverse the trial court's entry of summary judgment and remand for further proceedings.

### **I. Facts and Case History**

{¶2} On September 1, 2011, appellant filed his complaint asserting a single cause of action in negligence. He claimed that ODRC forced him to use the top bunk in his cell at the Hocking Correctional Facility ("HCF") despite his having informed prison employees that sleeping on the top bunk was contrary to medical advice given him due to his various health problems, including a heart condition, a permanent back injury, and balance issues. He asserted that ODRC owed him a duty of care, that it breached that duty, and that, as a result, he suffered injuries, including a total loss of use of his right arm.

{¶3} ODRC timely filed an answer, denying the allegations of the complaint and asserting various defenses. It thereafter filed a motion for summary judgment pursuant to Civ.R. 56(B) and supported it with an affidavit of the institutional inspector at HCF, Alice Bartlett. In her affidavit, Bartlett testified that an HCF medical doctor, Dr. Asche, had issued a lower-bunk restriction for appellant for the approximate two-week period between August 17 and September 1, 2009. Bartlett further testified that Dr. Asche again evaluated appellant on September 2, 2009 but did not renew the lower-bunk restriction, and that, on September 3, 2009, a corrections officer ordered appellant to take his place on a top bunk. In addition, Bartlett stated that ODRC had no record that appellant fell on September 3, 2009.

{¶4} ODRC based its motion for summary judgment on the following three arguments: (1) the doctrine of discretionary immunity barred appellant's claim, as Dr. Asche's decision not to renew or extend appellant's lower-bunk restriction was a decision characterized by a high degree of discretion; (2) appellant's complaint sounded in medical malpractice and appellant had failed to provide the affidavit of merit required by Civ.R. 10(D)(2), failed to provide an expert's affidavit concluding that Dr. Asche had violated the appropriate professional standard of care, and failed to timely file expert medical reports within the deadline established by the trial court; and (3) to the extent that appellant's complaint is construed as stating ordinary negligence claims rather than medical claims, those ordinary negligence claims are barred under the precedent established in *Brown v. Dept. of Rehab. & Corr.*, 10th Dist. No. 10AP-790, 2011-Ohio-3652, which recognized that

discretionary immunity barred a tort claim against ODRC based on alleged negligence of prison staff.

{¶5} Appellant filed a memorandum in opposition to ODRC's motion for summary judgment supported by an affidavit executed by appellant. He stated that he was not certain of the exact date of his fall but that he did fall from an upper bunk on or about September 3, 2009. He testified that he had sustained several injuries to his back prior to his incarceration, resulting in his having obtained SSI (Social Security Supplemental Security Income) benefits; that he had informed ODRC officials of his inability to stay on an upper bunk; and that prison officials nevertheless forced him to use an upper bunk. He testified that he sustained injuries to his left arm in the fall, as well as to his hand, requiring surgery. In addition, he stated that the fall caused injury to his back, leaving him with difficulty in walking and standing for long periods of time.

{¶6} The sole evidence in the record before the trial court when determining ODRC's motion for summary judgment were the two affidavits described above.

{¶7} The trial court concluded that ODRC was entitled to summary judgment based on two conclusions of law. First, relying on *Brown*, the trial court determined that ODRC was entitled to discretionary immunity. Second, the trial court concluded that, to the extent that appellant's complaint asserted that Dr. Asche had acted negligently in refusing to extend appellant's lower-bunk restriction, that assertion constituted a medical claim of negligence, and appellant had failed to provide any expert evidence, by affidavit or otherwise, that Dr. Asche had failed to adhere to the required standard of care.

{¶8} Appellant timely appealed, asserting the following assignments of error:

I. The Court of Claims decision should be reversed because it erroneously styled and analyzed Appellant's claim as one of medical malpractice and failed to rule on his ordinary negligence claim.

II. The Court of Claims decision should be reversed because it erred in holding that the Appellee is entitled to discretionary immunity.

III. The Court of Claims decision should be reversed because there are genuine issues of material fact and Appellee was not entitled to judgment as a matter of law.

- a. The Court of claims erred in finding that there are no genuine issues of material fact.
- b. The Court of Claims erred in finding that the appellant is entitled to judgment as a matter of law.

## II. Legal Analysis

{¶9} Summary judgment is appropriate where "the moving party demonstrates that (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made." *Capella III, L.L.C. v. Wilcox*, 190 Ohio App.3d 133, 2010-Ohio-4746 (10th Dist.), ¶ 16, citing *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, ¶ 6. As this court stated in *Brown v. Dept. of Rehab. & Corr.*, 10th Dist. No. 10AP-790, 2011-Ohio-3652, ¶ 16:

The party seeking summary judgment bears the burden of informing the trial court of the basis for the motion and identifying portions of the record demonstrating an absence of genuine issues of material fact as to the essential elements of the non-moving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. Thereafter, the burden shifts to the non-moving party to show why summary judgment is inappropriate. Civ.R. 56(E). If the non-movant fails to respond, or fails to support its response with evidence of the kind required by Civ.R. 56(C), the court may enter summary judgment in favor of the moving party. *Snyder v. Ford Motor Co.*, 3d Dist. No. 1-05-41, 2005-Ohio-6415, ¶ 11; Civ.R. 56(E).

Moreover, "appellate review of summary-judgment motions is de novo." *Capella III*, citing *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 548 (2001). "De novo appellate review means that the court of appeals independently reviews the record and affords no deference to the trial court's decision." (Citation omitted.) *Holt v. State*, 10th Dist. No. 10AP-214, 2010-Ohio-6529, ¶ 9.

{¶10} We begin by addressing appellant's second assignment of error.

### A. Discretionary Immunity

{¶11} In his second assignment of error, appellant argues that the trial court improperly applied the doctrine of discretionary immunity to bar his claim.

**{¶12}** In July 2011, this court in *Brown* affirmed a decision of the Court of Claims applying the doctrine of discretionary immunity as to claims against ODRC for injuries sustained by an inmate in a fall from an upper bunk. Brown, an inmate in the custody of ODRC, had an inguinal hernia and had received a lower-bunk restriction in January 2007. In December 2008, the restriction expired, and prison officials ordered him to sleep in a top bunk. In April 2009, he fell from the top bunk and sustained injuries. ODRC claimed immunity, arguing that its decision regarding his bunk restriction was characterized by a high degree of official judgment or discretion.

**{¶13}** The trial court agreed that the doctrine of discretionary immunity barred Brown's claim, and we affirmed. We held that ODRC was entitled to immunity under R.C. 2743.02 as "the decision of the prison's medical personnel to allow [the inmate's lower-bunk] restriction to lapse without renewal was one that is characterized by the exercise of a high degree of discretion." *Brown* at ¶ 11. We further opined that "[a] decision whether to restrict an inmate to a lower bunk is necessarily one involving a substantial amount of official judgment." *Id.* at ¶ 11.

**{¶14}** In the case before us, the trial court, citing *Brown*, and reiterating the above-quoted text, concluded that "the decision of prison medical personnel to allow an inmate's bunk restriction to lapse without renewal is one that is characterized by the exercise of a high degree of discretion and one that necessarily involves a substantial amount of official judgment" and that ODRC "is entitled to discretionary immunity for Dr. Asches' decision not to renew [appellant's] bunk restriction." (Ct. of Claims May 8, 2012 Entry, at 4.)

**{¶15}** In reviewing the underpinnings of the discretionary immunity doctrine, however, we now find the analysis in *Brown* to be problematic.

**{¶16}** The seminal case involving the doctrine of discretionary immunity is *Reynolds v. State, Div. of Parole and Community Servs.*, 14 Ohio St.3d 68 (1984). The first paragraph of the syllabus of *Reynolds* provides:

The language in R.C. 2743.02 that "the state" shall "have its liability determined \* \* \* in accordance with the same rules of law applicable to suits between private parties \* \* \*" means that *the state cannot be sued for its legislative or judicial functions or the exercise of an executive or planning*

*function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion.* However, once the decision has been made to engage in a certain activity or function, the state may be held liable, in the same manner as private parties, for the negligence of the actions of its employees and agents in the performance of such activities.

(Emphasis added.) *Id.* at 68.

{¶17} In support of his argument against recognition of the discretionary immunity doctrine in this case, appellant cites a previous decision of the Court of Claims, *Stewart v. Ohio Dept. of Rehab. and Corr.*, Ct. Cl. No. 2000-12351, 2002-Ohio-5495. In *Stewart*, an inmate, who suffered from epileptic seizures and other medical conditions, fell from a top bunk after the expiration of a lower-bunk restriction. The Court of Claims found that, in assigning the inmate to an upper bunk, ODRC breached its duty of reasonable care owed an inmate.

{¶18} There was no appeal of the trial court's judgment in *Stewart*. Nevertheless, in *Brown* we distinguished *Stewart*. We observed that inmate Stewart's physical conditions were more serious, visually obvious, and of longer duration than those that Brown asserted. *Brown* at ¶ 13 (Brown did "not allege the same type of interminable, permanent disability like the inmate in *Stewart*," nor did he "allege the type of visually obvious deformity and paralysis" justifying a finding that prison officials were on notice of the inmate's need for a bunk restriction.).

{¶19} On re-examination, we do not find that distinction significant or relevant to a discretionary immunity analysis. Further, in examining our precedent, we find that the analysis of the discretionary immunity doctrine in *Brown* directly conflicts with that in *Franks*, a case we decided several months before our decision in *Brown*.

{¶20} In *Franks*, an inmate sued ODRC after he fell on a flight of stairs. ODRC had reassigned him to a third-floor cell, despite the inmate's protestations that he suffered from various physical conditions that made it difficult for him to climb stairs. In an attempt to secure a medical restriction that he be housed in a first-floor cell, the inmate had visited the prison infirmary and been examined by a nurse. The nurse, however, declined to issue a medical restriction.

**{¶21}** In *Franks*, we found that, "[u]nder the judicially created doctrine of discretionary immunity, ODRC is generally immune from tort liability for decisions relating to *policies and procedures which preserve internal order and maintain institutional security*." (Emphasis added.) *Id.* at ¶ 14. But, in *Franks*, we further observed there was "no indication that [ODRC's decision to assign the inmate to a third-floor cell] was made to preserve order or maintain security." *Id.* at ¶ 16. Accordingly, as a result of "engaging in the activities of reassigning appellant and refusing to issue a first-floor restriction, 'the state [could] be held liable, in the same manner as private parties.'" *Id.*, citing *Bugh v. Grafton Corr. Inst.*, 10th Dist. No. 06AP-453, 2006-Ohio-6641, ¶ 27 (ODRC decisions relative to inmate's use of special footwear and transportation to repeated medical appointments, thereby postponing needed surgery, were not subject to discretionary immunity doctrine). We expressly "refuse[d] to extend the judicially created doctrine of discretionary immunity" to inmate Franks' case. *Id.*

**{¶22}** Our holding in *Franks* was consistent with other precedent recognizing that discretionary immunity is appropriate only as to determinations of policy and procedures and that "[o]nce the decision has been made to engage in a certain activity or function, the state may be held liable, in the same manner as private parties, for the negligence of the actions of its employees and agents in the performance of such activities." *Reynolds* at paragraph one of the syllabus. Moreover, "the negligent implementation of a basic policy decision may also be actionable, even if such implementation allows state employees to exercise some degree of discretion." *Young v. Univ. of Akron*, 10th Dist. No. 06AP-1022, 2007-Ohio-4663, citing *Semadeni v. Ohio Dept. of Transp.*, 75 Ohio St.3d 128, 132 (1996).

**{¶23}** Indeed, many state employees are called upon to exercise a high degree of discretion while working. Were we to find that discretionary immunity applies every time a state employee exercises discretion in performing his or her job, we would be vastly expanding the scope of the discretionary immunity doctrine while simultaneously limiting the scope of the state's waiver of sovereign immunity from liability as established by the Court of Claims Act. R.C. 2723.02(A)(1). Accordingly, application of the discretionary immunity doctrine requires more than a finding that a state employee (such as Dr. Asche or the prison officials who assigned appellant to an upper bunk) made a decision that

required the exercise of a high degree of discretion—it requires a finding of the exercise of a high degree of official judgment or discretion as to an executive or planning function involving the making of a basic policy decision.

**{¶24}** Our interpretation of the discretionary immunity doctrine in *Brown* cannot be reconciled with our discussion of the doctrine in *Franks* nor with the precedent established by the Supreme Court of Ohio in *Reynolds and Semedini*. In view of that conflict, we today overrule *Brown* and follow the precedent established in *Franks, Reynolds, and Semedini*.

**{¶25}** Accordingly, ODRC is entitled to discretionary immunity only if the decision to assign appellant to an upper bunk constituted the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion. We do not distinguish between medical and non-medical claims in applying this criterion, which applies both to claims based on Dr. Asche's decision not to extend appellant's lower-bunk restriction and to claims based on the decision of non-medical HCF staff to thereafter assign appellant to an upper bunk. We specifically reject the premise that a bright-line rule exists that medical decisions made by a medical professional in a state prison facility fall within the scope of discretionary immunity simply because a medical professional exercised a high degree of professional judgment in making a discretionary medical decision.

**{¶26}** We acknowledge that prison officials have the responsibility of establishing and maintaining security within the institution and this may or may not involve establishing policies and procedures governing the assignment of prisoners to cells and bunks. Implementation of any such policies would necessarily be entrusted to employees at the prison level. In this case, however, ODRC did not demonstrate in support of its summary judgment motion that appellant's bunk assignment involved the exercise of an executive or planning function, such as prison security, involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion as described in *Reynolds*. Accordingly, ODRC did not establish that it was entitled to summary judgment.

**{¶27}** We therefore sustain appellant's second assignment of error.

## **B. Ordinary Negligence vs. Medical Malpractice Claim**

{¶28} The trial court concluded that "[t]o the extent that plaintiff argue[d] that Dr. Ashe improperly decided not to grant him a bunk restriction," appellant had stated a medical claim that could not withstand ODRC's motion for summary judgment. (May 8, 2012 Entry, at 4.) In his first assignment of error, appellant argues that the trial court erroneously characterized his complaint as asserting a claim of medical malpractice. Appellant argues that, irrespective of whether Dr. Ashe was negligent in refusing to extend his short-term lower-bunk restriction, other ODRC staff were negligent in deferring to Dr. Ashe's judgment concerning the safety of assigning appellant to an upper bunk. He argues that his complaint therefore stated a claim of ordinary negligence and that the trial court erred by not applying ordinary negligence principles in considering his claim. In substance, appellant challenges ODRC's argument that ODRC was entitled to summary judgment based on appellant's failure to comply with procedural burdens imposed on medical malpractice claims, e.g., proffer of an affidavit of merit, and an expert's affidavit—requirements that apply to medical claims but not to ordinary negligence claims.

{¶29} Appellant's complaint did allege conduct by ODRC staff members who "may have assisted or participated" in forcing him to use a top bunk. That complaint was broad enough to encompass claims of ordinary negligence by non-medical ODRC staff as well as claims of medical malpractice. In its written entry granting summary judgment, however, the trial court referenced only the decision-making of "Dr. Ashe" or "prison medical personnel." It did not mention appellant's claim of liability based on the conduct of non-medical prison staff despite the fact that appellant's complaint alleged conduct by ODRC staff members who "may have assisted or participated" in forcing him to use a top bunk.

{¶30} The trial court's written judgment entry expressly reflected consideration of the doctrine of discretionary immunity only in regard to the conduct of Dr. Ashe and did not analyze whether the doctrine extended to the decision-making of non-medical prison staff. The trial court did, however, enter complete summary judgment in favor of ODRC and may have done so because it believed that the discretionary immunity doctrine barred appellant's claim even if the claim sounded in common-law negligence as opposed to professional negligence, i.e., medical malpractice. Nevertheless, the trial court relied on

legal principles governing the adjudication of medical malpractice claims as an alternative justification for entry of summary judgment in favor of ODRC "to the extent" that the complaint could be construed as being based on the conduct of Dr. Asche. We therefore consider appellant's first assignment of error on the merits.

**{¶31}** The trial court correctly observed that a successful claim of medical malpractice is dependent upon proof of a violation by a medical professional of the standard of care owed a patient. "To prevail on a medical malpractice claim, a plaintiff must establish: (1) the existence of a standard of care within the medical community; (2) the defendant's breach of that standard; and (3) proximate cause between the medical evidence and the plaintiff's injuries." *Adams v. Kurz*, 10th Dist. No. 09AP-1081, 2010-Ohio-2776, ¶ 11. A medical malpractice claimant must provide proof of the recognized standard of care in the medical community through expert testimony. *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 131–32 (1976).

**{¶32}** Civ.R. 10(D)(2) requires that a medical claim falling within the definition of R.C. 2305.113 be accompanied by an affidavit of merit. Similarly, R.C. 2305.113(E)(3) defines a medical claim as being a claim asserted in a civil action "against a physician, podiatrist, hospital, home, or residential facility [or an employee or agent of the same], and that arises out of the medical diagnosis, care, or treatment of any person." Moreover, "a medical claim must both (1) arise out of the medical diagnosis, care, or treatment [of a person] and (2) be asserted against one of the statutorily enumerated medical providers." *Franks* at ¶ 8.

**{¶33}** In *Franks*, we recognized that the requirements of Civ.R. 10(D)(2) and R.C. 2305.113 apply in prison inmate medical claims. We concluded, however, that the Court of Claims had erred in granting summary judgment because ODRC had not alleged that it was a medical provider. The Court of Claims had therefore erred in concluding that the inmate had asserted a medical claim requiring the filing of an affidavit of merit.

**{¶34}** In the case at bar, ODRC failed to provide evidence, through affidavit or otherwise, that Dr. Asche had provided appellant with medical diagnosis, care, or treatment. Rather, ODRC's affidavit established only that Dr. Asche had (1) issued a short-term lower-bunk restriction that had lapsed, (2) had re-evaluated appellant at the time the restriction expired, and (3) had refused to renew the lower-bunk restriction.

Where a medical examination is conducted as a precondition to obtaining a benefit or to obtain information concerning a person's eligibility for a benefit, that examination is distinguishable from one occurring in the diagnosis, care or treatment of a person, as requisite to a medical claim. *Smith v. Katzman*, 81 Ohio App.3d 682, 686 (8th Dist.1992) (alleged negligence in conducting a medical examination for purpose of application for Social Security benefits was not a medical claim, citing *New York Cent. RR. Co. v. Wiler*, 124 Ohio St. 118 (1931) (alleged negligence in conducting a medical examination at direction of employer was not a medical malpractice claim).

**{¶35}** If appellant intended to prove that his lower-bunk restriction resulted from a physician-patient relationship between himself and Dr. Asche, and that Dr. Asche violated the requisite standard of care by refusing to issue a lower-bunk restriction, then, arguably, appellant stated a medical claim.<sup>1</sup> However, there is no allegation that ODRC or Dr. Asche are statutorily enumerated medical providers under R.C. 2305.113(D). Therefore, we believe that, as in *Franks*, it was "premature for the trial court to conclude that appellant has asserted a medical claim and [to] grant judgment on such a claim." *Id.* at ¶ 10.

**{¶36}** ODRC argued below that it was entitled to summary judgment based on appellant's failure to file an affidavit of merit and provide an expert's affidavit concerning the appropriate standard of medical care. To the extent that the complaint asserted non-medical claims, failure to provide an expert's affidavit or other evidence of the required professional standard of care did not justify entry of summary judgment. Similarly, appellant's failure to file with the court an affidavit of merit, which Civ.R. 10(D)(2) requires only for medical claims, does not justify dismissal of appellant's negligence claims based on the conduct of ODRC non-medical personnel.

**{¶37}** We therefore sustain appellant's first assignment of error to the extent that it challenges entry of summary judgment in favor of ODRC based on appellant's failure, at

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<sup>1</sup> We note that, during oral argument of this cause, appellant's counsel asserted that the complaint was not intended to assert a medical claim but, rather, a general negligence claim relative to HCF's assignment of appellant to an upper bunk.

this stage of the litigation, to provide an expert's affidavit concerning the appropriate standard of care.

### **C. Ordinary Negligence Analysis**

{¶38} In his third assignment of error, appellant contends that there are genuine issues of material fact as to whether the elements of ordinary, common-law negligence, exist in this case precluding entry of judgment as a matter of law. Because appellant asserts ordinary negligence, he was "required to demonstrate the existence of a duty, a breach of that duty, and an injury proximately caused by the breach. \* \* \* In regard to the custodial relationship between the state and its prisoners, the state owes a common-law duty of reasonable care and protection from unreasonable risks. \* \* \* 'However, the state is not an insurer of inmate safety and owes the duty of ordinary care only to inmates who are foreseeably at risk.' " (Citations omitted.) *Franks* at ¶ 12-13, citing *Woods v. Ohio Dept. of Rehab. & Corr.*, 130 Ohio App.3d 742, 745 (10th Dist.1998).

{¶39} We agree with appellant that, in its current procedural posture, this case is not appropriate for disposition of his ordinary negligence claims through summary judgment. ODRC did not argue below that appellant had failed to demonstrate the existence of the elements of an ordinary negligence claim, and appellant was therefore under no burden to produce evidence at the summary-judgment stage to support those claims. It would have been, therefore, inappropriate and premature for the trial court to have entered summary judgment in favor of ODRC on the basis of an argument that ODRC had not asserted in that court—that being that appellant had failed to demonstrate the existence of the elements of an ordinary negligence claim. Nor will we express an opinion on this matter in the absence of trial court consideration of the issue in the first instance.

{¶40} Rather, ODRC argued defenses that would preclude its liability as a matter of law irrespective of ODRC's alleged negligence, i.e., discretionary immunity and failure to comply with procedural requirements required by statute in connection with an action asserting medical claims. The trial court accepted these two legal arguments and entered summary judgment in favor of ODRC accordingly. We have determined, however, that neither the doctrine of discretionary immunity nor appellant's failure to comply with

procedural requirements imposed on medical claims justified entry of complete summary judgment in this case.

{¶41} Accordingly, we sustain appellant's third assignment of error to the extent that we recognize that ODRC has not yet argued to the Court of Claims that summary judgment should be granted based on the presence of genuine issues of material fact as to the existence of the elements of common-law negligence. Accordingly, ODRC was not entitled to entry of summary judgment on that basis.

### **III. Conclusion**

{¶42} We have determined that neither the doctrine of discretionary immunity nor appellant's failure to comply with procedural requirements required of medical malpractice claims justified entry of summary judgment in this case. The trial court therefore erred in entering summary judgment to ODRC on the basis of the arguments made by ODRC in the trial court in support of summary judgment. Moreover, the question of whether genuine issues of material fact exist as to a claim of ordinary negligence precluding judgment in ODRC's favor as a matter of law have not yet been presented to, or determined by, the trial court.

{¶43} We therefore sustain all three of appellant's assignments of error. Accordingly, we reverse the summary judgment entered by the Court of Claims in favor of defendant-appellee and remand this case to that court for further proceedings in accordance with law and consistent with this decision.

*Judgment reversed and cause remanded.*

KLATT, P.J., and CONNOR, J., concur.

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