[Cite as *Hawley v. Ohio Dept. of Rehab. & Corr.*, 2022-Ohio-651.]

ANDREA K. HAWLEY, et al. Plaintiffs v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION Defendant AND NANCY G. SCHULTZ, et al. Plaintiffs v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION Defendant	Case Nos. 2015-00042JD and 2015-00043JD Judge Patrick E. Sheeran DECISION

{¶1} On February 3, 2021, Plaintiffs filed objections to the magistrate's January 21, 2021 decision recommending judgment in favor of Defendant, Ohio Department of Rehabilitation and Correction (ODRC). For the reasons set forth below, the Court adopts the magistrate's decisions as its own.

Standard of Review

{¶2} Civ.R. 53(D)(4)(b) provides that, "[w]hether or not objections are timely filed, a court may adopt or reject a magistrate's decision in whole or in part, with or without modification." However, when a party files objections to a magistrate's decision, the 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} In reviewing the objections, the court does not act as an appellate court but rather conducts "a de novo review of the facts and conclusions in the magistrate's decision." *Ramsey v. Ramsey*, 10th Dist. Franklin No. 13AP-840, 2014-Ohio-1921, ¶ 17 (internal citations omitted). Objections "shall be specific and state with particularity all grounds for objection." Civ.R. 53(D)(3)(b)(ii). Additionally, they must be supported "by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if the transcript is not available." Civ.R. 53(D)(3)(b)(iii). When an objecting party fails to properly support her objections with 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.

Background

{¶4} Plaintiffs, Andrea Hawley and Nancy Schultz,[1] brought an action for negligence against Defendant arising from an incident that occurred while they were working as contract employees for HealthPro, Inc. in the pharmacy at the Ohio Reformatory for Women (ORW), which is operated by Defendant. Plaintiffs claim that, on February 4, 2010 while performing their usual job duties, they, along with several other employees and inmates of ORW, were exposed to an unknown substance which caused various injuries.

{¶5} The case proceeded to trial on the issue of liability before a magistrate of this Court.[2] At trial, Plaintiffs presented multiple theories as to the identity and their exposure to the substance that caused their injuries. First, Plaintiffs assert that they

[1] Plaintiffs' husbands, Jerome Hawley and Christopher Schultz, also brought claims of loss of consortium arising from the same incident; however, their claims are dependent upon the success of their spouses' claims. Therefore, "Plaintiffs" shall refer to Ms. Hawley and Ms. Schultz.

[2] Although the magistrate's decision states that the case proceeded to trial on the issues of liability and damages, the issues were bifurcated for trial. *See* March 6, 2019 Order of the Magistrate. Indeed, the February 24, 2020 trial only pertained to the issue of liability.

were exposed to toxic fumes, vapors, or chemicals that were present in the pharmacy where they were working. Alternatively, Plaintiffs suggest that their injuries could have been caused by an improper design and construction of the HVAC system in the building disseminating the hazardous substance in one of two ways. First, the system operated such that contaminated air originating in the food services area would be drawn directly into the system and redistributed throughout the building, thus circulating the unknown substance from the kitchen into the pharmacy area. Second, the system may have similarly introduced contaminated outside air into the internal system, thereby spreading the substance throughout the building.

{¶6} Following the trial, the magistrate recommended judgment in favor of Defendant because the evidence failed to establish that Defendant breached the duty of ordinary care owed to Plaintiffs. Moreover, the magistrate found that Plaintiffs neither identified any toxic chemical or hazardous substance that caused their injuries, nor did they offer sufficient evidence to establish that an act or omission by Defendant was the proximate cause of their injuries. Finally, the magistrate concluded that the doctrine of *res ipsa loquitur* did not apply to infer that their injuries were the proximate cause of Defendant's negligence because Plaintiffs did not establish that their injuries ordinarily would not have occurred if Defendant had exercised reasonable care under the circumstances.

{¶7} In total, Plaintiffs make nine objections to the magistrate's decision. Plaintiffs argue that the magistrate erred when he made the following factual findings: (1) Mark Smith, ORW's Health and Safety Coordinator, "testified that he did not detect any unusual or noxious odors in or near the building"; (2) Plaintiffs' fellow employees who were "working in the same area remained conscious and suffered no immediate or lasting effects"; and (3) Dr. Joliff's expert opinion was credible when he opined that the Plaintiffs' symptoms "were not of the type typically caused by any toxic exposure, but rather are indicative of the body's natural response to stressful situations".

Furthermore, Plaintiffs contend that the magistrate erred when he made the following legal conclusions: (1) Plaintiffs cannot show that their injuries ordinarily would not have occurred if Defendant had exercised reasonable care under the circumstances; (2) the doctrine of *res ipsa loquitur* did not apply; (3) Plaintiffs offered insufficient evidence to show that the presence of any harmful substance assumed to be present in the pharmacy was a proximate cause of their alleged injuries; (4) the events of February 4, 2010 could have been the result of a reason other than Defendant's negligence; and (5) Plaintiffs failed to show that a deviation in the HVAC system plan resulted in any defect that "would constitute a breach of Defendant's duty to maintain the premises in a reasonably safe condition." In their sixth objection, Plaintiffs argue that the magistrate erred when he failed to find that Defendant breached its duty of care, pursuant to R.C. 4101.11, to "furnish employment which is safe for the employees" and "to do every other thing reasonably necessary to protect the life, health, safety and welfare of such employees and frequenters".

Discussion

Objections to Factual Findings

{¶8} Plaintiffs argue the magistrate erred when he concluded that Mark Smith, ORW's Health and Safety Coordinator, "did not detect any unusual or noxious odors in or near the building". The Court disagrees. While the magistrate was correct that Smith testified that he did not detect any unusual or noxious odors in or near the building, the Court notes that Smith also confirmed that he included in his incident report that "therewas an odor, but nothing noticeable." Smith testified that the odor he referenced in his report may have been the rubbing alcohol that Plaintiff Schultz used to clean the floor in the pharmacy. He additionally stated that, while checking every room to make sure it was evacuated, he did not wear any face covering and he neither felt any effects nor subsequently began feeling ill. Upon a de novo review, it is clear that Smith did not

smell any odors that he believed to be a toxic fume or gas during his evacuation. Thus, the Court finds no error with the magistrate's factual finding.

{¶9} Plaintiffs also object to the magistrate concluding that Plaintiffs' fellow employees who were "working in the same area remained conscious and suffered no immediate or lasting effects". Specifically, Plaintiffs argue that, in addition to Plaintiffs,

> three other pharmacy technicians were exposed to the toxic fumes on February 4, 2010 while working in the pharmacy area of the Reformatory. Samantha Easton [*sic*] and Judy Pendleton [*sic*] were exposed but not transported for emergency treatment. Debbie Basinger was exposed and treated at the emergency room. Eight other personnel located throughout the medical building were exposed and transported for emergency room treatment.

The Court disagrees. Plaintiffs' argument requires the Court to assume Plaintiffs, Easton, Pendleton, Basinger, and eight additional personnel were exposed to toxic fumes, which is not supported by the evidence. The Court agrees that Plaintiffs were the only two who experienced a sudden onset of symptoms, while the fellow employees in that area remained conscious. Additionally, while there are accounts in the record of the fellow employees looking sick, feeling dizzy or nauseous, and/or going to the hospital, the Court also agrees that there is no evidence that they suffered lasting effects.

{¶10} To the extent that the magistrate mischaracterized some of the injuries experienced when concluding that Plaintiffs' co-workers in the same area suffered no "immediate effects", the Court finds it was a harmless error and he did not misapprehend any of the facts presented. The magistrate was making a distinction between the syncopal episodes that Plaintiffs experienced and the less severe symptoms that others working in the same area experienced. Furthermore, this characterization of the injuries was not material to the magistrate's conclusion that the

doctrine of *res ipsa loquitur* did not apply. Despite Plaintiffs admitting they could not identify a gas, fume, vapor, or chemical that they were exposed to, the magistrate hypothetically assumed that a harmful substance was present in the pharmacy causing Plaintiffs' injuries before concluding that they offered insufficient evidence to show that the same outcome would not have occurred if Defendant had exercised ordinary care. Therefore, the Court finds no error with the magistrate's factual finding.

{¶11} Lastly, Plaintiffs argue the magistrate erred when he concluded that Dr. Jolliff's expert opinion was credible when he opined that Plaintiffs' symptoms "were not of the type typically caused by any toxic exposure, but rather are indicative of the body's natural response to stressful situations". Plaintiffs specifically argue that Dr. Jolliff's opinion was not supported by the trial testimony and evidence because he was not furnished any medical information or "incident reports from the eleven treated in the emergency room other than those of the Plaintiffs" and "had no history as to whether these individuals experienced any fumes, or odors, or gasses or what their individual symptoms and complaints were." The Court disagrees.

{¶12} Prior to rendering an opinion, Dr. Jolliff had reviewed, among other things, Plaintiffs' medical records as well as the Material Safety Data Sheets which listed the chemicals that were near the pharmacy. Additionally, Dr. Jolliff rendered his opinion while assuming that several individuals were transferred to the hospital with "loss of consciousness, dizziness, headache, metallic taste in mouth, blurred vision, elevated heart rate, and elevated blood pressure". Plaintiffs take issue with the fact that chestpain and burning in the eyes, nose, and throat were not included among the symptoms described, arguing this renders Dr. Jolliff's opinion unreliable. However, in addition to his knowledge and experience as a toxicologist, Dr. Jolliff referenced a 2000 New England Journal of Medicine article studying "mass psychogenic illness" affecting 186 patients after experiencing a "gasoline-like smell" in a teacher's classroom. Despite no toxin ever being found, some of the reported symptoms included "headaches, dizzy,

nausea, chest tightness, difficulty breathing, sore throat, burning eyes, cough[,]" shortness of breath, and metallic taste. Furthermore, Plaintiffs had the opportunity to cross-examine Dr. Jolliff at trial as to his lack of knowledge about the other eleven injured, and they did not. Therefore, the Court finds no error with the magistrate finding that Dr. Jolliff's expert opinion was credible. *See Siegel v. State*, 28 N.E.3d 612, 2015-Ohio-441, ¶ 12 (10th Dist.) ("'* * * the trial court may appropriately give weight to the magistrate's assessment of witness credibility in view of the magistrate's firsthand exposure to the evidence * * *'".).

{¶13} Accordingly, the Court OVERRULES Plaintiffs' objections to the magistrate's factual findings.

Objections to Legal Conclusions

{¶14} Plaintiffs' first four objections take issue with the magistrate's analysis when determining whether the doctrine of *res ipsa loquitor* applies to the facts of this case. Literally translated from Latin, *res ipsa loquitor* means "the thing speaks for itself." *Hickey v. Otis Elevator Co.*, 163 Ohio App.3d 765, 2005-Ohio-4279, 840 N.E.2d 637, ¶ 23 (10th Dist.). In order to infer Defendant's negligence from the factual circumstances surrounding the injury, Plaintiffs must provide evidence sufficient "to support two conclusions: (1) That the instrumentality causing the injury was, at the time of the injury, or at the time of the creation of the condition causing the injury, under the exclusive management and control of the defendant; and (2) that the injury occurredunder such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed." *Id.* at ¶ 24, quoting *Hake v. Wiedemann Brewing Co.*, 23 Ohio St.2d 65, 66, 262 N.E.2d 703 (1970). However, the doctrine of *res ipsa loquitor* does not apply if the court can reasonably infer that the injury could be due to a cause or causes other than defendant's negligence. *Id.* at ¶ 25, quoting *Jennings Buick, Inc. v. Cincinnati*, 63 Ohio St.2d 167, 172, 406 N.E.2d 1385 (1980). The magistrate found that the doctrine of *res ipsa loquitor* did not apply to the

facts of this case because the events that occurred on February 4, 2010 could be attributed to a reason other than Defendant's negligence and Plaintiffs could not establish that their injuries would not have occurred if Defendant had exercised ordinary care. Upon de novo review, the Court agrees.

{¶15} Specifically, Plaintiffs argue that requiring them to identify the specific toxin that caused their injuries is an impossible burden. The Court is not persuaded by this argument because the magistrate imposed no such burden when reaching his conclusion. Despite Plaintiffs admitting they could not identify a specific toxin and the various testing performed showed no toxin was detected, the magistrate still hypothetically assumed Plaintiffs' injuries were caused by a harmful substance when finding that they failed to present evidence sufficient to establish Defendant's negligence was the proximate cause of their injuries. Additionally, although Plaintiffs claim the improperly constructed HVAC system was the cause for disseminating the inferred harmful toxin, they offer insufficient proof to conclude that such a substance ever circulated through the HVAC system. Indeed, "[t]he doctrine of *res ipsa loquitor* does not supply proof that the instrumentality caused the plaintiff's injuries; rather, such proof of causation is a prerequisite to application of the doctrine * * *." *Hickey* at ¶ 27. Therefore, the Court finds the magistrate appropriately applied the law.

{¶16} Plaintiffs' fifth and sixth objections take issue with the magistrate's analysis when determining whether Defendant breached a duty owed to Plaintiffs. First, Plaintiffs argue that the magistrate erred when finding that Plaintiffs failed to show that a deviation in the HVAC system plan resulted in any defect that "would constitute a breach of Defendant's duty to maintain the premises in a reasonably safe condition." The Court disagrees. Although Plaintiffs' expert architect opined that the HVAC system was improperly constructed because the air-handling units were allegedly less than ten feet apart, he also acknowledged that he took no actual measurements of the distance between them. Even assuming the air-handlers were improperly constructed, Plaintiffs

have offered insufficient evidence to conclude that Defendant failed to maintain the premises in a reasonably safe condition.

{¶17} Indeed, Defendant was neither responsible for the design and construction of the HVAC system nor ensuring the HVAC system was properly installed when it took possession of the building. Additionally, the maintenance manager at ORW testified that preventative maintenance was routinely performed on the HVAC system and had been performed in January 2010 during which no issues were discovered. Therefore, the Court finds the magistrate appropriately applied the law. For the same reasons, the Court is not persuaded by Plaintiffs' argument that the magistrate erred in failing to find that Defendant breached its duty of care, pursuant to R.C. 4101.11, to "furnish employment which is safe for the employees" and "to do every other thing reasonably necessary to protect the life, health, safety and welfare of such employees and frequenters".

{¶18} Accordingly, the Court OVERRULES Plaintiffs' objections to the magistrate's legal conclusions.

Conclusion

{¶19} For the reasons stated above, the Court finds that the magistrate properly determined the factual issues and appropriately applied the law. Consequently,Plaintiffs' objections are OVERRULED. The Court adopts the

magistrate's decision and recommendation as its own, and judgment shall be rendered in favor of Defendant.

PATRICK E. SHEERAN
Judge

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{¶20} The Court finds that the magistrate properly determined the factual issues and appropriately applied the law. Consequently, Plaintiffs' objections are OVERRULED. The Court adopts the magistrate's decision and recommendation as its own, and 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.

PATRICK E. SHEERAN
Judge

Filed January 10, 2022
Sent to S.C. Reporter 3/7/22