

[Cite as *Short v. Ohio Dept. of Rehab. & Corr.*, 2017-Ohio-1127.]

JOSHUA SHORT

Plaintiff

v.

OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION

Defendant

Case No. 2014-00755

Magistrate Robert Van Schoyck

DECISION OF THE MAGISTRATE

{¶1} Plaintiff brought this action for negligence alleging that he was struck and injured by glass fragments as a result of a corrections officer breaking a window at the Southeastern Correctional Institution (SCI) on August 18, 2013, at which time plaintiff was an inmate in the custody and control of defendant. The issues of liability and damages were bifurcated, trial was held on the issue of liability, and the magistrate recommended judgment in favor of plaintiff. The court adopted the magistrate's decision and entered judgment accordingly. The case then proceeded to trial on the issue of damages.

{¶2} As was previously established during the liability phase of trial, plaintiff's face was inches away from the window when an officer on the other side struck and broke the window. At the damages phase of trial, plaintiff testified that when the window broke, glass shattered directly into his face and he immediately fell to the ground. Plaintiff stated that he realized he was bleeding from a cut on his face and he felt a burning sensation in his right eye. Plaintiff recalled being startled and feeling scared, and that it was another 10 to 15 minutes before someone unlocked the room where this occurred. Plaintiff recounted that once the room was unlocked, photographs were taken of his face and of the scene, and he was escorted to the infirmary, where he was examined by a nurse and his right eye was rinsed out. According to plaintiff, the nurse

told him that he had abrasions on the white part of his right eye and needed to go to an outside hospital, pending approval from the institutional doctor.

{¶3} SCI Health Care Administrator Dino Cardaras, R.N., though he never examined plaintiff himself, was familiar with plaintiff's medical records, and he testified that the Medical Exam Report and other documentation prepared by the nurse reflect that the institutional doctor, Dr. Estis, was not at SCI at that time, so the nurse telephoned Dr. Estis, who ordered that plaintiff be sent out to the local emergency room. (Joint Exhibits 1 & 4; Damages Trial.) Plaintiff testified that he was transported to the emergency room at Fairfield Medical Center in Lancaster. Plaintiff stated that he still felt a burning sensation in the eye at that time. Plaintiff recalled a doctor examining the eye, putting dye in the eye to perform a test, and rinsing the eye out. Plaintiff stated that when he was discharged back to SCI later that day, he still felt a burning sensation in the eye, but he understood that the doctor at Fairfield Medical Center had recommended that he see an optometrist within the next 48 hours. Cardaras authenticated medical records from plaintiff's visit to the emergency room. (Joint Exhibits 2 & 3; Damages Trial.) Among other things, the discharge summary and instructions show that plaintiff was prescribed gentamicin antibiotic ointment to apply in the eye four times a day for the next three to four days, and it was advised that after one hour plaintiff could remove an eye patch that he was apparently wearing.

{¶4} Plaintiff testified that he was admitted into the infirmary at SCI when he returned, and he remained there overnight until a physician could see him the next morning. Cardaras authenticated a copy of an order approved over the telephone by Dr. Estis that evening to admit plaintiff to the infirmary for observation. (Joint Exhibit 4; Damages Trial.) Cardaras also authenticated copies of assessments prepared by the nurses observing plaintiff in the infirmary. (Joint Exhibit 6; Damages Trial.) According to a note written in an assessment by Nurse Alexis Wilson at 10:30 p.m., the eye patch was removed, plaintiff complained of burning in the eye, the sclera or white part of the

eye was observed to be reddened and watery, and there was a superficial abrasion observed to the right side of the right eye. According to an assessment by Nurse Janelle Hanson at 6:20 a.m. the following morning, the sclera was again noted to be red and plaintiff complained of burning, but he denied any vision difficulty.

{¶5} Plaintiff stated that he saw Dr. Estis the morning of August 19, 2013, and there is a progress note corresponding to this examination. (Plaintiff's Exhibit 15, p. 66; Damages Trial.) Plaintiff testified that he complained of pain and blurred vision in the eye, and he recalled that Dr. Estis gave him a container of gel to apply in the eye, and once the visit was over he was discharged from the infirmary. Cardaras authenticated a set of progress notes that Dr. Estis prepared during the examination, in which Dr. Estis noted several normal findings relating to the eye and noted that plaintiff did not complain of any visual problems, but Dr. Estis did note an abrasion on the face near the eye, and the plan of care was to continue the gentamicin ointment for three days, with no follow-up required. (Joint Exhibit 5; Damages Trial.) Cardaras also authenticated a copy of the order from Dr. Estis to discharge plaintiff from the infirmary at 9:00 a.m. that morning. (Joint Exhibit 4; Damages Trial.)

{¶6} Plaintiff testified that he continued to experience problems with the eye, though, that prompted him to seek further care. Indeed, as related by Cardaras, progress notes show that toward the end of that same day when plaintiff was released from the infirmary, August 19, 2013, an officer in plaintiff's dormitory contacted the medical department and notified Nurse Wilson that plaintiff was complaining of eye irritation, and Wilson wrote that plaintiff would be signed up for a "nurse's sick call" appointment. (Joint Exhibit 5, p. 69; Damages Trial.) Cardaras testified that there is a progress note one day later, on August 20, 2013, by Nurse Peggy Hunter, documenting that she saw plaintiff for his eye complaints, and that she reviewed with him the discharge instructions issued by Fairfield Medical Center, including that he was to apply a cool compress for discomfort and was not to rub the eye, and also that she

demonstrated to plaintiff how to apply his eye ointment. (Joint Exhibit 5, p. 69; Damages Trial.) As Cardaras explained, Hunter's progress note also states that an order would be made to refer plaintiff for an optometry appointment, and there is a separate order from Dr. Estis, also dated August 20, 2013, approving the referral. (Joint Exhibit 4, p. 51; Damages Trial.)

{¶7} Cardaras testified that a progress note by Nurse Brandi Miller dated August 23, 2013, but which actually appears to have been written near the end of the day on August 22, 2013, documented that Miller saw plaintiff at his request due to complaints that he felt his eye was getting worse and that he thought there "might still be glass present" in the eye. (Joint Exhibit 5, p. 69; Damages Trial.) Cardaras related that a corresponding Medical Exam Report prepared by Miller included plaintiff's complaints of more redness and burning in the eye, and a spot in his field of vision. (Joint Exhibit 5, p. 86; Damages Trial.) In the Medical Exam Report, Miller wrote that she observed some redness and irritation in the eye, and that it was watery, but that there was no glass present. Additionally, Miller observed that there was a small scratch on the face, near the eye, and that it was "healing well." Miller also wrote that she flushed the eye, gave plaintiff eye drops and a cold compress, and that she signed plaintiff up for a doctor's sick call appointment. As Cardaras testified, there is a progress note showing that Dr. Estis saw plaintiff on the morning of August 23, 2013, and documented plaintiff's complaints of worsening problems with the right eye, including irritation and a black spot in his field of vision, such that he wanted to be sent out to the emergency room or to see an ophthalmologist. (Joint Exhibit 5, pp. 69 & 67; Damages Trial.) The assessment by Dr. Estis in the progress note was that plaintiff had conjunctivitis, but that from his examination the eye was "basically unchanged." In a separate order corresponding to this visit, Dr. Estis ordered a seven-day supply of Maxitrol eye drops for plaintiff and he scheduled a follow-up appointment for August 28, 2013. (Joint Exhibit 4, p. 50; Damages Trial.)

{¶8} Cardaras also testified about an August 25, 2013 nursing assessment form completed by Nurse Dave Woolsey. (Joint Exhibit 8; Damages Trial.) As Woolsey recorded, when he saw plaintiff that day, plaintiff complained that the eye burned, had blurred vision, and was sensitive to light. Woolsey's note provided that plaintiff was already scheduled for the follow-up appointment with Dr. Estis, that plaintiff was given some instruction about how to care for an eye injury, and that an eye patch was ordered for him.

{¶9} As Cardaras related, in the progress note corresponding to plaintiff's August 28, 2013 follow-up appointment with Dr. Estis, it was noted that plaintiff was adamant that his eye was getting worse. (Joint Exhibit 5, pp. 67 & 66; Damages Trial.) Dr. Estis again wrote that his assessment was conjunctivitis, this time calling it "possibly traumatic," and Dr. Estis wrote that he advised plaintiff to wear an eye patch at all times until he felt better and to not rub the eye. It was also noted that in addition to Maxitrol, plaintiff had Naphcon-A and Liquid Tears eye drops, which were confiscated at the appointment; furthermore, a follow-up appointment was set for September 6, 2013, and it was noted that plaintiff was to have an optometry appointment as well. Cardaras stated that there is a separate order dated August 28, 2013, to order a box of gauze eye patches for plaintiff. (Joint Exhibit 4, p. 50; Damages Trial.) Plaintiff testified that he never received those eye patches, though, and was eventually told by staff that they were misplaced or thrown out.

{¶10} A progress note dated September 4, 2013, documented that plaintiff was complaining of eye pain again and wanted to be seen that evening, but another note from the following day pointed out that he was already scheduled for his follow-up appointment with Dr. Estis on September 6, 2013. (Joint Exhibit 5, p. 65; Damages Trial.) As Cardaras related, in the progress note corresponding to that follow-up appointment, Dr. Estis wrote that plaintiff complained of having a headache the day before as well as the eye having blurred vision and some sensitivity to light, or

photophobia, but that plaintiff admitted the eye was improving. (Joint Exhibit 5, p. 65; Damages Trial.) Dr. Estis observed, among other things, that the sclera was no longer injected. The assessment of Dr. Estis at that time was “resolving eye trauma,” and his plan of care was for plaintiff to wear an eye patch as needed and to follow up with an optometry appointment.

{¶11} Scott Wolf, O.D. testified by way of deposition.¹ (Defendant’s Exhibit A; Damages Trial.) Dr. Wolf testified that he has been licensed to practice optometry in the state of Ohio since 2002. Dr. Wolf explained that he has worked in private practice since that time and continues to do so, but since 2013 he has also been working under a subcontract to provide optometric care at seven correctional institutions operated by defendant, including SCI. According to Dr. Wolf, he visits each of those institutions once or twice a month and sees 25 to 32 inmates per visit.

{¶12} Dr. Wolf testified that plaintiff was referred to him for an appointment that occurred at SCI on September 10, 2013, as documented in a progress note and a report that he made during the examination, although he stated that he has no independent recollection of plaintiff. (Joint Exhibit 5, p. 65 & Joint Exhibit 9; Damages Trial.) Dr. Wolf was not certain whether, at the time of the appointment, he had reviewed the medical records associated with the care and treatment plaintiff received for the eye, but he did offer some testimony to explain the terminology and care reflected in those records.

{¶13} From the emergency room records of plaintiff’s visit to Fairfield Medical Center on August 18, 2013, Dr. Wolf explained the various types of examination and testing that was performed there and that there was not reported to be any indication of a foreign body, abrasion, or infection in the eye at that time. Dr. Wolf could not identify what type of doctor it was who examined plaintiff in the emergency room. To the extent

¹The objection raised in the deposition transcript at page 25/line 11 is OVERRULED; the objection raised at page 45/line 4 is SUSTAINED.

that the emergency room discharge records reflect that plaintiff was to use gentamicin, Dr. Wolf explained that this is a prescription antibiotic ointment used to treat a bacterial infection of the eye, and it may be used as a precautionary measure without an actual finding of infection.

{¶14} With respect to the progress notes from plaintiff's August 19, 2013 visit with Dr. Estis, Dr. Wolf explained that the findings recorded by Dr. Estis were normal, such as the movement of the eye, the appearance of the pupil and its reaction to light, and the absence of injection in the sclera, but that Dr. Estis' assessment of plaintiff's status at that time was "post foreign body exposure." As Dr. Wolf explained, the progress notes from plaintiff's August 23, 2013 visit with Dr. Estis recorded that by that time there was some mild injection to the sclera, meaning there was some redness to the outer edge of the white part of the eye, and it was the assessment of Dr. Estis that plaintiff had conjunctivitis. According to Dr. Wolf, conjunctivitis is a broad term for any infection, inflammation, or irritation to the eye, and there are numerous reasons why it may occur. Insofar as Dr. Estis ordered Maxitrol eye drops at that time for plaintiff, Dr. Wolf testified that this is a prescription steroid and antibiotic that is used to treat inflammation and bacterial infection. Regarding the other products that Dr. Estis noted were in plaintiff's possession at that time, Dr. Wolf testified that Naphcon-A is an over-the-counter antihistamine that is typically used to treat allergic conjunctivitis and Liquid Tears is an over-the-counter artificial tear that is widely used to treat dry eyes.

{¶15} Dr. Wolf explained that at his own appointment with plaintiff on September 10, 2013, he noted in his report the history plaintiff related to him about the right eye, and noted plaintiff's complaints that the eye had blurry vision, was painful, and was bothered by exposure to the sun. Dr. Wolf testified that, based upon what he wrote in his report, he found a "2-3 inch hair swirled up" in the eye. Plaintiff, who testified that he specifically remembered Dr. Wolf examining him and telling him that he found a hair beneath the eyelid, stated that Dr. Wolf did not show him the hair and that he does not

believe there actually was a hair under the eyelid. Dr. Wolf otherwise testified that the cornea, iris, and colored part of the eye were normal, and the layer over the white part of the eye, where conjunctivitis may form, was normal as well. Dr. Wolf stated that he measured plaintiff's visual acuity in the left eye at 20/40, and in the right eye at 20/50, and overall it appeared plaintiff was nearsighted in both eyes and had some astigmatism in the left eye. Dr. Wolf also stated that he attempted to perform a fundus examination to look at the inside of the eye and check the retina, but plaintiff was too photophobic for him to do so. Indeed, plaintiff testified that he remembered talking with Dr. Wolf about his right eye having a heightened sensitivity to light since the accident. Plaintiff stated, though, that other than recommending that he wear eyeglasses, Dr. Wolf told him the eye appeared to be normal.

{¶16} As described by Dr. Wolf, inflammation in the eye is a potential cause of photophobia, and the inflammation can result from various causes. Dr. Wolf explained that in an inflamed eye, when the pupil adjusts with exposure to bright light and dim light, the movement of the pupil causes the eye to be sensitive and to hurt. Dr. Wolf testified that there is no definitive way to test whether a complaint of photophobia is valid, as opposed to malingering. According to Dr. Wolf, an underlying cause for photophobia, such as inflammation, may be treated, but otherwise wearing sunglasses is essentially all that a patient can do to mitigate photophobia.

{¶17} Dr. Wolf related that, from what he wrote in his report, his assessment was that plaintiff was either malingering or actually had some impairment in the right eye, but he was not confident one way or the other. Dr. Wolf stated that the plan of care was to prescribe Maxitrol eye drops for plaintiff to use twice a day in the right eye and to refer plaintiff to defendant's Franklin Medical Center in Columbus for further evaluation.

{¶18} As Dr. Wolf testified, the September 10, 2013 appointment appears to have been the only time that he saw plaintiff. Dr. Wolf stated, however, that there are also progress notes and a consultation request dated October 8, 2013, which reflect that

plaintiff was scheduled to see him again on that date but “refused” the appointment. (Joint Exhibit 5, p. 65 & Joint Exhibit 10; Damages Trial.) It was plaintiff’s testimony, though, that he never refused, nor was he aware of failing to attend, any such appointment. Regarding plaintiff’s whereabouts at that time, the progress notes include an entry dated October 5, 2013, noting that the medical department received notice that plaintiff was being placed in segregation, just three days prior to the appointment that he purportedly refused. (Joint Exhibit 5, p. 65; Damages Trial.)

{¶19} Plaintiff testified that he continued to have complaints with his right eye, including photophobia and the burning sensation, the latter of which persisted for several months after the accident. Plaintiff vaguely testified that he told some unidentified nurses about his complaints, but that he received no more care or treatment. Plaintiff stated that when defendant transferred him to the London Correctional Institution in June 2014, his recollection is that he still had some residual burning in the eye, and certainly photophobia, but that he did not seek any further attention for the eye at that institution because he had concluded that defendant was not going to do anything more for him.

{¶20} As plaintiff related, he was released from prison and returned home to Butler County in April 2016, and later that month he visited a local optometrist to whom he related his history and his complaint of photophobia. A copy of the examination record from that visit was attached as Exhibit E to Dr. Wolf’s deposition transcript. (Defendant’s Exhibit A; Damages Trial.) As stated by Dr. Wolf, who interpreted the terminology in the document, the optometrist who saw plaintiff at that visit gave him an examination and informed him that he could improve the visual acuity in both eyes by wearing eyeglasses, but that eyeglasses would not improve photophobia, for which it was recommended that he wear sunglasses whenever he was outdoors. The examination record also includes an assessment recommending that plaintiff seek specialized attention relating to his reported history of eye trauma. Plaintiff testified that

in the approximately four months between that visit and the damages trial, he had not seen any other providers. According to plaintiff, he never wore corrective lenses or had any vision problems at all, including sensitivity to light, prior to the accident. Although the burning sensation and other problems with the right eye resolved over time, plaintiff stated, that eye remains sensitive to bright light.

{¶21} “In order to sustain an action for negligence, a plaintiff must show the existence of a duty owing from the defendant to the plaintiff or injured party, a breach of that duty, and that the breach was the proximate cause of resulting damages.” *Sparre v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 12AP-381, 2013-Ohio-4153, ¶ 9. “As a general rule, the appropriate measure of damages in a tort action is the amount which will compensate and make the plaintiff whole.” *N. Coast Premier Soccer, LLC v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 12AP-589, 2013-Ohio-1677, ¶ 17. “[D]amages must be shown with reasonable certainty and may not be based upon mere speculation or conjecture * * *.” *Rakich v. Anthem Blue Cross & Blue Shield*, 172 Ohio App.3d 523, 2007-Ohio-3739, ¶ 20 (10th Dist.).

{¶22} Upon review of the evidence presented at trial, the magistrate finds as follows. Plaintiff was hit in the face and cut by shattered glass and it is more probable than not that glass came into contact with the right eye. Given the sudden, shocking nature of what happened, and plaintiff’s face being just inches away from the window when it was broken, plaintiff was startled and scared. Moreover, plaintiff felt a painful burning sensation in his right eye and he realized he was bleeding. Plaintiff remained locked in the room, though, for several minutes afterward, prolonging his suffering and preventing him from seeking any medical attention for his injuries. The initial moments after the accident were anguish-inducing.

{¶23} When plaintiff was examined afterward by a nurse, his discomfort was such that he felt there were glass fragments in his eye. After the nurse flushed his eye and he was transported to the emergency room, where he had to undergo various tests, he

continued to feel a painful burning sensation in the eye. Plaintiff spent that night in the infirmary, still in pain, and nurses noted his eye was red. The next morning, plaintiff's vision was blurry and he was still in pain. After returning to his dormitory later that day, on August 19, 2013, plaintiff's eye was irritated such that he sought out further attention, and only when he saw a nurse one day later was a referral ordered for him to see an optometrist, but it would still be three weeks until he actually got to see the optometrist. In the interim, plaintiff continued to feel pain and suffer worrisome symptoms.

{¶24} On August 22, 2013, plaintiff still felt that he might have a glass fragment in his eye and that the eye was getting worse, and his eye was objectively found to be "very irritated." On August 23, 2013, he saw a black spot in his field of vision, the eye was irritated and had developed conjunctivitis, and he was concerned enough that he asked to be sent out to an emergency room or specialist. On August 25, 2013, the eye burned, had blurred vision, and was sensitive to light. On August 28, 2013, plaintiff adamantly felt the eye was worsening. On September 4, 2013, the eye was painful enough that plaintiff tried again to see a nurse, unsuccessfully. Finally, on September 6, 2013, there was some improvement and the redness was gone, but there was still some blurred vision and sensitivity to light.

{¶25} When plaintiff saw the optometrist, Dr. Wolf, on September 10, 2013, he still had some complaints of blurred vision, pain, and sensitivity to light. The optometrist referred plaintiff to Franklin Medical Center for further evaluation of his complaints, but for reasons that were not established at trial, this never happened. In spite of the records stating that plaintiff "refused" to attend a later appointment with Dr. Wolf, plaintiff was credible in stating that he never refused any appointment, and indeed it appears that he was confined in segregation at that time. Plaintiff received no further care for the eye from defendant, but on the other hand evidence of plaintiff seeking out any further care is lacking.

{¶26} Overall, in addition to the distress plaintiff experienced when the accident occurred, he continued to experience several painful and worrisome symptoms in the days and weeks that followed which would bring about significant anguish upon any reasonable person, considering the importance of one's eyesight. Plaintiff also suffered a cut on his face which healed in full. The eye symptoms remained acute for many days, but by the time of the September 6, 2013 visit with Dr. Estis and the September 10, 2013 visit with Dr. Wolf, plaintiff had begun to improve. As shown by the lack of evidence that plaintiff sought further attention after that point, his symptoms substantially dissipated after that time, with the exception that he continued to experience some residual feeling of burning in the eye which resolved more gradually, within a few months, but that symptom was not severe, based upon the paucity of evidence that he sought any further attention for it. During the course of his recovery, plaintiff had to undergo numerous examinations, administer medications in his eye, and wear an eye patch.

{¶27} Although defendant argues that Dr. Wolf found plaintiff to be malingering, he did not actually diagnose plaintiff as such and it was his professional opinion that plaintiff should have undergone further evaluation at Franklin Medical Center to determine the etiology of his complaints. Plaintiff's testimony, in conjunction with the supporting medical records, establishes the genuineness of his complaints in the time leading up to his visit with Dr. Wolf. Defendant also suggested that plaintiff's complaints were attributable to him rubbing his eye, but there is no credible evidence to support that argument, plaintiff's complaints with the eye began immediately after the accident, and the greater weight of the evidence demonstrates that plaintiff did suffer irritation and other harm to his eye as a result of exposure to broken glass. There was also little or no significance established relative to Dr. Wolf's testimony about finding a hair under the eyelid, and clearly the hair was not present throughout the post-accident course, considering the flushing and examinations that occurred during that timeframe.

{¶28} Based upon the evidence that he presented, the pain and suffering for which plaintiff may recover are confined to the past. While plaintiff testified that he continues to suffer photophobia up to the present day, the only evidence on that matter is essentially his own testimony. Plaintiff did not have an expert to more fully explain this elusive condition, nor to offer opinions that would tend to substantiate that he actually has this condition and to causally relate it to the accident. Dr. Wolf also testified about the difficulty in diagnosing this condition. Moreover, plaintiff did not continue to seek any care for this condition while in defendant's custody, nor did he seek any follow-up or specialized attention for this condition after his April 8, 2016 optometry appointment. In short, sufficient evidence was not put forth to establish that plaintiff is entitled to recover for chronic photophobia. It was also not shown that plaintiff suffered any permanent loss of visual acuity as a result of the accident. Additionally, plaintiff's medical expenses were covered by the state of Ohio while he was in defendant's custody and he did not establish an entitlement to recover for any other medical expenses, nor did he establish any entitlement to lost wages.

{¶29} For the past pain and suffering associated with the injuries caused to plaintiff as a result of defendant's negligence, plaintiff is entitled to damages in the amount of \$12,500. Plaintiff is also entitled to recover the \$25 filing fee.

{¶30} Based upon the foregoing, plaintiff is entitled to a recovery in the total amount of \$12,525. Accordingly, it is recommended that judgment be entered for plaintiff in that amount.

{¶31} 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).

ROBERT VAN SCHOYCK
Magistrate

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