[Cite as *Johnson v. Dept. of Rehab. & Corr.*, 2017-Ohio-8696.]

DANIEL JOHNSON Plaintiff v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION Defendant	Case No. 2014-00768 Magistrate Robert Van Schoyck DECISION OF THE MAGISTRATE

{¶1} Plaintiff brought this action for negligence arising from a November 18, 2013 accident in which he fell out of an upper bunk bed and was injured while incarcerated in defendant's custody and control at the Warren Correctional Institution (WCI). 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, with a 25 percent diminishment in any award for compensatory damages. The court adopted the magistrate's decision and entered judgment accordingly. The case then proceeded to trial on the issue of damages.

{¶2} At the damages phase of trial, plaintiff testified that he was asleep when he fell out of the bed, which he estimated to be about 5 feet above the floor. Plaintiff stated that he tried to catch himself, but his head struck a metal footlocker and the rest of his body landed on the concrete floor. Plaintiff stated that he is 5'11" tall and weighed about 225 pounds at the time. Plaintiff recalled that his cellmate got up and checked on him and then pounded on the door to get help. Plaintiff testified that when a corrections officer came and asked him to get up, he tried to stand but ended up stumbling and laying back down on the ground. According to plaintiff, his head hurt and he felt dizzy, and he also felt a little pain in his lower back. Plaintiff recounted being transported on a cart to the infirmary, and upon arriving there he walked under his own power from the

cart to an exam room where nursing staff cleaned and bandaged a cut above his right eye and gave him an ice pack and ibuprofen before sending him back to his housing block. Plaintiff stated that he walked back to the block under his own power, but that he still felt dizzy and his head hurt that night, being a 7 on a scale of 1 to 10.

{¶3} Plaintiff testified that his head hurt every day initially and then became intermittent. Plaintiff explained that sometimes the headaches were severe enough that he had to just lay down and go to sleep. Plaintiff acknowledged that the wound on his head, which did not require any stitches, healed without leaving a scar. In addition to his head injury, plaintiff described having pain in his lower back that would radiate down through his left hip and thigh. According to plaintiff, he went to the infirmary a few times to seek treatment and he remembered seeing a doctor there and being given ibuprofen, but he had to pay a co-pay each time he went to the infirmary, which caused him to limit the number of visits that he made. Plaintiff testified that when he was released from WCI in July 2014, he would still have a headache or low back pain every once in a while. According to plaintiff, those lingering symptoms went away over time, subsiding completely by the summer of 2015.

{¶4} Matthew Fonner, R.N. testified that he has been employed with defendant at WCI for five years. Fonner stated that he was on duty when the accident occurred and that even though he does not specifically recall seeing plaintiff that night, a Medical Exam Report prepared and signed by him shows that he went to plaintiff's cell and assessed him before bringing him back to the infirmary on a cart. (Plaintiff's Exhibits 10 & 10A.)

{¶5} Fonner explained that the "Subjective Evaluation" portion of the Medical Exam Report is where he documents the patient's complaints, and here he wrote that plaintiff described having a headache after falling out of bed and hitting the footlocker. In the "Objective Physical Findings" portion of the Medical Exam Report, Fonner explained, he documents his readings of the patient's vital signs and his personal

observations of the patient. Here, Fonner stated, he noted two scratches and a bump on the ridge above plaintiff's right eye, which he also identified on an anatomical diagram on the Medical Exam Report. Fonner stated that in addition to the readings of plaintiff's vital signs, he noted that plaintiff was alert and oriented and able to have a relevant conversation, and that when plaintiff was told to come to the cart to be taken to the infirmary, plaintiff was able to stand up, put on his shoes and coat without assistance, and walk with a steady gait, which, according to Fonner, were indications that there was no neurological deficit at that time. Fonner also noted that there was no complaint of dizziness. In the "Treatment" portion of the Medical Exam Report, Fonner stated, he wrote that he gave plaintiff an ice pack and acetaminophen, or Tylenol, for the wound above the eye and relief of pain. Fonner stated that upon concluding the exam, he signed the Medical Exam Report at 1:20 a.m. Fonner testified that he does not recall seeing plaintiff at any other time for any complaints associated with the accident.

{¶6} On cross-examination, Fonner was asked to give testimony about several documents in plaintiff's medical records. (Plaintiff's Exhibit 11.) According to Fonner, a November 19, 2013 Nursing Assessment form was signed by Nurse K. Hill, who documented plaintiff's complaints of a throbbing, painful headache which he rated at 7 on a scale of 1 to 10; Hill also noted, among other things, that plaintiff reported that Tylenol helped, and that she educated him on the signs and symptoms of head trauma. (Plaintiff's Exhibit 11, pp. 73-74.) Fonner testified that Interdisciplinary Progress Notes dated November 22, 2013, reflect a doctor's sick call appointment with Dr. Timothy Heyd to follow up with plaintiff after the accident. (Plaintiff's Exhibit 11, p. 94, 93.) Fonner identified a Nursing Assessment form dated January 8, 2014, as having been signed by Nurse Hill, who noted plaintiff's complaints of intermittent headaches ranging in severity from 5 to 9 on a scale of 1 to 10, and that plaintiff reported that he "feels like someone is ripping my brain" and that "this is the worst headache of his life." (Plaintiff's

Exhibit 11, pp. 71-72.) Fonner stated that Interdisciplinary Progress Notes dated January 10, 2014, by both Nurse Hill and Dr. Heyd, appear to pertain to a doctor's sick call appointment concerning headaches. (Plaintiff's Exhibit 11, p. 92.) Fonner stated that he did not recognize the handwriting in a January 23, 2014 Interdisciplinary Progress Note which apparently documented plaintiff complaining of headaches. (Plaintiff's Exhibit 11, p. 91.)

{¶7} Timothy Heyd, M.D. testified that he is a physician practicing at both WCI and the adjacent Lebanon Correctional Institution and that he has maintained board-certification in family medicine since 1994. Dr. Heyd, who testified that he remembered seeing plaintiff, explained the Interdisciplinary Progress Notes that he prepared during two appointments with plaintiff following the accident.

{¶8} Dr. Heyd stated that when he saw plaintiff on November 22, 2013, he noted that plaintiff had struck the front of his head during the fall four days earlier and complained of soreness but did not have a headache. (Plaintiff's Exhibit 11, pp. 94, 93.) Dr. Heyd explained that he noted plaintiff reported no vision changes or lightheadedness, that he took plaintiff's vital signs, that he noted plaintiff was alert and oriented and that his pupils were reactive, that he examined plaintiff's cervical spine and found no tenderness, and that he examined plaintiff's abdomen and determined it to be soft. In the assessment portion of his note, Dr. Heyd stated, after reiterating the fact that plaintiff had fallen and that plaintiff was on coumadin for his history of deep vein thrombosis, he wrote that plaintiff was to maintain his bottom bunk and bottom range restrictions.

{¶9} Dr. Heyd stated that he saw plaintiff again for complaints of headaches on January 10, 2014, noting that plaintiff initially told him "every night when I lay down my head hurts," and that plaintiff subsequently said it hurt "every 2 or 3 nights." (Plaintiff's Exhibit 11, p. 92.) Dr. Heyd noted that plaintiff reported getting temporary relief from medications that he had taken, including Tylenol, Advil, and Naprosyn. As Dr. Heyd

explained, in the objective portion of his note he documented plaintiff's vital signs as stable, that plaintiff was alert and oriented, and that he assessed plaintiff's neurological function and eye function to be normal. Dr. Heyd stated that his assessment was that plaintiff was having headaches that were likely musculoskeletal in nature, meaning that they were resulting from bruising or inflammation to muscle or bone, or from muscle strain, conditions which are consistent with striking one's head, Dr. Heyd stated. As Dr. Heyd testified, he wrote that plaintiff would be given a 10-day supply of Naprosyn, which he said is a non-steroidal anti-inflammatory drug, and that plaintiff could obtain more in the commissary if it was effective. Dr. Heyd also wrote that plaintiff would be scheduled for a follow-up appointment in 10 to 14 days, or sooner if his condition worsened.

{¶10} "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. "'It is axiomatic that every plaintiff bears the burden of proving the nature and extent of his damages in order to be entitled to compensation.'" *Jayashree Restaurants, LLC v. DDR PTC Outparcel LLC,* 10th Dist. Franklin No. 16AP-186, 2016-Ohio-5498, ¶ 13, quoting *Akro-Plastics v. Drake Indus.*, 115 Ohio App.3d 221, 226 (11th Dist.1996). "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.).

{¶11} "Although a claimant may establish proximate cause through circumstantial evidence, 'there must be evidence of circumstances which will establish with some

degree of certainty that the alleged negligent acts caused the injury.'" *Mills v. Best W. Springdale*, 10th Dist. Franklin No. 08AP-1022, 2009-Ohio-2901, ¶ 20, quoting *Woodworth v. New York Cent. RR. Co.*, 149 Ohio St. 543, 549 (1948). "It is well-established that when only speculation and conjecture is presented to establish proximate causation, the negligence claim has failed as a matter of law." *Harris v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 13AP-466, 2013-Ohio-5714, ¶ 15. "Generally, where an issue involves a question of scientific inquiry that is not within the knowledge of a layperson, expert testimony is required." *Id.* at ¶ 16, citing *Stacey v. Carnegie-Illinois Steel Corp.*, 156 Ohio St. 205 (1951). Thus, "[w]here complicated medical problems are at issue, testimony from a qualified expert is necessary to establish a proximate causal relationship between the incident and the injury." *Tunks v. Chrysler Group LLC*, 6th Dist. Lucas No. L-12-1297, 2013-Ohio-5183, ¶ 18.

{¶12} Upon review, the magistrate makes the following findings. In the early morning of November 18, 2013, plaintiff was asleep in his upper bunk bed when he accidentally rolled out and fell to the ground five feet below with great force. The front of plaintiff's head, above the right eye, struck a metal footlocker, while the rest of his body struck the concrete floor. Plaintiff's head hurt badly and he experienced some dizziness and stumbled when he first tried to get up, but by the time Nurse Fonner arrived at the cell he was able to stand up and walk to the cart with which Fonner transported him to the infirmary. Plaintiff had a bump and a small wound on his forehead above the right eye, but as Fonner observed, plaintiff did not appear to have a neurological deficit. Fonner specifically noted that plaintiff was not dizzy, so while it appears that plaintiff did experience some dizziness immediately after the fall, it was probably minor and was not an issue when he saw Fonner. Plaintiff's wound was bandaged, he was given Tylenol and an ice pack for pain relief, and he returned to his cell block. Plaintiff had a painful headache the rest of the night.

{¶13} When a nurse examined plaintiff the next day, November 19, 2013, he still had a painful, throbbing headache, just as bad as it had been the night before, but he was getting some relief from Tylenol. When Dr. Heyd saw plaintiff on November 22, 2013, plaintiff reported soreness in his head rather than a headache. Dr. Heyd examined plaintiff thoroughly, his findings were normal, and he did not deem it necessary to prescribe or otherwise arrange for any additional treatment. Although plaintiff's head was only sore then, plaintiff credibly explained that the constant headaches he initially suffered became intermittent. When they occurred, the headaches remained severe enough that at times plaintiff had to lay down and sleep, but he was generally able to manage the pain and discomfort of the headaches with medication such as ibuprofen or Tylenol.

{¶14} The wound above plaintiff's right eye was minor and healed without leaving a scar. In addition to the head injury, it was established that plaintiff's 225-pound body falling five feet off the upper bunk bed and onto the concrete floor also caused some soft-tissue type of injury and resulting minor aches and pains temporarily in his lower back and left hip area. Although Fonner did not record any complaint of back pain when he examined plaintiff after the fall, considering plaintiff's testimony and the nature of the fall itself it is more likely than not plaintiff did suffer such an injury, but it appears that plaintiff experienced only minimal pain symptoms in this regard, as demonstrated by the lack of evidence in the medical records of him voicing any such complaints.

{¶15} The headaches resulting from plaintiff's head trauma gradually became less frequent, but at least in early 2014 they continued to be severe at times, as shown by the complaints he expressed when he went to the infirmary on January 8, 2014, for what he described as the worst headache of his life. Consistent with what Dr. Heyd noted on January 10, 2014, plaintiff was having nighttime headaches every 2 to 3 days, but the headaches were still manageable with medication. Plaintiff continued to

complain of headaches when he had another appointment at the infirmary on January 23, 2014.

{¶16} More likely than not, plaintiff continued to have intermittent headaches at a gradually decreasing frequency for some time beyond January 2014. Considering that plaintiff had to pay a co-pay every time he went to the infirmary, it is understandable that he may have limited his visits. However, plaintiff saw fit to seek treatment multiple times through January 2014 while his symptoms remained at least intermittently severe, so his decision not to seek treatment after January 2014 and indeed his inability to point to any subsequent medical evidence to substantiate his claim of continuing headaches suggests that the frequency and severity of the headaches probably diminished significantly after that time. Moreover, there is no credible evidence of plaintiff seeking medical attention for headaches after his release from WCI in July 2014. It is also noted that plaintiff was not diagnosed with a concussion or other specific head injury. Under the circumstances, without corroborating medical evidence or explanatory testimony from a medical expert, the bare testimony plaintiff gave about his headaches persisting until the summer of 2015 does not carry enough weight to substantiate that as the duration of his damages. The magistrate sympathizes with plaintiff's injuries and finds him to be a credible witness, but the evidence that was presented is too speculative to support a finding that his headaches continued that long, some 20 months after the accident. Rather, the greater weight of the evidence supports the finding that plaintiff's headaches and associated pain and suffering persisted up to a few months after the accident.

{¶17} Finally, it is noted that 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.

{¶18} In determining the monetary value of plaintiff's temporary pain and suffering, it is instructive to review damage valuations in other recent cases. In *Robinson v. Ohio Dept. of Rehab. & Corr.*, Ct. of Cl. No. 2012-06041, 2015-Ohio-5628, damages were set at $8,500 for an inmate who suffered temporary pain and suffering over an approximately two-month period from head, back, and hip injuries resulting from a fall out of an upper bunk bed. *Robinson* involved significantly worse back problems, but a less significant head injury, compared with the facts of this case. In *Brooks v. Dept. of Rehab. & Corr.*, Ct. of Cl. No. 2012-06181, 2016-Ohio-7810, damages were set at $6,500 for an inmate who suffered several weeks of pain in his back and other areas after a fall from a bunk.

{¶19} Based upon the foregoing, for the past pain and suffering associated with the injuries caused to plaintiff as a result of defendant's negligence, plaintiff's damages are set at $8,500. After applying the 25 percent diminishment for contributory fault, plaintiff is entitled to an award of $6,375. Accordingly, it is recommended that judgment be entered for plaintiff in that amount.

{¶20} *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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