[Cite as *Whitley v. Dept. of Rehab. and Corr.*, 2004-Ohio-4561.]

IN THE COURT OF CLAIMS OF OHIO

PAUL WHITLEY :

Plaintiff : CASE NO. 2001-11278
Magistrate Steven A. Larson

v. :

MAGISTRATE DECISION

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION :

:

Defendant

: : : : : : : : : : : : : : : : :

{¶1} Plaintiff brought this action against defendant alleging negligence. The case was tried before a magistrate of the court on November 18, 2002, at Richland Correctional Institution (RICI).

{¶2} At all times relevant hereto, plaintiff was an inmate in the custody and control of defendant pursuant to R.C. 5120.16. On December 6, 1999, while incarcerated at Lorain Correctional Institution (LORCI), plaintiff was granted a bottom bunk restriction due to his diabetic condition. When plaintiff was transferred from LORCI to RICI on April 3, 2000, he did not receive a bottom bunk assignment. On April 14, 2000, plaintiff injured his neck, back, and shoulder after falling out of his bunk following a diabetic seizure.

{¶3} In order for plaintiff to prevail upon his claim of negligence, he must prove by a preponderance of the evidence that defendant owed him a duty, that it breached that duty, and that the breach proximately caused his injuries. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285. Defendant owed plaintiff the common law duty of reasonable care. *Justice v. Rose* (1975), 102 Ohio App. 482. Reasonable care is that which would be utilized by an ordinarily prudent person under certain circumstances. *Smith v. United Properties, Inc.* (1965), 2 Ohio St.2d 310.

{¶4} While cognizant of a "special relation" between an inmate and his custodian, no higher standard of care is derived from this relationship. *Scebbi v. Dept. of Rehab. and Corr.* (Mar. 21, 1989), Court of Claims No. 87-09439. Although the state is not an insurer of the safety of its

prisoners, once it becomes aware of a dangerous condition in the prison, it is required to take the reasonable care necessary to make certain that the prisoner is not injured. *Clemets v. Heston* (1985), 20 Ohio App.3d 132. However, it is plaintiff who must prove that defendant was on notice or aware of the dangerous condition. Id.

{¶5} Additionally, plaintiff is required to exercise some degree of care for his own safety. See *Hartman v. Di Lello* (1959), 109 Ohio App. 387, 390-1; *Bowins v. Euclid General Hospital* (1984), 20 Ohio App.3d 29, 31; *Thompson v. Kent State University* (1987), 36 Ohio Misc.2d 16. Here, defendant raised two defenses at trial: contributory negligence and implied assumption of the risk. Contributory negligence is defined as "any want of ordinary care on the part of the person injured, which combined and concurred with the defendant's negligence and contributed to the injury as a proximate cause thereof, and as an element without which the injury would not have occurred." *Joyce-Couch v. DeSilva* (1991), 77 Ohio App.3d 278, 290. Implied assumption of the risk "requires that a plaintiff consent to, or acquiesce in, an appreciated known risk, or involves a risk so obvious that the plaintiff must have known or should have known and appreciated it." *Brady-Fray, Adm., etc. v. Toledo Edison Company, et al.*, Lucas App. No. L-02-1260, 2003-Ohio-3422, citing *Benjamin v. Deffet Rentals* (1981), 66 Ohio St.2d 86, 89. Under implied assumption of the risk, "the defendant owes plaintiff a duty; however, because plaintiff knew of the danger involved and intelligently acquiesced to it, plaintiff's claim is barred." *Brady-Fray*, supra, citing *Anderson v. Ceccardi* (1983), 6 Ohio St.3d 110, 113.

{¶6} R.C. 2315.19, Ohio's comparative negligence statute, merges the defenses of contributory negligence and implied assumption of the risk. Additionally, R.C. 2315.19 (C) states in relevant part: "*** If the percentage of the negligence or implied assumption of the risk that is attributable to the complainant *** is greater than the total percentages of the negligence attributable to all parties from whom the complainant seeks recovery, which percentages were determined pursuant to division (B) of this section, the court shall enter judgment in favor of those parties."

{¶7} In the case at bar, plaintiff twice failed to exercise a reasonable degree of care for his own safety. First, plaintiff did not adhere to established protocol whereby he could have formally

notified defendant of his need for a lower bunk. Specifically, Brian Cain, health care administrator at RICI, testified that plaintiff could have either (1) gone to nurses' sick call, or (2) sent a kite to medical regarding his concerns. Plaintiff did neither.

{¶8} Next, according to both the testimony of Mr. Cain, along with the medical notations by Dr. William Loecher contained in plaintiff's interdisciplinary progress notes made on April 12, 2000, plaintiff refused to submit to the use of "finger sticks" to monitor his glucose levels. (Defendant's Exhibit C.) By refusing the finger sticks, plaintiff ignored his own well-being and made it impossible for defendant to adequately monitor and treat plaintiff's glucose levels. It was reasonably foreseeable to plaintiff that his failure to submit to the finger sticks and the resulting lack of information concerning his glucose levels could lead to diabetic seizures such as the episode suffered on April 14, 2000.

{¶9} To summarize, plaintiff not only failed to follow established procedure regarding his need for a lower bunk restriction, he also failed to submit to finger sticks in order to properly manage his glucose levels. The court finds that plaintiff's own negligence exceeds 50 percent; therefore, R.C. 2315.19 bars judgment in his favor.

{¶10} To the extent that plaintiff alleges that Dr. Loecher was negligent for not issuing plaintiff a lower bunk restriction, plaintiff has failed to satisfy his burden of proof. "Under Ohio law, as it has developed, in order to establish medical malpractice, it must be shown by a preponderance of the evidence that the injury complained of was caused by the doing of some particular thing or things that a physician or surgeon of ordinary skill, care, and diligence would not have done under like or similar conditions or circumstances, or by the failure or omission to do some particular thing or things that such a physician or surgeon would have done under like or similar conditions and circumstances, and that the injury complained of was the direct result of such doing or failing to do some one or more of such particular things." *Bruni, et al. v. Tatsumi, et al.* (1976), 46 Ohio St.2d 127, 131 citing *Ault v. Hall* (1928), 119 Ohio St. 422; *Amstutz v. King* (1921), 103 Ohio St. 674; *Bowers v. Santee* (1919), 99 Ohio St. 361; *Hier v. Sites* (1914), 91 Ohio St. 127, 130; *Gillette v. Tucker* (1902), 67 Ohio St. 106; *Pollack v. Dussourd* (C.A.6, 1947), 158 F.2d 969. Furthermore,

"proof of the recognized standards must necessarily be provided through expert testimony." *Bruni*, supra, at 132. Here, plaintiff did not produce expert testimony on the issue of medical malpractice. Thus, the court cannot be persuaded that Dr. Loecher was negligent when he elected not to prescribe a lower bunk restriction for plaintiff. Lastly, Mr. Cain testified that there is no standing order that insulin-dependant diabetics be issued a bottom bunk, regardless of whether such restriction was previously afforded at another institution.

{¶11} The court concludes that plaintiff has failed to prove by a preponderance of the evidence that defendant breached a duty of care and well-being to plaintiff by not issuing him a lower bunk restriction. Accordingly, judgment is recommended in favor of defendant. Moreover, even if it could be concluded that defendant was negligent, plaintiff's comparative negligence is greater than 50 percent and thus, under R.C. 2315.19, he is barred from recovery.

{¶12} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision. A party shall not assign as error on appeal the court's adoption of any finding or conclusion of law contained in the magistrate's decision unless the party timely and specifically objects to that finding or conclusion as required by Civ.R. 53(E)(3).*

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STEVEN A. LARSON
Magistrate

Entry cc:

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ML/cmd

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