

Court of Claims of Ohio

The Ohio Judicial Center
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JACK NOTT

Plaintiff

v.

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION

Defendant

Case No. 2005-07950

Judge Clark B. Weaver Sr.
Magistrate Steven A. Larson

MAGISTRATE DECISION

{¶ 1} Plaintiff brought this action alleging negligence. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶ 2} At all times relevant to this action, plaintiff was an inmate in the custody and control of defendant at the Grafton Correctional Institution (GCI) pursuant to R.C. 5120.16. As a result of plaintiff's health problems, including diabetes, defendant authorized him to wear specially cushioned, velcro-fastening shoes for everyday use. However, on the morning of August 19, 2003, defendant issued plaintiff orange canvas shoes and a matching jumpsuit to wear on a one-day round trip to the Corrections Medical Center (CMC) in Columbus. Plaintiff testified that when traveling outside GCI, inmates are required to wear the orange attire for security purposes inasmuch as it allows the inmates to be more easily identified.

{¶ 3} According to plaintiff, the canvas shoes were the size he normally wears (11), but the left shoe was stretched and worn such that it fit him loosely and repeatedly slipped off his foot as he walked toward the vehicle that was bound for CMC. Plaintiff

testified that a corrections officer who escorted him to the vehicle put the shoe back on his foot two or three times, but eventually told him to carry the shoe, thus requiring him to walk the remaining distance to the vehicle without a left shoe. Plaintiff could not recall whether he was wearing a sock on his left foot, but the only inmate accompanying plaintiff on the trip, Johnny McCarter, testified that he and plaintiff were not permitted to wear socks.

{¶ 4} Plaintiff and McCarter both testified that at some point later in the trip, McCarter informed plaintiff that the bottom of his left foot appeared to be bleeding. Plaintiff testified that, as a result, he discovered a wound on the bottom of his left foot which he believes he sustained by stepping on a sharp object while walking without a shoe at GCI that morning.

{¶ 5} According to nurse Marie Starkey, when an inmate makes a trip outside GCI such as plaintiff did, defendant's policy mandates that the inmate receive a medical examination upon his return. Starkey stated that when conducting these routine examinations, she focuses on any complaints reported to her by the inmate and makes a note of any complaints in the inmate's medical file.

{¶ 6} Starkey examined plaintiff shortly after he returned to GCI on the afternoon of August 19, 2003 and, according to the notes she made at that time, plaintiff apprised her only of a wound on his right ankle allegedly caused by wearing leg irons during the trip. (Plaintiff's Exhibit 2.) The notes contain no reference to plaintiff's left foot. Plaintiff testified that Starkey's notes were accurate and explained that he did not mention an alleged left foot wound to her because the right ankle was his most immediate concern.

{¶ 7} Starkey testified that, based upon her examination of plaintiff's right ankle, she gave him a pass to visit the infirmary to consult with a physician during "sick-call" the next day, August 20, 2003. Plaintiff failed to appear for the August 20, 2003 sick-call. He did appear for sick call on August 21, 2003, and according to notes from that

consultation, a physician examined wounds on both the right ankle and left foot and ordered that each wound be cleaned and dressed daily by GCI medical staff. (Plaintiff's Exhibit 2.)

{¶ 8} Although the right ankle wound eventually healed, plaintiff testified that in spite of regular treatment, the left foot wound persisted for several months and ultimately caused the entire foot to deteriorate. Following treatment in mid-2004 at CMC and the Ohio State University Medical Center, the foot was amputated on July 19, 2004.

{¶ 9} Plaintiff claims that the amputation resulted from the wound he allegedly sustained on August 19, 2003, inasmuch as his diabetes prevented proper wound healing such that an ulcer formed and ultimately eroded the otherwise healthy tissues of the foot. Although plaintiff testified that negligent medical treatment may have contributed to the deterioration of his foot, he does not couch his complaint as one for medical malpractice and he introduced no expert medical testimony regarding his medical treatment. Thus, plaintiff's claim is one for ordinary negligence. Specifically, it is alleged that defendant's employees were negligent in providing plaintiff with a poorly fitting shoe and later ordering him to walk without that shoe, thereby causing him to sustain a wound that necessitated the amputation of his left foot.

{¶ 10} 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 defendant's acts or omissions resulted in a breach of that duty, and that the breach proximately caused his injuries. *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 81, 2003-Ohio-2573, citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77. Ohio law imposes upon the state a duty of reasonable care and protection of its inmates. *McCoy v. Engle* (1987), 42 Ohio App.3d 204, 207-208.

{¶ 11} As an initial matter, to the extent that plaintiff claims that defendant was negligent in requiring him to wear orange canvas shoes rather than his cushioned shoes during the trip to CMC, the court finds that defendant's decision was based upon

security concerns and that defendant is therefore entitled to discretionary immunity. The Supreme Court of Ohio has held that “[t]he 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.” *Reynolds v. State* (1984), 14 Ohio St.3d 68, 70. Prison officials are afforded “wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.” *Bell v. Wolfish* (1979), 441 U.S. 520, 547.

{¶ 12} With regard to plaintiff’s left foot becoming injured, it is undisputed that there was a wound on the bottom of the foot by the time that he appeared for sick-call on August 21, 2003. However, the evidence adduced at trial does not establish how or when plaintiff sustained that wound. Although plaintiff contends that he sustained the wound on August 19, 2003, as a result of defendant’s employees issuing him a poorly fitting left shoe and later requiring him to carry the shoe, he offered minimal evidence to support his allegations. In particular, plaintiff failed to identify any of the employees allegedly involved in the matter and he offered only his own testimony to support his contention that he was ordered to carry his left shoe.

{¶ 13} Indeed, the only evidence of plaintiff having a wound on his left foot at any time prior to his examination on August 21, 2003, is the testimony of plaintiff and McCarter. However, the court finds that both plaintiff’s and McCarter’s recollection of the incident was poor and that they lacked credibility. In addition, plaintiff’s theory of how he became injured is speculative inasmuch as he testified that he was not aware of a wound on his left foot until McCarter allegedly alerted him to it at some unspecified stage of the trip. Plaintiff testified that he could not see the alleged wound during the

trip due to his being shackled, but he did not explain when he finally did see the wound or what he saw. Plaintiff did not report a wound on his left foot to Starkey during her examination of him after the trip and he did not appear for sick-call as scheduled on August 20, 2003.

{¶ 14} Accordingly, the court finds that plaintiff failed to establish by a preponderance of the evidence both that he injured his foot in the manner alleged and that defendant committed a breach of its duty of care toward him. Furthermore, the court concludes that even if plaintiff were to establish such a breach, he has not demonstrated that it proximately caused the amputation of his foot 11 months later.

{¶ 15} Although plaintiff introduced his entire medical file from his time in defendant's custody, he elicited testimony to identify and explain only a few records contained therein. (Plaintiff's Exhibit 1.) Smith's and Starkey's testimony as to some of those records established that on August 21 and 28, 2003, plaintiff met with physicians who examined a wound on his left foot and ordered that it be cleaned and dressed daily. (Plaintiff's Exhibits 2, 3.) Other records in the medical file indicate that subsequent to those two examinations, plaintiff continued to receive at least semi-regular treatment for one or more wounds on the bottom of his left foot; however, it is not clear from the face of these records whether the same wound that plaintiff allegedly suffered on August 19, 2003, remained present until the foot was amputated on July 19, 2004, much less whether the alleged wound proximately caused the amputation. Neither Smith nor Starkey testified as to the duration of any wound on plaintiff's left foot or the cause of the foot being amputated.

{¶ 16} The cause of the amputation is especially unclear in light of plaintiff's testimony attributing the deterioration of the foot, at least in part, to his use of a cream for athlete's foot. Moreover, records in plaintiff's medical file indicate that he had more than one wound on the foot during the relevant time period. At a minimum, records dated July 2, 3, and 15, 2004, describe a wound on the top of the foot, yet

notwithstanding those records, plaintiff presented no evidence pertaining to another wound and its role, if any, in resulting in amputation. (Plaintiff's Exhibit 1.)

{¶ 17} Based upon the foregoing, the court finds that plaintiff has failed to prove his negligence claim by a preponderance of the evidence. Accordingly, judgment is recommended in favor of defendant.

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).

STEVEN A. LARSON
Magistrate

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RCV/cmd
Filed May 11, 2009
To S.C. reporter June 15, 2009