[Cite as *Taylor v. Dept. of Rehab. and Corr.*, 2012-Ohio-4792.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Harlin Taylor,	:	
Plaintiff-Appellant,	:	
		No. 11AP-1156
v.	:	(Ct. of Cl. No. 2009-02821)
Ohio Department of Rehabilitation and Correction,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on October 16, 2012

Swope and Swope, and Richard F. Swope, for appellant.

Michael DeWine, Attorney General, and *Amy S. Brown*, for appellee.

APPEAL from Court of Claims of Ohio

KLATT, J.

{¶ 1} Plaintiff-appellant, Harlin Taylor, appeals a judgment of the Court of Claims of Ohio in favor of defendant-appellee, the Ohio Department of Rehabilitation and Correction ("ODRC"). For the following reasons, we reverse and remand the matter for further proceedings.

{¶ 2} Taylor was convicted of domestic violence and sentenced to a one-year prison term. Initially, ODRC imprisoned Taylor at the Correctional Reception Center ("CRC"). Upon arriving at that facility on September 3, 2008, Taylor underwent a medical examination. Because Taylor is an insulin-dependant diabetic, the physician who conducted the exam limited Taylor to a bottom bunk in the bottom range of the prison.

On the form that recorded the results of Taylor's physical examination, the physician wrote "BB/BR" under the "Treatment Plan" section and "Bottom Bunk/Range" in the section of the form for "Comments regarding accommodations." Additionally, written physician's orders for Taylor, dated September 3, 2008, state "BB/BR restriction."

{¶ 3} In conformity with the physician's orders, CRC medical personnel issued Taylor a "Medical Restriction Statement" that required prison administration to place him in a bottom bunk in the bottom range of the prison. This restriction was a long-term restriction, beginning September 3, 2008 and ending September 3, 2009.

{¶ 4} On September 16, 2008, ODRC transferred Taylor from CRC to the London Correctional Institution ("LoCI"). A form entitled "Intrasystem Transfer and Receiving Health Screening" accompanied Taylor to LoCI. The form consists of two sections; one completed by a CRC nurse and one completed by a LoCI nurse. In the section completed by the CRC nurse, the nurse wrote "Bottom Bunk Bottom Range" in the box marked "Disabilities, Limitations, Prosthetic Devices." In the section completed by the LoCI nurse, the nurse wrote "BB/BR pending" in the part of the form that indicated the plan for Taylor's health care while he remained at LoCI.

{¶ 5} Upon entering LoCI, Taylor was evaluated by LoCI medical personnel. An LoCI physician wrote out physician's orders for Taylor. In addition to prescribing medications to treat Taylor's diabetes, the physician wrote "BB." At trial, Taylor testified that "BB" meant that the physician ordered that he receive a bottom bunk.

{¶ 6} When Taylor arrived at the unit ODRC assigned him at LoCI, he discovered that he had a top bunk. According to Taylor, he complained about receiving a top bunk to certain correction officers and prison personnel working in his unit. At trial, those individuals stated that they could not remember any complaints from Taylor regarding his bunk assignment.

{¶ 7} On October 1, 2008, Taylor saw a CRC nurse. According to the form the nurse completed that day, Taylor complained that he "need[ed] a bottom bunk order." Taylor, however, remained assigned to a top bunk. Taylor did not file a grievance to protest that assignment.

{¶ 8} In the early morning of October 19, 2008, Taylor woke up and had to use the restroom. He fell from his bunk and seriously injured himself.

{¶ 9} Taylor filed a negligence suit against ODRC on March 3, 2009. The trial court bifurcated the liability and damages portions of the case for trial. A trial on ODRC's liability for negligence proceeded before a magistrate on April 19, 2010.

{¶ 10} In a decision issued August 31, 2011, the magistrate found that Taylor failed to provide sufficient evidence that ODRC was negligent in not providing him a bottom bunk. According to the magistrate, the evidence did not demonstrate that Taylor had a bottom-bunk restriction at LoCI. The magistrate found that the restriction issued at CRC did not apply at LoCI. Although LoCI physician's orders stated "BB," the magistrate disregarded this evidence because he found that Taylor had offered no testimony as to what "BB" meant. Further, the magistrate found that Taylor failed to exercise a reasonable degree of care for his own safety because he did not follow the grievance procedure to complain about his bunk assignment. The magistrate determined that Taylor's failure to file a grievance was the sole proximate cause of his injuries. Thus, the magistrate recommended that the trial court enter judgment in ODRC's favor.

{¶ 11} Taylor objected to the magistrate's decision. However, the trial court overruled Taylor's objections and adopted the magistrate's decision and recommendation. Consequently, the trial court rendered judgment in ODRC's favor in a judgment dated December 5, 2011.

{¶ 12} Taylor now appeals the December 5, 2011 judgment, and he assigns the following errors:

> [1.] THE TRIAL COURT AND MAGISTRATE ERRED WHEN THEY FOUND THAT PLAINTIFF-APPELLANT WAS TOLD HIS BOTTOM BUNK RESTRICTION WOULD NOT BE HONORED.
>
> [2.] THE TRIAL COURT AND MAGISTRATE ERRED WHEN AND ABUSED THEIR DISCRETION IN FINDING THE DEFENDANT-APPELLEE'S MEDICAL RECORDS, DATED SEPTEMBER 16, 2008, EX. 1, 2 AND 6 * * *, DO NOT ESTABLISH THE MEDICAL UNIT DID NOT ORDER A BOTTOM BUNK RESTRICTION.
>
> [3.] THE TRIAL COURT AND MAGISTRATE ERRED IN FINDING THAT BEFORE OCTOBER 19, 2008, PLAINTIFF-APPELLANT DID NOT HAVE A BOTTOM BUNK RESTRICTION SINCE THE DOCTOR'S ORDER DATED SEPTEMBER 16, 2008, PLT. EX. 6 * * *, INDICATES THE

> DOCTOR ORDERED ON SEPTEMBER 16, 2008, THAT PLAINTIFF-APPELLANT WAS GRANTED A BOTTOM BUNK RESTRICTION, AND THE DEFENDANT-APPELLEE FAILED TO FOLLOW PROCEDURE TO NOTIFY THE UNIT, THEREBY ESTABLISHING LIABILITY.
>
> [4.] THE TRIAL COURT AND MAGISTRATE ERRED IN FINDING FAILURE TO FOLLOW THE GRIEVANCE PROCEDURE WAS THE CAUSE OF THE INJURY, THE DEFENDANT-APPELLEE HAVING HAD OVER THIRTY (30) DAYS TO FOLLOW THE PROCEDURE FOR NOTIFYING THE UNIT AND THE GRIEVANCE PROCEDURE BEING NO GUARANTEE THE INSTITUTION WOULD COMPLY, PLUS PLAINTIFF-APPELLANT, A FIRST TIME INMATE, WAS NOT AWARE THE PROCEDURE WAS REQUIRED.
>
> [5.] THE JUDGMENT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND IS CONTRARY TO LAW.

{¶ 13} By his assignments of error, Taylor argues that judgment in ODRC's favor is against the manifest weight of the evidence. Recently, the Supreme Court of Ohio clarified the character and extent of the manifest-weight standard in civil cases. In *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶ 17, the court held that the manifest-weight standard articulated in *State v. Thompkins*, 78 Ohio St.3d 380 (1997), applies to civil cases, too. As stated in *Thompkins*:

> Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief."

(Emphasis omitted.) *Id.* at 387, quoting *Black's Law Dictionary* 1594 (6th Ed.1990). Thus, in determining whether a judgment is against the manifest weight of the evidence, an appellate court must consider whether the evidence on each element satisfied or failed to satisfy the burden of persuasion. *Eastley* at ¶ 19. In other words, the appellate court "sits as a 'thirteenth juror' and [agrees or] disagrees with the factfinder's resolution of the

conflicting testimony." *Thompkins* at 387, quoting *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). Although the manifest-weight standard requires an appellate court to reweigh the evidence, the court "must always be mindful of the presumption in favor of the finder of fact." *Eastley* at ¶ 21; *accord State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus ("On the trial of a case, either civil or criminal, the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of facts.").

{¶ 14} Because Taylor's second, third, and fifth assignments of error are interrelated, we will consider them together. Essentially, Taylor argues in these assignments of error that the trial court's determination that ODRC was not negligent is against the manifest weight of the evidence. We agree.

{¶ 15} To establish negligence, a plaintiff must show the existence of a duty, a breach of that duty, and injury resulting proximately therefrom. *Flagstar Bank, F.S.B. v. Airline Union's Mtge. Co.*, 128 Ohio St.3d 529, 2011-Ohio-1961, ¶ 19. ODRC owes prison inmates a duty of reasonable care and protection from dangerous conditions about which ODRC knew or should have known. *Barnett v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 09AP-1186, 2010-Ohio-4737, ¶ 18; *Washington v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 10AP-136, 2010-Ohio-4323, ¶ 14. "Reasonable care" is the degree of caution and foresight that an ordinary prudent person would employ in similar circumstances. *Franks v. Ohio Dept. of Rehab. & Corr.*, 195 Ohio App.3d 114, 2011-Ohio-2048, ¶ 12 (10th Dist.). Prison inmates must also exercise reasonable care to ensure their own safety. *Snider v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 11AP-965, 2012-Ohio-1665, ¶ 12.

{¶ 16} Here, Taylor argues that ODRC failed to reasonably care for him when, contrary to the LoCI physician's orders, it placed him in a top bunk. Taylor contends that assignment to a top bunk proximately caused the injuries that he sustained in his fall. The trial court found against Taylor for three reasons: (1) the evidence did not establish that LoCI medical personnel had required ODRC to assign him to a bottom bunk, (2) ODRC neither knew or should have known that Taylor needed a bottom bunk, and (3) Taylor's failure to grieve his placement in a top bunk was the sole proximate cause of his injuries.

{¶ 17} To prove that he had a bottom-bunk restriction at LoCI, Taylor presented the September 16, 2008 physician's orders that stated "BB." The trial court rejected the physician's orders as evidence of a bottom-bunk restriction because it found that the

record contained no testimony that explained the "BB" notation. We disagree. First, Taylor's testimony clarified the meaning of "BB," which was listed under item two of the physician's orders:

> Q: * * * Take a look at [the September 16, 2008 physician's orders]. The word that appears under the date of 9- -- looks like 9-16-2008. Do you remember seeing a physician on or about that date?
>
> A: Yes. * * *
>
> Q: Okay. Do you note what the doctor seems to have ordered at 9-16-08 under item two?
>
> A: Yeah. Bottom bunk.

(Tr. 18.)

{¶ 18} Additionally, the other documents that Taylor admitted into evidence explicate the meaning of "BB" when written on medical records maintained by ODRC. The bottom-bunk/bottom-range restriction that Taylor received at CRC is reflected in the September 3, 2008 record of Taylor's physical exam that includes the notation "BB/BR" and also states "Bottom Bunk/Range." The September 3, 2008 physician's orders for Taylor also state "BB/BR restriction." On the "Intrasystem Transfer and Receiving Health Screening form" the CRC nurse wrote "Bottom Bunk Bottom Range" and the LoCI nurse wrote "BB/BR pending."

{¶ 19} Reviewing the September 16, 2008 physician's orders in isolation, we concur with the trial court that the meaning of "BB" is unfathomable. However, when reviewed in the context of Taylor's other ODRC medical records, "BB" can only mean bottom bunk. Given Taylor's testimony and the totality of his medical records, we conclude that the finding that no bottom-bunk restriction existed at L0CI is against the manifest weight of the evidence.

{¶ 20} Next, the trial court found that ODRC was not aware that Taylor needed a bottom bunk. Although Taylor testified that he told various unit personnel about his need for a bottom bunk, those individuals disclaimed any memory of such a conversation with Taylor. The trial court found the unit personnel more credible than Taylor. Because the trier of fact is in the best position to determine the credibility of witnesses, we will defer to

the trial court's decision to disbelieve and thus, to disregard, Taylor's testimony about his complaints to unit personnel. We also note that the record contains Taylor's admission that he did not file a grievance regarding his placement in a top bunk.

{¶ 21} The record, however, contains other, undisputed evidence that ODRC had notice that Taylor needed a bottom bunk. First, ODRC's own medical records for Taylor contain an order from an LoCI physician that Taylor receive a bottom bunk. Second, Taylor complained to an LoCI nurse that he needed a bottom bunk on October 1, 2008—approximately two weeks prior to his fall. A form the nurse completed memorializes Taylor's complaint and, thus, is documentary evidence that ODRC had notice that Taylor needed a bottom bunk. Based on the foregoing evidence, we conclude that the trial court's finding that ODRC was not aware that Taylor needed a bottom bunk is against the manifest weight of the evidence.

{¶ 22} Finally, the trial court found that Taylor's failure to grieve his assignment to a top bunk was the sole proximate cause of Taylor's fall. If an injury is the natural and probable consequence of the alleged negligent act, then that act is the proximate cause of the injury. *Sutowski v. Eli Lilly & Co.*, 82 Ohio St.3d 347, 351 (1998). To find that an injury was the natural and probable cause of an alleged negligent act, it must appear that the injury complained of could have been foreseen or reasonably anticipated from the act. *Strother v. Hutchinson*, 67 Ohio St.2d 282, 287 (1981). "There may be more than one proximate cause of an injury." *Taylor v. Webster*, 12 Ohio St.2d 53, 57 (1967).

{¶ 23} Here, the trial court found that Taylor had a duty to exercise reasonable care for his own safety, and that he breached this duty by failing to grieve his bunk assignment. The trial court then apparently reasoned that if Taylor had filed a grievance, ODRC would have moved him to a bottom bunk and the accident would not have occurred. The trial court thus concluded the accident was a natural and probable consequence of Taylor's failure to grieve.

{¶ 24} We do not disagree with the trial court's reasoning. Nevertheless, we cannot concur with the trial court's conclusion that Taylor's failure to grieve was the *sole* proximate cause of the accident. Taylor is an insulin-dependant diabetic. ODRC does not contest Taylor's testimony that he gets weak when he does not "eat right." (Tr. 11.) Therefore, it could be reasonably anticipated that Taylor could seriously injure himself if

he left a top bunk in a weakened state. Logically, this is why the LoCI physician ordered ODRC to assign Taylor to a bottom bunk in the first place. Consequently, Taylor's accident is also a natural and probable consequence of his assignment to a top bunk. As the record contains evidence of two proximate causes, the trial court's finding of only one proximate cause is against the manifest weight of the evidence.

{¶ 25} When the negligent actions of both the plaintiff and the defendant produce a proximate cause of the injury, a trial court must apply the comparative negligence statutes to decide whether the plaintiff recovers and the amount of damages. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 681 (1998). R.C. 2315.33 provides that, if the contributory fault of the plaintiff does not exceed the fault of the other parties involved, the plaintiff's contributory fault does not bar recovery. However, the trial court must diminish any compensatory damages recoverable by an amount that is proportionally equal to the percentage of the plaintiff's negligence. *Id.*; R.C. 2315.35.

{¶ 26} In the case at bar, we decline to consider whether ODRC properly preserved the comparative-negligence affirmative defense and, if it did, whether Taylor's relative fault exceeds ODRC's. Given the conclusions we set forth above, we must remand this matter to the trial court for further proceedings. App.R. 12(C). We leave those questions, therefore, for the parties to raise and the trial court to address on remand.

{¶ 27} For the forgoing reasons, we sustain Taylor's second, third, and fifth assignments of error. Our ruling on these three assignments of error renders Taylor's first and fourth assignments of error moot. We reverse the judgment of the Court of Claims of Ohio, and we remand this matter to that court for further proceedings consistent with law and this decision.

Judgment reversed; cause remanded.

BRYANT and FRENCH, JJ., concur.