[Cite as *Washington v. Ohio Dept. of Rehab. & Corr.*, 2010-Ohio-4323.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Bennie Washington,	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-136 (C.C. No. 2007-06471)
Ohio Department of Rehabilitation and Correction,	:	(ACCELERATED CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on September 14, 2010

Bennie Washington, pro se.

Richard Cordray, Attorney General, and *Douglas R. Folkert*, for appellee.

APPEAL from the Court of Claims of Ohio.

SADLER, J.

{¶1} Plaintiff-appellant, Bennie Washington ("appellant"), pro se, appeals from a judgment of the Court of Claims of Ohio overruling appellant's objection to a magistrate's decision and adopting the magistrate's decision as the court's final judgment in favor of defendant-appellee, Ohio Department of Rehabilitation and Correction, in appellant's

negligence action to recover compensatory damages for an injury appellant allegedly sustained in a fall. For the following reasons, we affirm.

{¶2} Appellant, an inmate housed at Marion Correctional Institution ("MCI"), initiated this action on July 18, 2007, by filing a complaint against appellee in the Court of Claims. According to the allegations in the complaint, at approximately 5:30 p.m. on September 7, 2006, appellant stepped into a "softball size[d]" hole in the hallway of "(5) dorm" and fell. Thereafter, appellant was transported to the infirmary where he was treated for an injury to his "lower back and neck." According to appellant, both the maintenance supervisor and safety officer at MCI were aware of the existence of the hole prior to appellant's fall, yet failed to repair it. In its answer, appellee denied appellant's allegations.

{¶3} Appellant filed a motion for summary judgment on June 13, 2008; appellee filed a memorandum contra on June 24, 2008. The trial court denied appellant's summary judgment motion on September 28, 2008.

{¶4} A bifurcated trial on the issue of liability was held before a magistrate on October 7, 2008. The magistrate issued a decision on December 10, 2009, recommending judgment for appellee. Although not delineated as such, the magistrate's decision included findings of fact and conclusions of law. In part, the magistrate stated:

> Plaintiff testified that, when the incident occurred, he was leaving the MCI "chow hall" after finishing his evening meal and was on his way to take a "smoke break" with "some of the guys." Plaintiff stated that as he walked down the hall, the toe of his shoe became caught in a hole in the floor causing him to fall and "hit the ground hard." Plaintiff further stated that he could not stand on his own after the fall and that a corrections officer called a nurse who then transported him to the infirmary in a wheelchair. Plaintiff testified that after the

> incident, he sent a letter to the MCI maintenance department about the hole but he did not receive a response. According to plaintiff, there are loose tiles and "giant" holes that present a constant danger to individuals traversing the hallway. Plaintiff stated that the incident left him feeling "totally disrespected."

{¶5} The magistrate also cited testimony by Lee Campo, the MCI safety officer at the time of the incident, that the hallway in question is the "main" hallway of the institution, that all 2,000 inmates use it to enter and exit the "chow hall," and that corrections officers and staff members also traverse the hallway. Campo further stated that the hallway, which is lit at all times, is constantly being repaired because it sustains such heavy pedestrian traffic, and that he did not recall appellant's incident or being specifically instructed to repair any "hole" that caused plaintiff's fall.

{¶6} The magistrate also cited testimony by Keith Beitzel, the MCI building maintenance supervisor at the time of the incident, that the floor of the hallway at issue is covered by one-half inch thick tiles. Beitzel stated that as a result of appellant's fall, MCI's Deputy Warden Milligan issued a work order on September 7, 2006 to Dick Enderle, a member of MCI's maintenance staff. Beitzel identified MCI maintenance records (Defendant's Exhibit G), which demonstrate that Enderle signed the order and wrote that he removed broken tiles from the hallway and filled in the resultant holes with cement. In addition, Beitzel testified that the "holes" to which Enderle and appellant referred are three-quarters of an inch deep and are actually spots on the floor where tiles have broken or come loose.

{¶7} Noting Ohio law regarding both the state's duty to exercise reasonable care to prevent inmates from being injured by dangerous conditions about which the state

knows or should know, as well as a pedestrian's duty to exercise some degree of care for his or her own safety while walking, including the duty to avoid open and obvious conditions in a walkway, the magistrate concluded, "[b]ased upon the evidence and testimony presented at trial, the court finds that the 'hole' that caused [appellant's] fall was an open and obvious condition, and that therefore [appellee] did not owe [appellant] a duty of care." (Magistrate's Decision, 3.)

{¶8} On December 21, 2009, appellant filed a "Motion for Objection" to the magistrate's decision, objecting to "that factual finding of legal conclusion and decision as required by Civ.R. 53(D)(3)(b). And objection to that finding. Because of new discovery of material fact and of evidence." (Sic passim.) In his memorandum in support of his objection, appellant primarily alleged that the infirmary nurse who treated him after the fall ignored a subpoena to appear at trial and should thus be held in contempt for failure to obey a court order. In addition, appellant asserted that "[he] would like the Magistrate Decision overturned." However, appellant did not support his objection with a copy of the transcript or an affidavit of the evidence presented to the magistrate, as required by Civ.R. 53(D)(3)(b)(iii). On January 13, 2010, the trial court, having no transcript or affidavit to review, overruled appellant's objection, adopted the magistrate's decision, and entered judgment in favor of appellee.

{¶9} Appellant timely appealed the trial court's judgment. Although appellant has filed a brief, it fails to comply with App.R. 16(A). Specifically, appellant's brief does not include: (1) a statement of the assignments of error presented for review; (2) a statement of the issues presented for review; and (3) an argument containing the contentions of appellant with respect to each assignment of error. Because an appeal is decided on the

merits of the assignments of error presented, and here, appellant has not presented any for our review, we would be well within our discretion to summarily affirm the trial court's judgment. App.R. 12; *Miller v. Johnson & Angelo*, 10th Dist. No. 01AP-1210, 2002-Ohio-3681.

{¶10} However, in the interests of justice, we have independently reviewed the entire record on appeal, and have determined that, in our view, appellant's brief raises two assignments of error: (1) that the trial court's decision granting judgment in favor of appellee is against the manifest weight of the evidence, and (2) that the trial court erred in failing to find Andy Parker, the infirmary nurse who treated appellant following his fall, in contempt for failing to obey a court order to appear at trial.

{¶11} Civ.R. 53(D)(3)(b)(iii) requires a party objecting to a magistrate's findings of fact to support that objection with the transcript of all portions of the proceeding relevant to that finding or, if a transcript is not available, with an affidavit. A trial court reviewing a magistrate's decision may accept or reject that decision, with or without modifications, or may elect to hold a new hearing, take additional evidence or send the matter back to the magistrate for additional proceedings. Civ.R. 53(D)(4)(b). Appellant did not file a transcript or an affidavit of the evidence in support of his objection to the magistrate's decision.

{¶12} Absent a transcript or appropriate affidavit, the trial court is limited to consideration of the magistrate's conclusions of law in light of the facts found by the magistrate, unless the trial court elects to hold further hearings to take additional evidence. *Wade v. Wade* (1996), 113 Ohio App.3d 414, 418. If a transcript or affidavit is not provided, the trial court cannot make a credibility determination regarding the

evidence presented to the magistrate, and is therefore required to accept the findings of fact and consider only whether the evidence supported the magistrate's legal conclusions. *Moore v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 05AP-53, 2005-Ohio-3939, ¶11. Regardless of whether a transcript is filed, the trial court has the authority to determine whether the magistrate's findings of fact are sufficient to support the conclusions of law made, and to reach a different legal conclusion as long as that conclusion is supported by the magistrate's findings of fact. *Wade* at 419.

{¶13} Our review of the trial court's application of the law to a magistrate's findings of fact is for abuse of discretion. *Moore* at ¶12. An abuse of discretion connotes more than an error in law or judgment; it implies that the court's attitude was unreasonable, arbitrary or unconscionable. Id., citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶14} We first address appellant's argument, asserted in his first assignment of error, that the trial court's judgment against him on his negligence claim is against the manifest weight of the evidence. To prevail on his claim against appellee, appellant was required to establish that appellee owed appellant a duty of care, that appellee breached that duty, and that appellee's breach of duty was the proximate cause of appellant's injury. *Dean v. Dept. of Rehab. & Corr.* (Sept. 24, 1998), 10th Dist. No 97API12-1614, citing *Lopez v. Ohio Dept. of Transp.* (1987), 37 Ohio App.3d 69, 70. Due to the custodial relationship between the state and its inmates, the state has a duty to exercise reasonable care to prevent prisoners in its custody from being injured by dangerous conditions about which the state knows or should know. *Dean,* citing *Moore v. Ohio Dept. of Rehab. & Corr.* (1993), 89 Ohio App.3d 107, 112. Prison officials are not insurers of an

inmate's safety; however, they generally owe inmates a duty of reasonable care and protection from harm. *Williams v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 04AP-1193, 2005-Ohio-2669, ¶8, citing *Briscoe v. Ohio Dept. of Rehab. & Corr.,* 10th Dist. No. 02AP-1109, 2003-Ohio-3533. "Nonetheless, '[u]nder the "open and obvious" doctrine, an owner or occupier of property owes no duty to warn * * * of open and obvious dangers on the property. * * * The rationale behind the doctrine is that the open and obvious nature of the hazard itself serves as a warning, and that the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves.' " Id., quoting *Duncan v. Capitol S. Comm. Urban Redevelopment Corp.,* 10th Dist. No. 02AP-653, 2003-Ohio-1273, ¶27, quoting *Anderson v. Ruoff* (1995), 100 Ohio App.3d 601, 604. "The 'open and obvious doctrine,' where warranted, may be applied in actions against the ODRC with the result that ODRC would owe no duty to an injured inmate." Id.

{¶15} "Open and obvious dangers are those not hidden, concealed from view, or undiscoverable upon ordinary inspection." *Cooper v. Meijer Stores Ltd. Partnership,* 10th Dist. No. 07AP-201, 2007-Ohio-6086, ¶13, citing *Lydic v. Lowe's Cos., Inc.*, 10th Dist. No. 01AP-1432, 2002-Ohio-5001, ¶10. An individual "does not need to observe a dangerous condition for it to be an 'open and obvious' condition under the law; rather, the determinative issue is whether the condition is observable." Id., citing *Lydic.* "Even in cases where the plaintiff did not actually notice the condition until after he or she fell, this court has found no duty where the plaintiff could have seen the condition if he or she had looked." Id., citing *Lydic.* Accordingly, "a pedestrian's failure to avoid an obstruction

because he or she did not look down is no excuse." Id., citing *Lydic,* citing *Jeswald v. Hutt* (1968), 15 Ohio St.2d 224.

{¶16} As noted above, the magistrate did not delineate factual findings per se; however, we interpret the magistrate's recitation of the testimony and evidence presented at the trial as factual findings. Indeed, the magistrate concluded that "[b]ased upon the evidence and testimony presented at trial, the court finds that the 'hole' that caused [appellant's] fall was an open and obvious condition, and that therefore [appellee] did not owe [appellant] a duty of care." (Magistrate's Decision, 3.)

{¶17} The magistrate cited appellant's testimony that his fall resulted from the toe of his shoe being caught in a hole as he traversed the hallway. The magistrate also noted appellant's testimony that loose tiles and "giant" holes exist in the hallway. In addition, the magistrate cited the testimony of Beitzel, the building maintenance supervisor, that the holes to which appellant referred were approximately three-quarters of an inch deep and were actually areas on the floor where tiles have broken or come loose. The magistrate cites no testimony demonstrating that the hole appellant alleged to have caused his fall was hidden, concealed from view or undiscoverable upon ordinary inspection.

{¶18} Appellant argues that his freedom to choose his route while traversing the hallway was restricted by prison regulations. Specifically, appellant asserts that "we have to walk on either side of the main hallway and if we walk outside the line's [sic] in the hallway, we can get segregation and receive a conduct report. We are force [sic] to walk down a [sic] unsafe hallway." (Appellant's brief, 3.) We note initially that the magistrate's factual findings do not support appellant's contention. Moreover, this court has previously

rejected this argument: "even if appellant believed he had only one route available 'appellant's inability to select his route of travel does not mean the [hazard] was not an open and obvious condition. In other words, solely because this route was selected by the corrections officers * * * such does not render an open and obvious condition no longer open and obvious.' " *Mayle v. Ohio Dept. of Rehab. & Corr.,* 10th Dist. No. 09AP-541, 2010-Ohio-2774, ¶29, quoting *Cordell v. Ohio Dept. of Rehab. & Corr.,* 10th Dist. No. 08AP-749, 2009-Ohio-1555, ¶9. Thus, even if appellant's route was established by MCI and his movements may have been somewhat restricted, such does not mean that the hole in the walkway was not an open and obvious condition.

{¶19} Upon application of the doctrine of open and obvious to the facts as found by the magistrate, the magistrate could properly conclude that appellee owed appellant no duty of care, and the trial court did not abuse its discretion in adopting the magistrate's decision as its own. Accordingly, we overrule appellant's first assignment of error.

{¶20} We further find no merit to the contention raised in appellant's second assignment of error that the trial court erred in failing to find Andy Parker in contempt for failing to appear at the trial. The record reveals that a subpoena was issued to "Nurse Andy" on September 17, 2008. The subpoena was delivered to MCI on September 19, 2008. On September 29, 2008, MCI Warden Margaret A. Beightler returned the subpoena to the trial court with a notation that "Nurse Andy" was no longer employed at MCI. Appellant contends, without evidentiary support, that Andy Parker was in fact employed by MCI at the time of trial. As noted above, the record belies appellant's assertion.

{¶21} Finally, we find no merit to appellant's contention that Andy Parker's presence at trial was crucial to his case. Specifically, appellant maintains that "[i]f Nurse Andy Parker were allowed to come to my trial, the outcome would have been different." (Appellant's brief, 5.) Appellant provides no explanation as to the substance of Andy Parker's testimony or why such testimony was critical to his case. We thus overrule appellant's second assignment of error.

{¶22} Having overruled appellant's first and second assignments of error, we affirm the judgment of the Court of Claims of Ohio.

Judgment affirmed.

KLATT and FRENCH, JJ., concur.

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