

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Jack Nott,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 09AP-842
v.	:	(C.C. No. 2005-07950)
	:	
Ohio Department of Rehabilitation and Correction,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	
	:	

D E C I S I O N

Rendered on April 8, 2010

Richard F. Swope; John C. Bucalo, for appellant.

Richard Cordray, Attorney General, and *Eric A. Walker*, for appellee.

APPEAL from the Court of Claims of Ohio.

BRYANT, J.

{¶1} Plaintiff-appellant, Jack Nott, appeals from a judgment of the Ohio Court of Claims entering judgment for defendant-appellee, Ohio Department of Rehabilitation and Correction ("ODRC"), on plaintiff's complaint alleging defendant's negligence caused injury to plaintiff's left foot and ultimately resulted in amputation of his left leg. Because (1) the judgment of the Court of Claims is not against the manifest weight of the evidence in

concluding plaintiff failed to prove injury to his left foot was the result of defendant's negligence, but (2) the Court of Claims failed to address plaintiff's claim concerning injury to his right leg as a result of shackle abrasions, we affirm in part and reverse in part.

I. Procedural History

{¶2} On June 30, 2005, plaintiff filed a complaint against defendant asserting defendant knew plaintiff to be a severe diabetic but nonetheless negligently placed him in leg irons and gave him soft, worn shoes that would not stay on his feet when defendant transported plaintiff to the Corrections Medical Center. Plaintiff alleged that as a result of defendant's negligence "in utilizing metal shackles on a severe diabetic and forcing him to walk barefoot," plaintiff "received injury to his foot and left leg which would not heal and which resulted in the amputation of his left leg" below the knee. (Complaint, ¶5.)

{¶3} Following defendant's answer on July 22, 2005, the Court of Claims on August 12, 2005 held a status conference which resulted in the court's ordering liability and damages were to be tried separately. The liability portion of plaintiff's complaint was tried to a court magistrate on October 27, 2006.

{¶4} On May 11, 2009, the magistrate issued a decision, stating "it is undisputed that there was a wound on the bottom of [defendant's] 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." (Magistrate's Decision, 4.) With that premise, the magistrate determined "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." (Magistrate's Decision, 4.) Accordingly, the magistrate determined judgment should be entered for defendant.

{¶5} Plaintiff filed objections to the magistrate's decision. In a judgment entry filed August 11, 2009, the Court of Claims overruled plaintiff's objections, adopted the magistrate's decision and recommendation, including the findings of fact and conclusions of law, and entered judgment for defendant on plaintiff's negligence complaint.

II. Assignments of Error

{¶6} Plaintiff appeals, assigning the following errors:

ASSIGNMENT OF ERROR NO. 1:

THE MAGISTRATE AND THE TRIAL COURT ERRED AND ABUSED THEIR DISCRETION IN FINDING THAT PLAINTIFF-APPELLANT DID NOT ESTABLISH WHEN THE WOUND TO THE LEFT FOOT OCCURRED.

ASSIGNMENT OF ERROR NO. 2:

THE MAGISTRATE AND TRIAL COURT ERRED IN RULING AN EXPERT WAS REQUIRED TO PROVE THE EXTENT AND NATURE OF THE INJURIES BECAUSE THE CASE WAS TRIED AS LIABILITY ONLY.

ASSIGNMENT OF ERROR NO. 3:

THE MAGISTRATE AND TRIAL COURT ERRED WHEN THEY RULED PLAINTIFF-APPELLANT ONLY BECAME AWARE OF THE INJURY WHEN MCCARTER TOLD HIM ABOUT IT, WHICH IS INCONSISTENT WITH BOTH NOTT'S TESTIMONY AND MCCARTER'S TESTIMONY.

ASSIGNMENT OF ERROR NO. 4:

THE MAGISTRATE AND TRIAL COURT ERRED AND ABUSED THEIR DISCRETION IN RULING PLAINTIFF-APPELLANT FAILED TO CALL EMPLOYEES TO VERIFY HIS STORY, PARTICULARLY SINCE THE DEFENDANT-

APPELLEE, AFTER TWO ATTEMPTS TO DISCOVER THE NAMES OF TRANSPORT OFFICERS, COULD NOT IDENTIFY THEM.

ASSIGNMENT OF ERROR NO. 5:

THE MAGISTRATE AND TRIAL COURT ERRED WHEN THEY RULED PLAINTIFF-APPELLANT CLAIMED NEGLIGENCE BECAUSE OF THE USE OF CANVAS SHOES, RATHER THAN PROPER DIABETIC SHOES, WHICH IS CONTRARY TO THE ASSERTION THE CANVAS SHOES WERE WORN, DEFECTIVE AND WOULD NOT STAY ON HIS FEET AND DEFENDANT-APPELLEE FAILED TO GET PLAINTIFF-APPELLANT ANOTHER PAIR.

ASSIGNMENT OF ERROR NO. 6:

THE MAGISTRATE AND TRIAL COURT ERRED IN NOT RULING PROVIDING AND SUPPLYING PLAINTIFF-APPELLANT WITH WORN INADEQUATE CANVAS SHOES AND IN SO TIGHTLY SECURING PLAINTIFF'S SHACKLES THEY CAUSED INJURY WAS NOT NEGLIGENCE AND RULING THIS WAS AN ADMINISTRATIVE SECURITY ISSUE, GIVING THE DEFENDANT-APPELLEE IMMUNITY FROM LIABILITY.

ASSIGNMENT OF ERROR NO. 7:

THE MAGISTRATE AND TRIAL COURT IGNORED NOTT AND MCCARTER'S TESTIMONY OF WHEN AND HOW IT HAPPENED AND THE MEDICAL REPORTS OF AUGUST 21, 2003, TWO DAYS LATER, VERIFYING THE INJURY TO THE FOOT, AS WELL AS THE INITIAL REPORT REGARDING INJURY TO PLAINTIFF-APPELLANT'S LEGS DATED AUGUST 19, 2003.

ASSIGNMENT OF ERROR NO. 8:

THE MAGISTRATE AND TRIAL COURT'S RULING IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND IS NOT SUPPORTED BY THE EVIDENCE.

{¶7} Plaintiff's eight assignments of error raise two issues: (1) whether the manifest weight of the evidence supports the Court of Claims' judgment entered for defendant, and (2) whether the Court of Claims addressed all issues plaintiff raised.

{¶8} Because plaintiff alleged ODRC was negligent, plaintiff was required to show the existence of a duty, a breach of that duty, and an injury proximately caused by the breach. *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77. In the context of a custodial relationship between the state and its prisoners, the state owes a common law duty of reasonable care and protection from unreasonable risks. *McCoy v. Engle* (1987), 42 Ohio App.3d 204, 207-08. Reasonable care is defined as the degree of caution and foresight that an ordinarily prudent person would employ in similar circumstances. *Woods v. Ohio Dept. of Rehab. & Corr.* (1998), 130 Ohio App.3d 742, 745. The state is not an insurer of the safety of its prisoners, but once it becomes aware of a dangerous condition in the prison, it is required to take the reasonable steps necessary to avoid injury to prisoners. *Clemets v. Heston* (1985), 20 Ohio App.3d 132, 136. Prisoners, however, are also required to use reasonable care to ensure their own safety. See, e.g., *Macklin v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 01AP-293, 2002-Ohio-5069, ¶21, citing *Perry v. Eastgreen Realty Co.* (1977), 55 Ohio App.2d 130, 132.

{¶9} Judgments supported by some competent credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. "Credibility issues are not resolved as a matter of law, but are left to the trier of fact to

determine." *Ciccarelli v. Miller*, 7th Dist. No. 03 MA 60, 2004-Ohio-5123, ¶35, citing *Lehman v. Haynam* (1956), 164 Ohio St. 595.

A. Manifest Weight of the Evidence

{¶10} Some aspects of the evidence before the Court of Claims' magistrate were undisputed and reveal that plaintiff, a chronic diabetic who received a daily shot of insulin and oral medication, was an inmate at the Grafton Correctional Institution in 2003. On August 19, 2003, he and a fellow inmate, Johnny McCarter, were transported by van to the Corrections Medical Center where plaintiff was to procure a pair of eye glasses. Both inmates were dressed in orange jumpsuits and orange canvas shoes. They also were shackled, wearing leg irons, handcuffs, and chains around their waists.

{¶11} As the inmates were going to the van, plaintiff was unable to keep the left canvas shoe on his foot. Although he wore size 11, and defendant had issued a pair of size 11 canvas shoes to him, the left shoe was worn to the point that it would not remain on his foot. The guard driving the van three times attempted to put the shoe back on plaintiff's foot, but after the third time "he said, just pack them." (Tr. 28.)

{¶12} From there on, the evidence was disputed. Plaintiff testified that he, without a shoe on his left foot, stepped on something, causing a sore on the bottom of his foot. According to the evidence, McCarter saw plaintiff's foot was bleeding and told the guard not only before they left the institution, but also when they returned. On returning to the institution, plaintiff went to the infirmary where he saw Nurse Belva Starkey.

{¶13} Nurse Starkey testified that inmates, after a trip outside the institution, always are brought into the medical center, where the nurse could talk to the inmates

about complaints or injuries and assess any problems that occurred during the trip. On August 19, 2003, Nurse Starkey examined plaintiff on his return, conversed with him and wrote in her notes: "[h]e returned from CMC. He has an abrasion on his right ankle from the cuffs"; her testimony clarified that "would be the ankle cuffs." (Tr. 89.) The note further stated that "[t]he area was cleansed with H₂O, hydrogen peroxide; an antibiotic ointment and Band-Aid was applied; and then he was passed to see the doctor." (Tr. 89-90.) Nurse Starkey testified plaintiff did not mention to her on August 19, 2003 that he had a problem with his left foot and did not refer her to any kind of ulcer on his left foot. Nurse Starkey noted that whatever plaintiff told her, she marked on the paper.

{¶14} The nurse's note indicates plaintiff was passed on to the doctor's sick call for the next day "because he had an abrasion on his ankle, and he is a diabetic." (Tr. 90-91.) Plaintiff, however, did not appear for sick call the next day. Plaintiff instead appeared for sick call on August 21, 2003, saw the doctor, and complained about his left foot at that time. In rebuttal, plaintiff explained he did not tell the nurse about his left foot on August 19, 2003 because his right leg hurt so badly and presented a worse problem than his left foot.

{¶15} With that evidence, plaintiff contends he suffered injury to his left foot because he was forced to walk without a canvas shoe, having been issued a shoe that would not remain on his foot. Defendant responds that plaintiff suffered no injury to his left foot on August 19, 2003, as evidenced by his failure to report such injury to Nurse Starkey on his return to the institution and by her failure to discover it in examination. Resolving the disputed evidence required the magistrate and the judge of the Court of Claims to

assess plaintiff's credibility. Noting plaintiff's theory of how he was injured was speculative, the magistrate, and the court in adopting the magistrate's decision, concluded as to the critical credibility issue "that both plaintiff's and McCarter's recollection of the incident was poor and that they lacked credibility." (Magistrate's Decision, 4.)

{¶16} In the end, Nurse Starkey's testimony supports the Court of Claims' decision that plaintiff failed to establish he sustained an injury on August 19, 2003 as a result of being forced to walk without a shoe on his left foot. When that evidence is combined with the Court of Claims' determination that plaintiff lacked credibility, the necessary result is that the judgment of the Court of Claims is not against the manifest weight of the evidence.

{¶17} Plaintiff's remaining assignments of error largely are rendered moot as a result of our concluding the manifest weight of the evidence supports the Court of Claims' judgment. For example, plaintiff's fourth assignment of error asserts the magistrate and Court of Claims erred in ruling plaintiff failed to call employees to verify his story. The assignment of error refers to the magistrate's observation that plaintiff did not identify any of the employees involved in the matter, thus leaving the Court of Claims with only plaintiff's own testimony to support his contention he was ordered to carry his left shoe. Because, however, the magistrate and Court of Claims determined plaintiff's evidence failed to prove he suffered an injury to his left, bare foot, the magistrate's observation is not material to the Court of Claims' ultimate conclusion.

{¶18} Similarly, plaintiff contends the magistrate and Court of Claims wrongly discerned plaintiff's argument to be that defendant was negligent in requiring him to wear orange canvas shoes rather than his cushioned shoes during the trip. Any error, however, is harmless. Although plaintiff's point was the poor condition of the canvas shoes, rather than their use generally, was the cause of his injury, the issue is immaterial when the Court of Claims concluded, on the evidence presented, that plaintiff did not demonstrate he suffered an injury to his left foot on the August 19, 2003 trip.

{¶19} Likewise, to the extent the magistrate bridged into the damages issues in concluding plaintiff failed to prove his leg amputation was the proximate result of injury to his left foot, any error in that regard is immaterial. Once the magistrate determined plaintiff failed to demonstrate he suffered an injury to his left foot during the August 19, 2003 trip, whether the left foot injury caused the leg amputation was not an issue.

{¶20} Because the manifest weight of the evidence supports the Court of Claims' judgment, plaintiff's assignments of error with respect to the injury to his left foot are overruled.

B. Alleged Right Ankle Injury

{¶21} Although the magistrate and the Court of Claims addressed plaintiff's claim regarding the injury to his left foot, they did not address plaintiff's allegations that the iron shackles around his legs caused injury to the right leg that required follow-up treatment. Plaintiff contends that because he is a chronic diabetic, defendant's actions, even if customary for a non-diabetic inmate, amount to negligence when applied to him.

{¶22} The record reveals plaintiff presented evidence concerning the injury to his right ankle as a result of the iron shackles and also argued the injury throughout the case. Not only did Johnny McCarter testify the leg irons skinned plaintiff's leg, but plaintiff also testified that when he went to the infirmary following the trip, he told Nurse Starkey about his right leg because at that point it seemed worse than the left foot. Supporting plaintiff's testimony are Nurse Starkey's notes as well as a doctor's note of August 21, 2003 which observes an "abrasion of the medial aspect, right ankle" and includes the doctor's instructions for care of the ankle.

{¶23} Moreover, at the conclusion of plaintiff's case, defendant asked the magistrate to dismiss plaintiff's case pursuant to Civ.R. 41(B)(2). In responding to defendant's argument, plaintiff argued the evidence regarding injury to plaintiff's right leg. Although plaintiff admitted the shackles were "not the real big problem in this case," but "a minor part," plaintiff presented the issue for decision. (Tr. 85.) Similarly, in closing argument plaintiff noted plaintiff's diabetic condition and stated, "[i]f you're a guard, and you got an inmate, you put the shackles on him, you want to make sure you don't put them on so tight that * * * you end up scraping his legs and putting wounds on it so that the nurse could even see them." (Tr. 109-10.) As plaintiff explained, "[o]rdinary care requires these correctional officers, when * * * they put the shackles on, to make sure that they're applied so they don't do harm to the individual. * * * [H]e was sitting around and trying to walk in these metal shackles, and it caused an injury." (Tr. 111.)

{¶24} The Court of Claims, however, did not determine defendant's negligence with respect to the leg shackles and the injury plaintiff alleges they caused to his right leg.

Because that issue has not been determined, we remand the case to the Court of Claims to consider and resolve plaintiff's allegations concerning his right leg.

{¶25} Having overruled all of plaintiff's assignments of error regarding the alleged injury to his left foot, but having sustained the sixth and eighth assignments of error to the extent indicated regarding the alleged injury to his right leg, we affirm the judgment of the Court of Claims in part, reverse in part, and remand for further proceedings consistent with this decision.

*Judgment affirmed in part and
reversed in part; case remanded.*

KLATT and McGRATH, JJ., concur.
