

[Cite as *Elam v. Ohio Dept. of Rehab. & Corr.*, 2010-Ohio-1225.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

James Elam, Administrator of the Estate	:	
of Rex Elam III, Deceased,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 09AP-714
v.	:	(C.C. No. 2007-07728)
	:	
Ohio Department of Rehabilitation	:	(REGULAR CALENDAR)
and Correction,	:	
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on March 25, 2010

David A. Singleton, Bess Okum, and Molly Lyons, for appellant.

Richard Cordray, Attorney General, *Velda K. Hofacker*, and *Daniel R. Forsythe*, for appellee.

APPEAL from the Court of Claims of Ohio.

FRENCH, J.

{¶1} Plaintiff-appellant, James Elam, administrator of the estate of Rex Elam III ("appellant"), appeals the judgment of the Court of Claims of Ohio, which held that defendant-appellee, Ohio Department of Rehabilitation and Correction ("DRC"), was not liable in appellant's wrongful death lawsuit. For the following reasons, we affirm.

{¶2} On September 26, 2005, Gerald Catchings, an inmate at the Southern Ohio Correctional Facility ("SOCF"), fatally stabbed fellow inmate Rex Elam with a glass shank he made after breaking his cell window. Appellant sued DRC for Elam's wrongful death under a negligence theory, and a trial ensued.

{¶3} At trial, the court admitted into evidence details of Catchings' prior conduct. In May 1995, he removed a glass pane from his window. In June 1995, he told a corrections officer, who found glass outside his cell, "If you don't get me out of here I'm going to send another window out." (Plaintiff's Exhibit at 3-1.) In July 1995, a corrections officer found that putty had been stripped away to loosen the window panes in Catchings' cell. In August 1995, he threatened a corrections officer after throwing a window pane from his cell. From January 7, 1999 to March 14, 2002, he was placed at the Ohio State Penitentiary ("OSP") for "aggressive/predatory behaviors." (Plaintiff's Exhibit at 1-6.) In October 2003, he threatened corrections officers Donald Tackett and Brian Payne with a large piece of glass he broke from his cell window. After refusing to be handcuffed, he broke another part of his window, and Tackett ultimately used pepper spray to subdue him.

{¶4} At trial, Payne discussed the October 2003 incident. He said that Catchings threatened him with a six-inch piece of glass, and he noted that glass is contraband because inmates can use it for weapons. He confirmed that in his report on the incident, he described the inmate as "[v]ery violent." (Vol. I Tr. 38.) He testified that it was not unusual for inmates to act violently toward him because SOCF is a maximum security prison where inmates "are the worst of the worst." (Vol. I Tr. 35.) He testified

that even after this incident he did not think Catchings was any more violent than other SOCF inmates, and he had no reason to believe that Catchings would kill Elam or anyone else. In fact, he heard of no complaints about Catchings' behavior in the days prior to Elam's death. Although Payne testified that he had never found glass shanks in inmates' cells during routine inspections, an assistant to appellant's counsel testified that, when she interviewed Payne, he admitted finding these types of weapons in inmates' cells, and he said that inmates used glass as a weapon "because it's fast and handy." (Vol. I Tr. 58.)

{¶5} SOCF business administrator Denise Gray testified as follows. Prior to Elam's death, SOCF prison officials had unsuccessfully sought funds from different state resources for window replacements. They sought to obtain more energy efficient windows, but to bolster their request, they expressed a safety concern that the window glass could be broken and made into weapons because it was not "safety glass." (Vol. I Tr. 94.) Gray clarified that their efforts to replace the windows were for energy, not security, concerns.

{¶6} Gordon Bullion was a former maintenance supervisor at SOCF and testified that inmates broke windows into shards that were "[s]ometimes" sharp. (Vol. I Tr. 68.) David Newsome formerly oversaw security at SOCF and testified that Catchings "was kind of under the radar, kind of to himself, didn't have a lot of communication with staff or his peers." (Vol. II Tr. 131.) Newsome had never heard reports of the inmate threatening Elam, and there was no evidence that he would kill Elam.

{¶7} Donald Morgan was a security supervisor when Catchings killed Elam and testified as follows. Inmates at SOCF are those that "other prisons have a tough time managing." (Vol. II Tr. 140.) Catchings had destroyed prison property, including glass, numerous times, but this behavior was typical for an inmate at SOCF. Catchings also exhibited behavior typical of his fellow inmates when he threatened corrections officers in October 2003, because "a large number of the population" at SOCF "are assaultive to staff." (Vol. II Tr. 163.) Catchings was disciplined for his previous misconduct in 1995 and 2003, and this included him being subject to tight security and staying in the part of the prison that did not have windows in the cells, but did have windows in other parts of the area. After the October 2003 incident, Catchings was on disciplinary status for 18 months, "which is an extremely long period of time." (Vol. II Tr. 149.) The October 2003 incident gave Morgan no reason to believe that Catchings would make a glass shank to assault Elam, and he was not aware of any problems between these inmates.

{¶8} The court concluded that DRC was not liable in appellant's wrongful death suit because there was no actual or constructive notice that Catchings would attack Elam. The court recognized that, "[a]lthough the evidence demonstrates that Catchings had some history of breaking or removing glass from windows, all but one of these episodes occurred more than ten years prior to his attack upon Elam." The court also said that "Catchings' prior behavior was typical for an SOCF inmate and, moreover, there is no evidence that Catchings had ever before exhibited violence toward another

inmate" and that "Catchings did not exhibit a propensity for violence such that [DRC] should have known of the impending attack upon Elam."

{¶9} Appellant appeals, raising two assignments of error:

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED AS A MATTER OF LAW IN CONCLUDING THAT ACTUAL KNOWLEDGE OF A SPECIFIC VICTIM IS REQUIRED.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED WHEN IT IGNORED KEY EVIDENCE THAT ESTABLISHED ODRC'S KNOWLEDGE OF THE DANGERS PRESENTED BY BOTH THE WINDOW GLASS AND CATCHINGS.

{¶10} In his first assignment of error, appellant challenges the Court of Claims' conclusion that DRC was not liable in the wrongful death suit because "there is no evidence that Catchings had ever before exhibited violence toward another inmate," and "Catchings did not exhibit a propensity for violence such that [DRC] should have known of the impending attack upon Elam." Appellant argues that the court improperly required him to prove that DRC had actual knowledge that a specific victim would be attacked. He contends that precedent establishes that "[i]t is not necessary that the defendant should have anticipated the particular injury. It is sufficient that his act is likely to result in an injury to some one." See *Mudrich v. Standard Oil Co.* (1950), 153 Ohio St. 31, 39, quoting *Neff Lumber Co. v. First Natl. Bank* (1930), 122 Ohio St. 302. This precedent applies to the issue of proximate cause, a principle concerning whether an injury is the natural and probable consequence of a negligent act. See *Cascone v. Herb Kay Co.* (1983), 6 Ohio St.3d 155, 159-60; *Mudrich* at 37-39. To be sure,

proximate cause is an element of appellant's wrongful death suit. See *Littleton v. Good Samaritan Hosp. & Health Ctr.* (1988), 39 Ohio St.3d 86, 92. The Court of Claims did not reach the issue of proximate cause, however, because it concluded that appellant did not prove the separate and distinct requirement that DRC had notice of the attack. See *Doss v. Ohio Dept. of Rehab. & Corr.* (Mar. 28, 2000), 10th Dist. No. 99AP-661, citing *Baker v. Ohio Dept. of Rehab. & Corr.* (1986), 28 Ohio App.3d 99 (recognizing that "[w]here one inmate intentionally assaults another, actionable negligence on the part of the state will arise only where there was adequate notice to correctional authorities of the impending attack").

{¶11} Appellant also argues that, pursuant to *Walton v. Ohio Dept. of Rehab. & Corr.* (June 25, 1992), 10th Dist. No. 91AP-935, the identity of the specific victim is not required to establish notice to the state. This court did not refer to the notice issue in that case, however, and instead analyzed proximate cause and related negligence concepts. Conversely, in *Doss*, this court analyzed whether the state had notice that a specific inmate would be attacked and concluded that this notice did not exist because, although the victim previously had an argument with the assailant, corrections officers did not know about it, and the victim had no notice of the impending assault either. *Id.* Similarly, in *McDonald v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 02AP-735, 2003-Ohio-513, ¶15, 18, an inmate sued the state after being attacked by fellow inmates. This court concluded that the requisite notice was lacking because the victim had no prior problems with the assailants, and the assailants gave corrections officers no indication that they were going to attack the victim.

{¶12} Here, the Court of Claims examined the evidence to determine whether DRC had notice that Catchings would attack Elam, and this inquiry was proper pursuant to *Doss* and *McDonald*. Therefore, we overrule appellant's first assignment of error.

{¶13} In his second assignment of error, appellant argues that it was against the manifest weight of the evidence for the Court of Claims to conclude that DRC was not liable in the wrongful death suit. We disagree.

{¶14} Judgments supported by some competent, credible evidence going to all the material elements of the case are not against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. When applying this standard of review, an appellate court must presume the findings of the trier of fact are correct because it is best able to observe the witnesses and use those observations in weighing the credibility of the testimony. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. Appellant contends that the weight of the evidence did not support the Court of Claims' conclusion that DRC lacked constructive notice that Catchings would attack Elam. "'Constructive notice is that which the law regards as sufficient to give notice and is regarded as a substitute for actual notice.'" *State Farm Auto. Ins. Co. v. Ohio Dept. of Transp.* (June 8, 1999), 10th Dist. No. 98AP-936, quoting *In re Estate of Fahle* (1950), 90 Ohio App. 195, paragraph two of the syllabus.

{¶15} Appellant argues that, pursuant to *Vasquez v. Ohio Dept. of Rehab. & Corr.* (Feb. 22, 2001), 10th Dist. No. 00AP-387, the dangerous prison population at SOCF required DRC to eliminate the safety threat from the prison windows. In

Vasquez, an inmate attacked a fellow inmate with a 12-inch sharp object while the inmates were being transported to the recreation area at SOCF. Pursuant to prison policy, corrections officers searched the assailant prior to the transport, but the weapon was not discovered. The victim sued the state, claiming that this search was negligently performed. The Court of Claims did not hold the state liable in the suit. This court reversed, noting the state's "ongoing obligation to see that deadly weapons are not transported around the interior of Ohio's prisons, especially the Southern Ohio Correctional Facility."

{¶16} We decline to apply *Vasquez* to impose liability on DRC without consideration of whether it had notice of Catchings attacking Elam, given *Doss* and *McDonald* and given that the evidence in *Vasquez* implicated the notice issue because "[t]he attack on [the victim] was not the first of its kind." Moreover, we cannot impose liability on the sole basis that the prison population at SOCF is dangerous because DRC is not an insurer of inmate safety. See *Williams v. Southern Ohio Correctional Facility* (1990), 67 Ohio App.3d 517, 526.

{¶17} Next, appellant argues that Catchings' many altercations involving glass gave DRC constructive notice of the attack against Elam. Although the Court of Claims discounted this factor on the basis that all but one of the incidents occurred years prior to the attack, appellant contends that this finding was improper because Catchings was in a windowless cell for a period of time while being held for disciplinary reasons at OSP and the tight security area at SOCF. There is no evidence in the record depicting Catchings' surroundings at OSP, including whether his cell was windowless, however,

and Catchings still had access to glass even when he was placed in a windowless cell at SOCF. Therefore, the Court of Claims properly accorded little weight to the fact that Catchings had numerous altercations involving glass.

{¶18} Lastly, appellant argues that the October 2003 incident gave DRC constructive notice that Catchings would attack Elam. To be sure, Catchings threatened corrections officers during this incident and had to be subdued with pepper spray. Despite this incident, prison staff testified that there was no notice that Catchings would attack Elam. It was within the Court of Claims' province to accept this testimony, given that prison staff only portrayed the October 2003 incident as Catchings' effort to challenge authority figures, which was typical behavior of inmates at SOCF. Moreover, the incident did not escalate toward violence against other inmates, and Catchings ultimately submitted to the corrections officers' authority without inflicting any physical harm on them. In addition, Catchings had not physically assaulted anyone in the past either, Payne heard of no complaints about Catchings' behavior in the days prior to the fatal attack, Newsome had not heard of Catchings making any threats to Elam, and Morgan was not aware of any problems between the two inmates.

{¶19} Accordingly, we conclude that competent, credible evidence supported the Court of Claims' conclusion that DRC lacked constructive notice of Catchings attacking Elam. Therefore, it was not against the manifest weight of the evidence for the court to conclude that DRC was not liable in the wrongful death suit, and we overrule appellant's second assignment of error.

{¶20} In summary, we overrule appellant's two assignments of error. Consequently, we affirm the judgment of the Court of Claims of Ohio.

Judgment affirmed.

KLATT and CONNOR, JJ., concur.
