

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Charles Jodrey, #373-209,	:	
Plaintiff-Appellant,	:	
v.	:	No. 12AP-477
	:	(C.C. No. 2010-10343)
Ohio Department of Rehabilitation	:	(REGULAR CALENDAR)
and Correction,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on January 31, 2013

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

Michael DeWine, Attorney General, and Kristin Boggs, for appellee.

APPEAL from the Court of Claims of Ohio

KLATT, P.J.

{¶ 1} Plaintiff-appellant, Charles Jodrey, 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 affirm.

{¶ 2} On September 7, 2010, Jodrey filed a negligence suit against ODRC. The complaint alleged that a correctional officer negligently dumped Jodrey from his wheelchair, causing him to fall to the floor and injure himself.

{¶ 3} At a trial before a magistrate, Jodrey testified that he is an inmate at Pickaway Correctional Institution. Jodrey's left side is partially paralyzed and, as a result, he uses a wheelchair. On September 15, 2009, correctional officer Jason Martin accompanied Jodrey to the shower room. Jodrey was in his wheelchair, which he

propelled himself using his right foot and hand. Jodrey's shower lasted approximately 20 minutes. Martin became "mad" when Jodrey had difficulty re-dressing himself after his shower. (Tr. 18.) Martin kept "rushing [Jodrey] to hurry up." (Tr. 18.) When Jodrey and Martin were on their way back to Jodrey's unit, Jodrey discovered that he had forgotten his soap in the shower. Martin, who "was just mad," grabbed the handlebars of Jodrey's wheelchair and "shove[d]" Jodrey back to the shower room. (Tr. 19.) Once Jodrey and Martin were in the shower room, Martin dumped Jodrey out of his wheelchair and dropped the wheelchair on top of him. Jodrey testified that he believed that Martin intended to hurt him, and that Martin acted purposely and maliciously.

{¶ 4} Martin's memory of the incident differs dramatically from Jodrey's. According to Martin, he accompanied Jodrey to the shower room and then left Jodrey momentarily to find a chair that he could sit in while Jodrey showered. When Martin returned, he heard Jodrey moaning and complaining. Martin entered the shower room and found Jodrey on the floor. Jodrey told Martin that he had fallen.

{¶ 5} In his decision, the magistrate found Jodrey's testimony more credible than Martin's testimony. The magistrate further found that "Martin's intention when he upended the wheelchair was to harm [Jodrey] and that he acted with malicious purpose in doing so." Magistrate Decision, at 4. A state employee is not immune for malicious actions, so the magistrate recommended that the trial court issue a determination that Martin was not entitled to immunity and that the courts of common pleas would have jurisdiction over any civil suit against him based on his actions. The magistrate also recommended that the trial court grant judgment for ODRC.

{¶ 6} Jodrey objected to the magistrate's decision. After considering Jodrey's objections and the trial record, the trial court concurred with the magistrate's finding that Jodrey was the more credible witness. The trial court then found that Martin, intentionally and with malicious purpose, dumped Jodrey from his wheelchair. Additionally, the trial court found that "Martin's conduct in intentionally dumping a paralyzed and otherwise defenseless inmate from his wheelchair under circumstances where there [was] no threat of violence or physical harm is conduct which is manifestly outside the scope of his employment as a [correctional officer]." March 26, 2012 Judgment Entry, at 2. The trial court concluded that ODRC could not be held liable for

Martin's conduct, and thus, the court overruled Jodrey's objections and entered judgment in ODRC's favor.

{¶ 7} Jodrey now appeals, and he assigns the following errors:

[1.] THE MAGISTRATE AND TRIAL COURT ERRED AND RULED CONTRARY TO THE LAW AND THE FACTS, FINDING THAT C.O. MARTIN ACTED OUTSIDE THE SCOPE OF HIS EMPLOYMENT, AND IN FAILING TO FOLLOW THE TENTH DISTRICT COURT OF APPEALS DECISION IN ELLIOTT V. OHIO DEPT. OF REHAB. & CORR., 92 OHIO APP.3D 772, 637 N.E. 2D 106 (10TH DIST. 1994).

[2.] THE MAGISTRATE'S AND TRIAL COURT'S DECISIONS ARE CONTRARY TO LAW AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 8} Before addressing Jodrey's argument, we must consider the law underlying the trial court's decision to award judgment to ODRC. In R.C. 2743.02(A)(1), the state "waive[d] its immunity from liability" and "consent[ed] to be sued, and have its liability determined, in the court of claims * * * in accordance with the same rules of law applicable to suits between private parties." A plaintiff's election to sue the state in the Court of Claims for the act or omission of a state employee "results in a complete waiver of any cause of action, based on the same act or omission, that the filing party has against" the state employee. R.C. 2743.02(A)(1). If the plaintiff proves that the state employee would have been liable but for a determination that the employee was immune under R.C. 9.86, then the state will be liable for the employee's action or omission. R.C. 2743.02(A)(2); *Johns v. Univ. of Cincinnati Med. Assoc., Inc.*, 101 Ohio St.3d 234, 2004-Ohio-824, ¶ 17. Pursuant to R.C. 9.86, a state employee is immune from liability unless the employee's act or omission was "manifestly outside the scope of his employment * * *, or unless the * * * employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner." If the Court of Claims determines that the state employee is not immune, then the plaintiff's "waiver [of any cause of action against the employee] is void, the Court of Claims loses jurisdiction over the matter, and the plaintiff may then pursue his or her claim against the employee personally in a court of common pleas." *Johns* at ¶ 18, citing R.C. 2743.02(A)(1).

{¶ 9} In the case at bar, the magistrate determined that Martin was not immune from liability for his actions because he acted with malicious purpose. The magistrate then concluded, albeit implicitly, that because Martin could be held personally liable for his actions, the state could not be held liable for his actions. This conclusion is consistent with the Supreme Court of Ohio's interpretation of the applicable statutes. According to that court:

If the Court of Claims determines that the employee was acting within the scope of employment, in furtherance of the interests of the state, the state has agreed to accept responsibility for the employee's acts. R.C. 9.86 and 2743.02(A). In that event, only the state is subject to suit, and the litigation must be pursued in the Court of Claims. If the Court of Claims determines that the employee's acts did not further the interests of the state, *i.e.*, the employee was acting outside the scope of his employment, maliciously, in bad faith, or in a wanton or reckless manner, the state has not agreed to accept responsibility for the employee's acts and the employee is personally answerable for his acts in a court of common pleas.

Conley v. Shearer, 64 Ohio St.3d 284, 287 (1992). Thus, *either* the state *or* the employee will be liable depending on whether or not the employee was acting outside the scope of his employment, with malicious purpose, in bad faith, or in a reckless manner. If the Court of Claims determines that any of these conditions are met, then the plaintiff may not pursue the state in the Court of Claims, but, instead, may sue the employee in a court of common pleas. *Johns* at ¶ 18.

{¶ 10} This court reached a different conclusion in *Elliott v. Ohio Dept. of Rehab. & Corr.*, 92 Ohio App.3d 772 (10th Dist.1994). There, an inmate sued ODRC after a correctional officer struck him in the face without provocation or justification. The Court of Claims concluded that the correctional officer's actions were reckless, but within the scope of his employment. The Court of Claims then reasoned that its finding of reckless conduct allowed the plaintiff to sue the correctional officer personally in a court of common pleas, and its finding regarding the scope of employment allowed the plaintiff to recover against ODRC under the doctrine of respondeat superior. We agreed with the trial court's reasoning, stating:

R.C. 2743.02(A)(1), which addresses the state's waiver of immunity, also states that if a person sues the state in the Court of Claims, that person waives any cause of action he or she has against the employee who committed the act upon which the suit against the state is based. However, if the Court of Claims * * * determines *either* that the employee acted outside the scope of employment *or* in a reckless manner, then the waiver of suit *against the employee* is void. [R.C. 2743.02(A)(1)] does not say that the state's waiver of immunity is then void. The state may still be sued and held liable under the rules of law applicable to suits between private parties.

(Emphasis sic.) *Id.* at 775.

{¶ 11} We went on to hold that, pursuant to the doctrine of respondeat superior, only a finding that the employee acted outside of the scope of employment could relieve the state from liability for its employees' actions. *Id.* Consequently, a finding that a state employee was not immune because he acted with malicious purpose, in bad faith, or in a reckless manner would negate the employee's immunity, but would not excuse the state from liability. Such a finding would expose *both* the state *and* the employee to liability.

{¶ 12} In *Elliott*, we recognized that language from *Conley* opposed our reasoning. However, we concluded that that language was dicta because it was not necessary for resolution of the issue before the court, i.e., whether R.C. 2743.02(F) violated the Equal Protection Clauses of the United States and Ohio Constitutions. As the relevant language was dicta and, in our opinion, inconsistent with the applicable statutes, we "[did] not feel guided by the comment in our present determination." *Elliott* at 776.

{¶ 13} Given the Supreme Court of Ohio precedent on this issue, we question the reasoning employed in *Elliott*. Although the Supreme Court has not specifically addressed the issue at hand, both *Conley* and *Johns* indicate that the state will be solely liable for its employee's actions if the employee is immune, while the employee will be solely liable for the employee is not immune. However, as the relevant portions of both *Conley* and *Johns* are dicta, they are not binding. *Heisler v. Mallard Mechanical Co., LLC*, 10th Dist. No. 09AP-1143, 2010-Ohio-5549, ¶ 13. We, therefore, will follow the *Elliott* analysis in this case.

{¶ 14} Applying *Elliott*, we conclude that the magistrate's finding that Martin acted with malicious purpose would not, alone, support a judgment in ODRC's favor. If adopted

by the Court of Claims, such a finding would expose Martin to personal liability, but would not relieve ODRC from liability. The trial court, however, went further than the magistrate. Upon review of the record, the trial court also concluded that Martin acted outside of the scope of his employment.

{¶ 15} Although the issue of personal immunity is a question of law, whether an individual acted outside of the scope of employment is a question of fact. *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, ¶ 14. When reviewing whether findings of fact are against the manifest weight of the evidence, an appellate court will not reverse the trial court's judgment if competent, credible evidence supports it. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶ 14.

{¶ 16} In order for an employer to be liable under the doctrine of respondeat superior, the employee must commit the tort at issue while within the scope of employment. *Groob v. Keybank*, 108 Ohio St.3d 348, 2006-Ohio-1189, ¶ 42. Moreover, where the tort is intentional, the behavior giving rise to the tort must be calculated to facilitate or promote the business of the employer. *Id.* An employee may engage in even willful or malicious actions and remain within the scope of employment so long as the actions facilitate or promote the business of the employer. *Osborne v. Lyles*, 63 Ohio St.3d 326, 330 (1992); accord *Caruso v. State*, 136 Ohio App.3d 616, 620 (10th Dist.2000) ("[A]n employee's wrongful act, even if it unnecessary, unjustified, excessive, or improper, does not automatically take such act manifestly outside the scope of employment."). However, an intentional attack committed by an employee to " 'vent his own spleen or malevolence against the injured person' " is a clear divergence from his employment. *Byrd v. Faber*, 57 Ohio St.3d 56, 59 (1991), quoting *Vrabel v. Acri*, 156 Ohio St. 467, 474 (1952). "[A]n employer is not liable for independent self-serving acts of his employees which in no way facilitate or promote his business." *Byrd* at 59; accord *Caruso* at 622 (holding that, even if committed while engaged in an employer's business, an assault motivated by animosity and resentment is outside the scope of employment).

{¶ 17} Here, Martin's employer was ODRC and ODRC operates prisons. The use of force is sometimes necessary to control inmates. Ohio Adm.Code 5120-9-01(A). The circumstances presented by this case, however, did not permit Martin to use force. Ohio Adm.Code 5120-9-01(C) (listing the six circumstances in which a prison staff member

may use less-than-deadly force). Martin was not defending himself or another, he was not controlling or subduing an inmate who refused to obey prison rules, he was not stopping an inmate from destroying property or engaging in a disturbance, he was not preventing an escape or apprehending an escapee, and he was not controlling or subduing an inmate to stop or prevent self-inflicted harm. If any of these circumstances had existed, the use of force would have furthered ODRC's mission to supervise adult offenders in a safe, humane, and secure environment. By using force against Martin in the absence of any of these circumstances, Martin actually violated ODRC's mission—he compromised Jodrey's safety and security solely because he was angry and frustrated with Jodrey. Consequently, we conclude that the trial court did not err in concluding that Martin was acting outside the scope of his employment when he upended Jodrey's wheelchair.

{¶ 18} Jodrey argues that the outcome in this case is inconsistent with the holdings of *Thomas v. Ohio Dept. of Rehab. & Corr.*, 48 Ohio App.3d 86 (10th Dist.1988), *Booth v. Ohio Dept. of Rehab. & Corr.*, Ct. of Cl. No. 2004-01419, 2005-Ohio-7018, *adopted*, 2006-Ohio-2540, and *Elliott v. Ohio Dept. of Rehab. & Corr.*, Ct. of Cl. No. 91-08743 (Nov. 20, 1992), *aff'd*, 92 Ohio App.3d 772 (10th Dist.1994). None of the cited cases pertain to the case at bar. In *Thomas* and *Elliott*, correctional officers struck inmates after the inmates disobeyed either a direct order (*Thomas*) or prison rules and regulations (*Elliott*). The *Thomas* and *Elliott* courts found that the correctional officers acted within the scope of their employment because they had the authority to use non-deadly force to the extent they reasonably believed necessary to enforce prison rules and regulations. Although the amount of force used in both cases was unnecessary, both officers employed force to discipline inmates, which served the prison's interest.

{¶ 19} In *Booth*, a prison staff member struck an inmate after the inmate collided with the staff member and spilled food on him. The magistrate found that the staff member reasonably believed that the inmate intended to escalate an earlier conflict into a physical altercation. Therefore, the magistrate concluded that force was necessary for self defense or to enforce prison rules and regulations, but the staff member used excessive force. Nonetheless, because force was authorized, the magistrate found that the staff member acted within the bounds of the scope of his employment.

{¶ 20} Here, Martin cannot claim that the circumstances permitted him to use force or that he used force to stop or discipline Jodrey's disobedient behavior. Rather, unlike the prison personnel in *Thomas*, *Booth*, and *Elliott*, Martin's only apparent motive for his actions was to vent his anger. That self-serving motive removes Martin's actions from the scope of his employment.

{¶ 21} Because Martin's tortious conduct did not occur within the scope of his employment, his employer, ODRC, cannot be held liable for it. Accordingly, we conclude that the trial court appropriately entered judgment for ODRC.

{¶ 22} For the foregoing reasons, we overrule Jodrey's two assignments of error, and we affirm the judgment of the Court of Claims of Ohio.

Judgment affirmed.

CONNOR and DORRIAN, JJ., concur.
