[Cite as *Melior v. Ohio Dept. of Rehab. & Corr.*, 1992-Ohio-273.]

IN THE COURT OF CLAIMS OF OHIO

DR. ARMIN A. MELIOR :

Plaintiff : CASE NO. 89-05732

v. : REFEREE REPORT

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION : William L. Hills, Referee

:

Defendant

: : : : : : : : : : : : : : : : :

Roger L. Clark, Esq. and Margaret Apel, Esq.
For Plaintiff

Lee Fisher, Attorney General and
Catherine M. Cola, Esq.
For Defendant

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On March 14, 1989, plaintiff, Dr. Armin A. Melior, filed this action against defendant, Ohio Department of Rehabilitation and Correction (ODRC), alleging it was negligent in permitting soapy water to accumulate in the walkway without notice to the users of the corridor outside Control Center 1 at the Southern Ohio Correctional Facility (SOCF). Plaintiff further alleges that he slipped and fell on an accumulation of soapy water that was left on the floor by an inmate under the supervision and control of the ODRC.

Defendant denied any negligence in this matter and consistent with the September 27, 1991, order of this court, the

issues of liability and damages were bifurcated, with the trial pertaining to the issue of liability to commence first. Pursuant to Civ. R. 53, the undersigned referee was appointed to hear this cause. This recommendation is made pursuant to the evidence addressed by the parties and the law applicable to the issues.

FINDINGS OF FACT

1) On March 15, 1987, plaintiff, a physician and employee of National Emergency Services, was called to provide medical services for an inmate located at SOCF;

2) Plaintiff previously held the position of medical director of SOCF, but was not employed by defendant at the time of this incident;

3) Upon entering SOCF, plaintiff passed through the Control Center 1 (CC1) area which required the guards to open the gates for access to both CC1 and the infirmary which was located in another corridor beyond a second set of gates;

4) While plaintiff was providing services for the institution in the infirmary, an inmate was performing his normal duties of cleaning and stripping the floor in and around the CCl area;

5) The accessible area of CCl can only be entered or exited

through gates that are required to be opened by guards who are located in the enclosed area of CCl;

6) Upon plaintiff's return from the infirmary to the gate entering the CC1 area, a guard opened the gate to allow access;

7) While walking through the CCl area and toward the gate granting access to exit the area, plaintiff fell and injured himself;

8) No one witnessed plaintiff's fall, but the inmate cleaning the floor and some of the guards on duty did see the plaintiff lying on the floor and getting up without assistance from anyone;

9) Signs indicating "caution—wet floors" were hung by hooks on the gates entering and departing the CCl area;

10) Folding "wet floor" signs and trash cans were alternatively placed in the walking area of CCl to warn of the area that was being serviced;

11) The referee finds that the signs did give adequate warning of the potential for water on the floors prior to the subject incident;

12) The referee further finds that there were reasonably safe conditions in CCl and the adjoining area on the date of this incident;

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13) The referee finds that plaintiff was a business invitee and the defendant is to exercise reasonable care to see that the premises is reasonably safe for use by the invitee.

CONCLUSIONS OF LAW

1) Plaintiff's claim for a right to relief sets forth an action sounding in negligence. In a claim predicated on negligence, plaintiff has the burden of proving by a preponderance of the evidence the existence of a duty, the breach of that duty and injury resulting proximately therefrom. *Strother* v. *Hutchinson* (1981), 67 Ohio St. 2d 282;

2) An occupier of premises is under no duty to protect a business invitee against dangers which are known to such invitee or are so obvious and apparent that he may reasonably be expected to discover them and protect himself against them. *Rayburn* v. *J.C. Penney Outlet Store* (1982), 3 Ohio App. 3d 463;

3) As recently stated in *Brauning* v. *Cincinnati Gas & Electric Co.* (1989), 54 Ohio App. 3d 38, 44, the standard applied to owners or occupiers of a premise to his invitees and frequenters is as follows:

> The duty imposed under R.C. 4101.11 and 4101.12 is similar to the common—law duty of an owner or occupier of premises to his invitees. An owner or occupier of premises is not an insurer; however, he owes a duty to his invitees to exercise ordinary care to maintain

> the premises in a reasonably safe condition and to warn of any latent dangers of which he knew or reasonably should have known. *Eicher* **v.** *United States Steel Corp.* **(1987), 32 Ohio St. 3d 248. Cyr, supra.;**

4) Plaintiff failed to exercise ordinary care for his own safety as he is required to do. *Sidle* v. *Humphrey* (1968), 13 Ohio St. 2d 45;

5) In *Sapp* v. *United States* (C.A. 5, 1955), 227 F. 2d 280, the United States Fifth Circuit Court of Appeals noted that:

> **Respondeat superior liability, moreover, is based not only on the fact that the master has authority to supervise and thereby control his servants, but also on the fact that he has the ultimate right to discharge those who disobey his instructions, and hire more tractable employees. The government, however, cannot choose its prisoners, and is unlikely to find among those thrust upon it, by reason of their criminal behavior, very many of a cooperative nature. The most which ordinary reason can demand of the government in such cases, therefore, is that it take all proper precautions to insure the safety of the public ***. *Id.* at 281;**

6) We are not prepared to extend the doctrine of *respondeat superior* to inmates who are on institutional grounds, even those inmates who perform job-like functions at the state's prisons. Although the state can exercise some control over who performs what functions at the prison, the state cannot

go into the open labor market and choose its workers. *Bell* v. *Department of Rehabilitation and Correction* (May 12, 1992), Franklin App. No. 91AP—1375, unreported;

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Therefore, the referee finds that the plaintiff has failed to prove by a preponderance of credible evidence that the March 15, 1987, fall was caused by the negligence of the defendant or any act of an inmate under the responsibility and control of defendant. Accordingly, finding no breach of duty owed to plaintiff, it is recommended that judgment be entered in favor of defendant and against plaintiff.

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WILLIAM L. HILLS
Referee

Entry cc:

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