

[Cite as *Swearingen v. Mansfield Corr. Inst.*, 1992-Ohio-278.]

IN THE COURT OF CLAIMS OF OHIO

DONALD L. SWEARINGEN, #A230-287	:	
	:	
Plaintiff	:	CASE NO. 91-09952
	:	
v.	:	<u>REFEREE REPORT</u>
	:	
MANSFIELD CORRECTIONAL INSTITUTION :	:	Fred D. Gartin, Referee
	:	
Defendant	:	
	:	
: : : : : : : : : : : : : : : :		
		Donald L. Swearingen, #A230-287
		Pro se

Lee A. Fisher Attorney General and
Gregg H. Bachmann, Esq.
For Defendant

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On September 8, 1992, a trial was conducted in the above-captioned case at the Mansfield Correctional Institution (MCI). Plaintiff is an inmate under the custody and control of defendant. On July 23, 1991, plaintiff was incarcerated at Mansfield Correctional Institution. Plaintiff's cell was in the upper range in the segregation unit.

Plaintiff was ordered to appear before the Rules Infractions Board (RIB). Officers Stevens and Soltesz went to plaintiff's cell and escorted him down the steps.

Plaintiff alleges he was either pushed or since it was after an operation, that defendant was negligent for forcing him to walk down the steps. Defendant asserts plaintiff was not pushed.

the officers also assert that they were not told by plaintiff that he was unable to physically walk down the steps and that perhaps plaintiff fell deliberately.

A determination of the case at bar requires an analysis of the law on battery.

Battery is the unlawful touching the person of another or the striking, beating, or wounding of another by the aggressor with the intent of inflicting injury upon the person assaulted *** such intent need not, however, be an expressed intent but may be inferred from the nature of the defendant's act or conduct, nor is it necessary that the defendant act in anger or with malice toward the person when the battery was directed.

6 Ohio Jurisprudence 3d (1978), 103, Assault, Civil Aspects, Section 4.

Plaintiff has failed to prove any evidence that either officer pushed him down th steps. Plaintiff even testified that he did not feel anybody push him and, at the time of the incident, he did not think anybody pushed him, although other inmates were yelling he was pushed. The referee finds plaintiff was not pushed and he has, therefore, failed to prove the intentional tort of battery.

Plaintiff's complaint could also be construed to set forth an action sounding in negligence. In a claim predicated on negligence, the plaintiff bears the burden of proving by a preponderance of the evidence that defendant breached a duty owed to plaintiff and this breach proximately caused injury. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282. Defendant owed to

plaintiff the common law duty of reasonable care. *Justice v. Rose* (1975), 102 Ohio App. 482. Reasonable care is that which would be utilized by an ordinary prudent person under similar circumstances. *Smith v. United Properties, Inc.* (1965), 2 Ohio St. 2d 310.

Plaintiff alleges that he told the officers that he could hardly walk, but was ordered from his cell. Both officers Soltesz and Stevens testified that plaintiff never informed them that he could not walk and he did not appear ill.

Weighing the credibility of the testimony, the referee concludes plaintiff did not inform the officers that he was ill to the extent that he could not walk. Furthermore, no testimony was presented that plaintiff appeared to ill to walk. Therefore, the referee finds plaintiff has failed to prove any negligence on behalf of defendant.

As to whether plaintiff deliberately fell, defendant presented the testimony of John Goudy, an inmate at MCI, who testified that plaintiff told him falling down steps was a good way "to get a lawsuit and he was trying to build a nest egg for when he got out." Plaintiff also testified that he has filed eight law suits in this court within the past year.

The referee finds that in all probability, plaintiff either deliberately fell or had an accident at no fault of defendant and tried to capitalize on the situation. For this reason, the referee recommends plaintiff pay all costs associated with this action.

Additionally, finding no intentional acts attributable to Officers Stevens and Soltesz, it is recommended that a finding be

made that they acted within the scope and course of their employment and are immune from suit pursuant to R.C. 2743.02(F).

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Based upon the above report and recommendation, plaintiff's motion for a preliminary injunction should also be overruled.

FRED D. GARTIN
Referee

Entry cc:

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