[Cite as *Muhammad v. Ohio Dept. of Rehab. & Corr.*, 2002-Ohio-3531.]

IN THE COURT OF CLAIMS OF OHIO

AMIR MUHAMMAD	:	
Plaintiff	:	CASE NO. 2001-01302
v.	:	MAGISTRATE DECISION
DEPARTMENT OF REHABILITATION AND CORRECTION	:	Magistrate Steven A. Larson
Defendant	:	

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{¶1} This case was tried to a magistrate of the court on the issues of defendant's liability for negligence and the civil immunity of Dr. Albert Loescher and Health Care Administrator Brian Cain, who are employees of defendant at the Richland Correctional Institution (RiCI).

{¶2} At all times relevant to this action, plaintiff was an inmate in the care, custody and control of defendant pursuant to R.C. 5120.16. Plaintiff testified that when he entered the prison system he was diagnosed with diverticulitis, a disease of the intestine which required that he eat a special diet low in roughage and residue. Plaintiff maintained that if he ate high-residue food such as whole grain breads, cereals, peas, tomatoes, or nuts of any kind his intestines would become inflamed and irritated causing him severe stomach pain, bleeding from the rectum, and high fevers, all lasting three to five days.

{¶3} Plaintiff testified that prior to his transfer to RiCI, medical personnel at both Lorain Correctional Institution (LoCI) and Trumbull Correctional Institution (TCI) ordered a special high-fiber low-residue diet which he followed to prevent his disease from becoming symptomatic. Plaintiff contends that upon his arrival at RiCI on April 14, 2000, defendant violated its published policies by refusing to continue his special diet previously prescribed

by the doctor at TCI. Additionally, plaintiff testified that Dr. Loescher and Cain deliberately attempted to cause him "suffering, pain and death" by failing to continue his special diet. Plaintiff testified that as a result of defendant's refusal to prescribe a special diet, he did not receive "three (3) nutritionally balanced meals during each 24 hour period" as mandated by DRC Policy 304-02. (Plaintiff's Exhibit 15.) Plaintiff also maintains that: he suffered stomach pain, bleeding and high fevers on April 28, 2000, which lasted several days; he had a hemorrhoidal attack on May 21, 2000; and he underwent surgery on August 22, 2000, to remove part of his colon and small intestine.

{¶4} Cain testified that between the time that plaintiff was issued his diet order by the doctor at TCI and the time that plaintiff was transferred to RiCI, defendant's policy regarding low-residue diets had been changed to a policy requiring inmates to monitor their own low-residue diets. Cain testified that when plaintiff entered RiCI, he did not meet the criteria for Dr. Loescher to write a special diet order. Plaintiff was provided with information on how to monitor his low-residue diet and was scheduled to meet with the dietitian on her next visit to RiCI. Cain further testified that there were vegetarian meals as well as other appropriate meals for a person on a low-residue diet available in the food service line. Finally, Cain denied any attempt by himself, the medical staff at RiCI, or Dr. Loescher to intentionally harm plaintiff by requiring him to monitor his own diet.

{¶5} The court has considered the evidence presented at trial to determine whether Dr. Loescher and Cain are entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86.

{¶6} R.C. 2743.02(F) provides, in part:

{¶7} "A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of his employment or official responsibilities, or that the officer, or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original

jurisdiction to determine initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action. ***"

{¶8} R.C. 9.86 provides, in part:

{¶9} "*** no officer or employee (of the state) shall be liable in any civil action that arises under the law of this state for damages or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner. ***"

{¶10} In *Thomson v. University of Cincinnati College of Medicine* (October 17, 1996), Franklin App. No. API-02260, at pp. 10-11, the court noted that:

{¶11} "Under R.C. 9.86, an employee who acts in the performance of his duties is immune from liability. However, if the state employee acts manifestly outside the scope of his or her employment or acts with malicious purpose, in bad faith, or in a wanton or reckless manner, the employee will be liable in a court of general jurisdiction. 'It is only where the acts of state employees are motivated by actual malice or other such reasons giving rise to punitive damages that their conduct may be outside the scope of their state employment.' *James H. v. Dept. of Mental Health & Mental Retardation* (1980), 1 Ohio App.3d 60, 61. Even if an employee acts wrongfully, it does not automatically take the act outside the scope of the employee's employment even if the act is unnecessary, unjustified, excessive, or improper. *Thomas v. Ohio Dept. of Rehab. And Corr.* (1988), 48 Ohio App.3d 86. The act must be so divergent that its very character severs the relationship of employer and employee." *Wiebold Studio, Inc. v. Old World Restorations, Inc.* (1985), 19 Ohio App.3d 246.

{¶12} Based upon the totality of the evidence presented, the court finds that both Dr. Loescher and Cain acted within the scope of their employment at all times relevant

hereto. The court further finds that neither Dr. Loescher nor Cain acted with malicious purpose, in bad faith, or in a wanton or reckless manner

{¶13} toward plaintiff. Consequently, they are entitled to civil immunity pursuant to R.C. 9.86 and R.C. 2743.02(F). Therefore, the courts of common pleas do not have jurisdiction over civil actions against them based upon the allegations in this case.

{¶14} In order for plaintiff to prevail upon his claim of negligence, he must prove by a preponderance of the evidence that defendant owed him a duty, that it breached that duty, and that the breach proximately caused his injuries. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285. 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. Reasonable or ordinary care is that degree of caution and foresight which an ordinarily prudent person would employ in similar circumstances. *Smith v. United Properties, Inc.* (1985), 2 Ohio St.2d 310. Accordingly, the issue is whether defendant breached its duty of reasonable care under the circumstances of this case.

{¶15} Plaintiff alleges that he did not receive proper medical treatment for his diverticulosis at RiCI. It is clear from the evidence that plaintiff did, in fact, have diverticulosis when he transferred to RiCI, and that it required him to eat a low-residue diet. However, defendant did not deny plaintiff a low-residue diet inasmuch as the food service line offered a choice of food. Dr. Loescher examined plaintiff as part of the intake process at RiCI and determined that plaintiff did not need special diet orders. Defendant required plaintiff to monitor his own low-residue diet, which was the policy in effect when plaintiff transferred to RiCI. To implement the DRC policy, Cain counseled plaintiff on which foods he should avoid and which foods he could eat. In addition, a consultation with the RiCI dietitian was ordered. It is clear from the correspondence between plaintiff and defendant that plaintiff knew, as early as May 24, 2000, what foods he should avoid to prevent a painful episode. (Plaintiff's Exhibits 4, 5, & 7.)

{¶16} As part of its continued treatment of plaintiff's medical condition, defendant arranged surgery at Ohio State University Hospital for August 22, 2000, to remove part of plaintiff's small intestine and colon. Plaintiff testified that the surgery was successful and that he can now eat a variety of food without pain.

{¶17} Plaintiff failed to prove by a preponderance of the evidence that defendant was negligent in establishing or monitoring his diet. Plaintiff also failed to present any expert testimony to support his claim that his medical treatment fell below the requisite standard of care. *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127. Judgment is recommended in favor of defendant.

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STEVEN A. LARSON
Magistrate

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