

[Cite as *Tate v. Ohio Dept. of Rehab. & Corr.*, 2002-Ohio-424.]

IN THE COURT OF CLAIMS OF OHIO

PHILLIP TATE :

Plaintiff : CASE NO. 2001-04956

v. : MAGISTRATE DECISION

DEPARTMENT OF REHABILITATION : Steven A. Larson, Magistrate
AND CORRECTION

Defendant :
: : : : : : : : : : : : : : : :

On November 29, 2001, this case was tried to a magistrate of the court on the issues of defendant's liability for negligence and the civil immunity of Lieutenants Brock and Cox.

At all times relevant hereto, plaintiff was an inmate in the custody and control of defendant pursuant to R.C. 5120.16. His complaint alleges that defendant was negligent for failing to adequately clothe him in sub-zero weather during his transfer from Madison Correctional Institution (MaCI) to Grafton Correctional Institution (GCI); for failing to properly train and supervise its employees; and for failing to establish policies in regard to providing adequate winter clothing.

Plaintiff further alleges that actions of Lieutenants Brock and Cox were malicious and intentional and, therefore, on July 26, 2001, he moved for an immunity determination. On August 10, 2001, the court ordered that the issue of the immunity of Lieutenants Brock and Cox be determined in conjunction with the trial on the merits.

The court considered the evidence presented at trial to determine whether Lieutenants Brock and Cox are entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86.

R.C. 2743.02(F) provides, in part:

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. ***

R.C. 9.86 provides, in part:

*** 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. ***

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

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. *Wiebod Studio, Inc. v. Ohio World Restorations, Inc.* (1985), 19 Ohio App.3d 246.

Based upon the totality of the evidence presented, the court finds that both Lieutenants Brock and Cox acted within the scope of their employment with ODRC at all times relevant hereto. The court further finds that neither Lieutenant Brock or Cox acted with malicious purpose, in bad faith, or in a wanton or reckless manner 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.

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.

In the early morning hours of December 18, 2000, plaintiff was told to get dressed and gather his personal items in preparation for his transfer from MaCI to GCI. Plaintiff testified that he dressed warmly, gathered his personal items, including a box marked "legal," and proceeded as directed to the receiving and discharge area at MaCI to await a bus for transfer.

The outside temperature that day was unusually cold, ranging from a low of minus 12.8 degrees to a high of only minus 3.8 degrees. (Plaintiff's Exhibit F.)

Plaintiff testified that while he was waiting for the bus, Lieutenant Brock noticed plaintiff's box marked "legal" and became upset, apparently because the box exceeded plaintiff's allocation of space. Plaintiff claims that in retaliation for transporting the extra box, Lieutenant Brock ordered him to discard his underwear and travel in only light coveralls without a coat.

The bus first traveled about one mile to London Correctional Institution (LCI) to pick up additional inmates for transfer. Although the distance was short, it took eight to ten minutes to enter LCI through a sally port and an additional ten to fifteen minutes to exit. While the inmates at LCI boarded, plaintiff was required to remain on the bus. Plaintiff testified that the bus

was turned off upon entering and exiting LCI and while waiting for inmates to board, thus, further extending the duration of plaintiff's exposure to freezing temperatures.

Instead of traveling directly to GCI, the bus made an additional stop at the Correctional Medical Center (CMC) in Franklin County, a trip that took approximately one hour. Plaintiff testified that his prior trips to CMC took less time; therefore, he believed that the bus driver, CO Gillespie, purposely took a longer route to prolong plaintiff's exposure to freezing temperatures. Plaintiff stated that there was no heat on the bus, the windows were frosted inside and out, and the plastic seats were cold and hard. He shivered the entire trip and arrived at CMC in agony.

Upon arrival at CMC, a well-equipped medical center, plaintiff complained of headache, chest pain, and shivering. He reported that he had a history of high blood pressure. Nurse Supervisor Alvin Braddy examined plaintiff and the other fourteen inmates who had arrived on the bus to determine if any had received either frostbite or injuries during the trip from LCI. (Plaintiff's Exhibit D.) Although plaintiff's blood pressure was elevated, an EKG excluded a cardiac problem. In addition, plaintiff showed no signs of frostbite.

Plaintiff was treated with Tylenol for his headache and blood pressure medication for his elevated blood pressure. Plaintiff and the other fourteen inmates were provided coats, socks, underwear and undershirts for the final leg of the trip to GCI.

After reaching GCI, the inmates were again medically evaluated as part of the intake process. Plaintiff's medical

records confirm that he reported the bus being cold and that he had to travel dressed in only a jumpsuit. He complained that he was "freezing all over." However, the medical record also contains the notation "inmate has no complaints now, is dressed in warm clothing, underwear & winter jacket." (Defendant's Exhibit 2.) Plaintiff conceded that he did not seek medical treatment for exposure to the cold after his arrival at GCI; however, he testified that he remained in his dorm for two weeks recovering from exposure to the cold during his transfer.

CO Gillespie testified that he transported the inmates by bus from MaCI and LCI to GCI on December 18, 2000. He started the bus at approximately 5:50 a.m. and entered MaCI between 6:20 and 6:30 a.m. He allowed the bus to idle long enough to warm up prior to boarding inmates at MaCI at approximately 6:40 a.m. CO Gillespie explained, contrary to plaintiff's testimony, that the bus was operated by a diesel engine that was never shut off except for two short periods of time while passing through security at MaCI and LCI. The bus also had an independent heater located on the floor in the middle of the bus that had been checked by CO Gillespie and found to be operating properly. During the trip, no inmates complained of cold temperature or requested additional clothing.

CO Gillespie testified that defendant's policies require him to alter his route of travel for security reasons and, therefore, his route from LCI to CMC was selected for that reason and not to prolong plaintiff's exposure to the cold.

Based upon the evidence presented, the court finds that defendant did not breach its duty of reasonable care to plaintiff under the circumstances. Temperatures on the day of plaintiff's

transfer were extremely cold. The COs participating in the transfer followed established procedures with respect to preparing the bus and inmates for transfer. The bus and its heater were operating properly. The court finds that the claim that plaintiff and inmate Stewart were singled out and required to travel in only light coveralls is not credible.

The court further finds that as a result of the extreme cold, despite being on a heated bus, the inmates were somewhat affected by the cold. In fact, medical personnel were waiting for the bus to evaluate the condition of the inmates when they arrived at CMC. All fifteen inmates arriving at CMC were evaluated and three, including plaintiff, were provided minor medical treatment. All inmates were issued coats, socks, underwear and undershirts for the remainder of the trip to GCI. The court finds that defendant's response to the unusual situation of extreme cold was reasonable and, in fact, prevented any injury to the inmates.

The court concludes that plaintiff did not prove that defendant failed to establish policies regarding provision of adequate winter clothing or that defendant failed to properly train and supervise its employees regarding the transfer of inmates in cold weather. In fact, the execution of defendant's policies under the extreme weather conditions ultimately prevented any injuries to inmates.

Accordingly, judgment is recommended in favor of defendant on the issue of liability.

STEVEN A. LARSON

Case No. 2001-04956

- 8 -

MAGISTRATE DECISION

Magistrate

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