[Cite as *Scrivner v. Ohio Dept. of Rehab. & Corr.*, 2004-Ohio-1468.]

IN THE COURT OF CLAIMS OF OHIO

DOUGLAS W. SCRIVNER, III, et al.	:	
	:	CASE NO. 2003-01679
Plaintiffs		Judge Joseph T. Clark
	:	
v.		DECISION
	:	
OHIO DEPARTMENT OF REHABILITATION AND CORRECTION	:	
Defendant	:	

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{¶1} Plaintiffs, Douglas, Dawn, and Sierra Scrivner, brought this action against defendant alleging claims of intentional tort and loss of consortium. On January 22, 2004, plaintiffs filed a motion for leave to amend their complaint to add a claim for spoliation of evidence. On February 9-12, 2004, this case was tried to the court on the issue of liability simultaneously with Case No. 2003-01661, at which time plaintiffs' motion to amend their complaint was GRANTED.

{¶2} On February 2, 2001, Scrivner[1] was employed as a corrections officer (CO) at Warren Correctional Institution (WCI), a close- security facility. That morning, he was assigned to work first shift, from 6 a.m. to 2 p.m. Scrivner had ridden into work with two other COs and had anticipated returning home with them at the end of his shift. At the start of the workday, it was snowing and very cold outside, but the road conditions were not hazardous, and the local schools were open. As the morning progressed, road conditions deteriorated due to the accumulation of ice and snow, and many employees at WCI who

[1] "Scrivner" shall be used to refer to Douglas Scrivner throughout this decision.

were scheduled to work that morning arrived late. In addition, it became necessary to spread salt on the icy sidewalks at WCI that morning.

{¶3} Scrivner worked as a "relief officer" that day, but he discovered at roll call that he was to be a "transport officer," and was assigned to assist COs Wayne Mitchell and Richard Lake in taking two inmates to The Ohio State University Hospital (OSUH), in accordance with defendant's policy which required that three COs accompany any two inmates during transportation.

{¶4} When Scrivner was told of his assignment for the day, he became concerned for two reasons: first, he feared that he would not arrive back at WCI in time to ride home with the other COs in his car pool, because trips to OSUH typically returned late; second, it was his daughter's birthday and he wanted to be home in time to celebrate it with her.

{¶5} Scrivner spoke to Lieutenant Taylor to see if he could switch assignments with CO Smith who had offered to take Scrivner's place. Lt. Taylor spoke in turn with Captain Kenneth Sexton; however, Captain Sexton declined Scrivner's request noting that to do so would be contrary to his policy not to switch assignments among COs. Scrivner testified that he was also concerned about the bad weather, but that he was reluctant to mention the weather as a reason for fear of being "written up."

{¶6} The vehicle that was used for the transport was van number 632, a 15-passenger van which had been modified in the following ways: the first bench seat behind the driver and the passenger had been removed and, in its place, a "jump seat" (a single seat from a Jeep) had been bolted to the floor directly behind the driver's seat; steel and plexiglass barriers were installed both in front of and behind the jump seat to separate it from the three bench seats located at the rear of the van. Those two barriers formed a "cage" in which the jump seat was located. The jump seat faced the passenger side of the van such that the occupant had to sit with legs outstretched toward the side door of the van. The jump seat had been installed by the mechanic at WCI and was not equipped with a seatbelt, although the driver and passenger seats were so equipped.

{¶7} CO Lake testified that he had also asked Captain Sexton if the trip could be canceled due to worsening weather, but that the Captain had replied that the trip would go

forward. Lake testified that he took Captain Sexton's response to be a threat of potential disciplinary action if he were to refuse to proceed with the trip. Lake further testified that CO Mitchell had also asked Captain Sexton to cancel the trip but that Mitchell's request was refused as well.

{¶8} Captain Sexton testified that he was the commander of the first shift on February 2, 2001, which meant that he was in charge of all shift personnel. He further testified that he had arrived at WCI at approximately 4:50 a.m., and that although it was very cold outside, he had arrived on time. He stated that although there was some precipitation, he did not feel that there was a need to cancel the trip due to the weather. He also testified that he had talked to CO Scrivner that morning inasmuch as Scrivner wanted to switch job duties with another officer; however, he denied that COs Lake and Mitchell had asked him to cancel the trip.

{¶9} Testimony revealed that COs Lake and Scrivner discussed which one of them would drive; it was decided that Lake would drive, that Mitchell would ride in the passenger seat and that, since he did not want to drive in the bad weather, Scrivner would ride in the jump seat.

{¶10} Before leaving WCI, Lake stopped in the parking lot to get his personal cell phone out of his car because of his concerns about the weather and the fact that the van radio had only limited range. One of the prisoners to be transported to OSUH that day was an inmate by the name of Neville. Neville was on "video orders," meaning that he was supposed to be videotaped every time he was taken from his cell to any other location. Testimony at trial revealed that video orders are issued both to protect the COs from frivolous claims of misconduct and to protect the inmates from the use of excessive force upon them. The videotapes were labeled with the inmate's name and number and the date the video was taken. Although there was no written policy regarding video orders, it was defendant's practice to take the videos, label them and store them securely in the warden's or captain's office. Although Neville was videotaped that day, that particular videotape has never been found.

{¶11} Prior to trial, plaintiffs' counsel sought, unsuccessfully, to have the videotape produced. Plaintiffs argue that the videotape would have demonstrated that the weather had deteriorated; that COs Scrivner, Mitchell, and Lake had discussed the fact that they did not want to go on the trip; and that Captain Sexton had ordered them to go in spite of the bad weather.

{¶12} The transport van was driven through Lebanon, then onto I-71 for the remainder of the trip to Columbus. After traveling approximately 49 miles, the van left the roadway and continued to a point where it struck a concrete pillar. In the process, CO Mitchell was killed and CO Scrivner was severely injured.

{¶13} Plaintiffs assert that defendant committed an intentional tort by ordering COs Scrivner, Mitchell, and Lake to transport inmates to OSUH despite knowledge of dangerous road conditions. Defendant contends that CO Lake's failure to control the van was the sole cause of the accident.

{¶14} "[I]n order to establish 'intent' for the purpose of proving the existence of an intentional tort committed by an employer against his employee, the following must be demonstrated: (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task." *Fyffe v. Jeno's Inc.* (1991), 59 Ohio St.3d 115, paragraph one of the syllabus; *Johnson v. Ohio Dept. of Rehab. and Corr.*, Franklin App. No. 02AP-1428, 2003-Ohio-4512.

{¶15} Plaintiffs presented the expert testimony of Ronald Huston, Ph.D., mechanical engineer and forensic consultant. He opined to a reasonable degree of engineering certainty that an injury was substantially certain to occur to a passenger riding in the jump seat of van number 632 for the reason that, without a seatbelt, there was nothing to prevent movement of such passenger if a collision were to occur. However, he also testified that even with the poor road conditions, the typical driver could travel without

having a collision and that only a small percentage of motorists, if any, could be expected to be in an accident that day. He further testified that the greater the speed of a vehicle, the greater the possibility of injuries in an accident, and that the damage to the van was consistent with a high-speed impact.

{¶16} Defendant presented the expert testimony of Tim Tuttle, an accident reconstructionist certified by the Accreditation Commission for Traffic Accident Reconstruction. Tuttle testified that he had been self-employed as an accident reconstructionist for nine years and that, prior to that time, he had been employed by the Ohio State Highway Patrol (OSHP) from 1982 to 2001. He further testified that he had performed both about 500 accident reconstructions while employed at OSHP and approximately 168 accident reconstructions in private practice. Tuttle opined to a reasonable degree of certainty that van number 632 traveled 271 feet from the point where it left the roadway to the point of impact with the concrete pillar; that its estimated speed at the time it left the roadway was 75 miles per hour (mph); and that the van's speed at the time of impact was 43.8 mph. In addition, Tuttle opined that the fastest speed which the van could have maintained and still be able to stop before striking the pillar was 61 mph. According to Tuttle, even if the coefficient of friction were reduced, giving Lake the benefit of the doubt that he slid more than the markings at the scene indicated, his speed would be reduced by only 4 mph, for a speed of 71 mph.

{¶17} Patrick Hennessey testified that on the day of the accident he was driving northbound on I-71 from Cincinnati to Columbus; that most of the traffic was traveling in the right lane and driving below the speed limit because of the poor road conditions; that he was traveling approximately 50 mph; that the left lane was covered with snow; and that the right lane had two distinct marks of tire tracks which could be followed. He further testified that he saw a van, later identified as van number 632, pass him in the left lane approximately 15 minutes prior to the accident and that he estimated the van's speed to be about 70 mph. He said that he remembers thinking at the time that the van was going to be in an accident due to the speed at which it was traveling, particularly due to the fact that the road conditions were so poor. The court finds Hennessey's testimony to be credible.

The court further finds that CO Lake failed to control the van on the icy roadway and that the van slid off the roadway and into the median some 271 feet before impacting the pillar.

{¶18} Based upon the evidence presented at trial, the court finds that plaintiffs have failed to prove their claim of intentional tort by a preponderance of the evidence. Other transport vehicles had left the WCI grounds on the day of the accident, but van number 632 was the only vehicle that was involved in an accident. Even if the court were to find that van number 632 was sent under a "dangerous condition," plaintiffs have failed to meet the second prong of the *Fyffe* test. In order to meet such test, plaintiffs must prove that defendant knew of the substantial certainty of injury to Scrivner as a result of the dangerous condition. "[E]ven if an injury is foreseeable, and even if it is probable that the injury would occur if one were exposed to the danger enough times, 'there is a difference between probability and substantial certainty.'" *Heard v. United Parcel Serv.* (July 20, 1999) Franklin App. No. 98AP-1267. "[T]he mere knowledge and appreciation of a risk—something short of substantial certainty—is not intent." *Fyffe*, at paragraph 2 of the syllabus. See, also, *Johnson*, supra, at paragraph 16.

{¶19} The court finds that Captain Sexton was aware of the weather conditions prior to sending the van out onto the highway. The court further finds that it would have been prudent for Captain Sexton to call either OSHP or the National Weather Bureau for information on road and weather conditions prior to the transport, but he did not. Knowing that the sidewalks at WCI were icy and that the snow was not letting up, Captain Sexton should have taken further action to assess the weather conditions. Nevertheless, the court finds that plaintiffs have failed to prove that defendant knew of any substantial certainty of injury to any occupant when it ordered the van to proceed to OSUH in inclement weather. The court further finds that defendant did not dictate the speed at which CO Lake should drive, and that CO Lake was driving too fast for the road conditions that day. In addition, the court finds that defendant could not have either anticipated that CO Lake would lose control on the icy roadway, or that it was substantially certain that Scrivner would be involved in an accident.

{¶20} Plaintiffs have asserted that the bad weather was a dangerous condition to which defendant subjected its employees. The court disagrees. Although the weather was bad that day, there was not a substantial certainty that Scrivner would be injured while traveling in a van to OSUH in such weather. Even if there were a possibility or a high probability of an accident on the roadway that day, it was not substantially certain that an accident would occur. Defendant's mere knowledge of the risk of driving to OSUH that day was something short of substantial certainty that an injury would occur, such that it does not constitute "intent" for purposes of an intentional tort. Therefore, plaintiffs have failed to prove their claim for intentional tort by a preponderance of the evidence.

{¶21} Plaintiffs also assert that defendant's failure to supply a seatbelt for Scrivner in the jump seat was a dangerous condition which defendant allowed to exist. The court finds that the fact that the jump seat did not have a seatbelt does not give rise to an intentional tort by defendant, even though seatbelts are required not only by defendant's policy and Federal Motor Vehicle Safety Standards, but also as a matter of good sense to prevent injury or death during motor vehicle crashes.

{¶22} It was not the seatbelt that caused the accident; it was a combination of circumstances to include road conditions and the way the van was being operated. The court finds that although the lack of a seatbelt in van 632 may have contributed to CO Scrivner's injuries in the collision, the lack of a seatbelt in and of itself does not constitute a substantial certainty of injury.

{¶23} Plaintiffs also assert a claim of spoliation of evidence in regard to the missing videotape of inmate Neville. "*** [T]he elements of a claim for interference with or destruction of evidence are (1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts. ***" *Smith v. Howard Johnson Co.* (1993) 67 Ohio St.3d 28, 29, 1993-Ohio-229.

{¶24} Assuming, arguendo, that Captain Sexton willfully destroyed the videotape of inmate Neville, plaintiffs have failed to prove disruption of their case or any damages

proximately caused by defendant's acts. The court has already found that the weather conditions were bad that day, and that Captain Sexton ordered the COs to continue the transportation of inmates despite the fact that the COs did not want to go. Even if the videotape were destroyed, the lack of such evidence did not interfere with plaintiffs' case. Therefore, plaintiffs' claim for spoliation of evidence is without merit.

{¶25} Plaintiffs' claims of loss of consortium are derivative in that they are dependent upon defendant's having committed a legally cognizable tort upon Scrivner. Because plaintiffs failed to prove defendant committed a tort against Scrivner, their claims for loss of consortium also fail. See *Bowen v. Kil-Kare, Inc.* (1992), 63 Ohio St.3d 84, 93.

{¶26} Based upon the foregoing, the court finds that plaintiffs have failed to prove any of their claims by a preponderance of the evidence. Judgment shall be rendered in favor of defendant.

{¶27} This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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JOSEPH T. CLARK
Judge

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