

[Cite as *Bell v. Ohio Dept. of Rehab. & Corr.*, 2004-Ohio-2379.]
IN THE COURT OF CLAIMS OF OHIO

CHRISTOPHER D. BELL :

Plaintiff :

V.

CASE NO. 2002-09854-AD

OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION

MEMORANDUM DECISION

Defendant

.....

FINDINGS OF FACT

{¶1} 1) On July 20, 2001, plaintiff, Christopher Bell, an inmate incarcerated at defendant's Grafton Correctional Institution (GCI), was assigned to a housing unit where smoking was permitted. Plaintiff remained in this housing unit until July 21, 2001.

{¶2} 2) Plaintiff has alleged that because he was placed in a housing unit where smoking was permitted, he became frightened and emotionally distressed over the possibility of contracting cancer or other diseases attributable to smoking. Furthermore, plaintiff stated he believes cigarette smoke causes him to suffer headaches and nausea.

{¶3} 3) On July 22, 2001, plaintiff was seen by a nurse at GCI, complaining of nausea, dizziness, and hypertension. Later, plaintiff claimed he passed out while in his cell, striking his head first on a metal table and then on the floor of his cell. After this alleged incident, plaintiff was observed bearing a 4.5 millimeter abrasion on his forehead. Upon examination plaintiff's vital signs were normal.

~~{¶4}~~ 4) Plaintiff contended he was injured by being assigned to a housing unit where smoking is permitted. Plaintiff stated he was

"placed in a smoke filled environment on July 20, 2001 despite the fact that the supervisor of GCI had all the information to indicate that the plaintiff should never be forced to live in any smoke filled environment at any length of time."

{¶5} 5) Plaintiff asserted he suffered headache, coughing, nausea, emotional distress, and fear of contracting cancer based on his housing assignment from July 20, 2001 to July 21, 2001. Plaintiff filed this complaint seeking to recover \$2,500.00, the statutory maximum award amount under R.C. 2743.10, as compensation for his alleged injuries. Plaintiff professed he was injured as a proximate result of negligence on the part of GCI personnel.

{¶6} 6) Defendant denied any liability in this matter. Defendant denied causing plaintiff any injury by assigning him to a housing unit where smoking was permitted. Defendant contended plaintiff has failed to produce sufficient evidence to establish he suffered any injury from being exposed to environmental tobacco smoke. Defendant argued plaintiff failed to prove he suffered any injury as a proximate cause of any negligent act or omission on the part of GCI staff.

{¶7} 7) Plaintiff filed a response insisting he did suffer injury from his exposure to environmental tobacco smoke. Plaintiff contended defendant should bear liability for any injury he suffered due to the deliberate exposure to smoke.

CONCLUSIONS OF LAW

{¶8} 1) In order to prevail on his negligence claim, plaintiff must prove, by a preponderance of the evidence, that defendant owed him a duty, that defendant breached that duty, and that defendant's breach of duty caused his injuries. *Strother v. Hutchinson* (1981), 67 Ohio St. 2d 282, 285. In the context of a custodial relationship, the state owes its inmates a common-law duty of reasonable care and protection from unreasonable risks of physical

harm; however, the state is not an insurer of inmate safety, and the special relationship between the state and the inmate does not expand or heighten the duty of ordinary reasonable care. *Woods v. Ohio Dept. of Rehab. & Corr.* (1998), 130 Ohio App. 3d 742, 744-745; *McCoy v. Engle* (1987), 42 Ohio App. 3d 204.

{¶9} 2) The credibility of witnesses and the weight attributable to their testimony are primarily matters for the trier of fact. *State v. DeHass* (1967), 10 Ohio St. 2d 230, paragraph one of the syllabus. The court is free to believe or disbelieve, all or any part of each witness's testimony. *State v. Antill* (1964), 176 Ohio St. 61.

{¶10} 3) In *Manos v. Ohio Dept. of Rehab. & Corr.* (1995), 71 Ohio Misc. 2d 51, this court stated:

{¶11} "**** plaintiff has failed to prove by a preponderance of the evidence that defendant's conditions of confinement which expose him to ETS are a breach of the duty of reasonable care. The court recognizes that society harbors concern and awareness of the possible health hazards posed by ETS, but this taken alone is insufficient to establish plaintiff's burden."

{¶12} 4) Plaintiff has failed to prove he suffered any damages as a result of defendant's act. Plaintiff has failed to prove an essential element to his claim. No recovery can be had where it is not certain plaintiff suffered any damages. *Blank v. Snyder* (1972), 33 Ohio Misc. 67.

{¶13} 5) In the instant claim, defendant did not owe plaintiff a duty to prevent his being exposed to second hand smoke at all times. Plaintiff has failed to prove defendant breached any duty owed to him and has failed to prove he suffered any injury from the cell assignment incident. *Tate v. Marion Correctional Institution* (2004), 2003-05429-AD jud.

{¶14} 6) Health risks associated with environmental tobacco

smoke may state a cause of action under 1983, Title 42 U.S. Code for violation of Cruel and Unusual Punishment Clause of the Eighth Amendment of the United States Constitution. *Helling v. McKinney* (1993), 509 U.S. 25, 113 S. Ct. 2475, 125 L. Ed. 2d 22. However, claims under Section 1983 are not actionable in the Court of Claims since states and agencies are not persons within the meaning of Section 1983, Title 42 U.S.Code. *Burkey v. S. Ohio Correctional Facility* (1988), 38 Ohio App. 3d 170.

{¶15} Having considered all the evidence in the claim file and, for the reasons set forth in the memorandum decision filed concurrently herewith, judgment is rendered in favor of defendant.

Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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4/12
Filed 4/26/04
Sent to S.C. reporter 5/12/04