

test was mandatory. After the other inmates in the cell block had been tested, the nurses counseled plaintiff a second time about the test, at which time they emphasized that all inmates were required to take the test. Plaintiff told his unit manager that he did not trust either Nietzel or Lapushansky and that he would not allow them to administer the test.

{¶3} When plaintiff refused to follow a direct order from Lieutenant Cardona to submit to a PPD test, defendant's employees determined that it was necessary to extract plaintiff from his cell. Once the extraction team was assembled, Lieutenant Cardona sprayed a burst of chemical mace into plaintiff's cell. Plaintiff was then removed from his cell, placed in handcuffs and leg irons, and escorted to a "strip cage." When he continued to refuse the test, the extraction team held plaintiff by the arms while a nurse administered the test. Plaintiff alleges that he was "kneed" in the back during the test and that CO Williams struck his face several times while he was being restrained.

{¶4} Plaintiff asserts that he received injuries to his face, hands, legs, and back as a result of the extraction. According to an examination report that was completed by Nurse Nietzel, plaintiff was observed to have a small abrasion on the right side of his face and was instructed to wash the abrasion with water. Nietzel's report documents that plaintiff refused to comply with her instructions and that plaintiff "refused all treatment." (Plaintiff's Exhibit 1.)

{¶5} Plaintiff's amended complaint alleges that defendant and its employees were "negligent" in utilizing unnecessary and undue force in "attacking" plaintiff.¹ In addition to the allegations of

excessive force on the part of the COs and medical staff, the court construes plaintiff's complaint to include claims against defendant for negligent supervision or training, and negligence in failing to intervene to protect plaintiff.² In order to prevail on a negligence claim, plaintiff must prove by a preponderance of the evidence that defendant owed him a duty, that it breached such duty, and that the breach proximately caused plaintiff's injuries.

Strother v. Hutchinson (1981), 67 Ohio St.2d 282, 285. Ohio law imposes a duty of reasonable care upon the state to provide for its prisoners' health, care and well-being. *Clemets v. Heston* (1985), 20 Ohio App.3d 132, 136.

{¶6} The Ohio Administrative Code sets forth the circumstances under which COs are authorized to use force against an inmate.

Ohio Adm.Code 5120-9-01 provides:

{¶7} "(A) As the legal custodians of a large number of inmates, some of whom are dangerous, prison officials and employees are confronted with situations in which it is necessary to use force to control inmates. This rule identifies the circumstances when force may be used lawfully.

{¶8} "***

To the extent that plaintiff's complaint alleges that defendant's COs were "negligent" in utilizing unnecessary force in "attack[ing]" and "assault[ing]" him, plaintiff's cause of action with respect to the conduct of the COs is in the nature of an intentional tort. See *Williams v. Pressman* (App.1953), 69 Ohio Law Abs. 470, 472. ("An assault and battery is not negligence, for such action is intentional, while negligence connotes an unintentional act.")

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Plaintiff also alleges in his complaint that he was assaulted by defendant's COs on December 7, 1999. However, at trial, plaintiff did not pursue his claim regarding the alleged December 7, 1999, incident. Furthermore, plaintiff's post-trial brief did not address the December 7, 1999, incident.

{¶9} "(C) There are six general situations in which a staff member may legally use force against an inmate:

{¶10} "(1) Self-defense from an assault by an inmate;

{¶11} "(2) Defense of third persons, such as other employees, inmates, or visitors, from an assault by an inmate;

{¶12} "(3) Controlling or subduing an inmate who refuses to obey prison rules and regulations;

{¶13} "****

{¶14} "(D) Force or physical harm to persons shall not be used as prison punishment. This paragraph shall not be construed to affect or limit the disciplinary measures authorized in rules 5120-9-06 and 5120-9-07 of the Administrative Code.

{¶15} "(E) The superintendent, administrator, or staff member of a correctional institution is authorized to use force, other than deadly force, when and to the extent he reasonably believes that such force is necessary to enforce the lawful rules and regulations of the institution and to control violent behavior."

{¶16} Plaintiff argues that Ohio Adm.Code 5120-9-01 does not authorize the use of force in his case because he did not commit an act of violence or threaten death or serious physical harm. Plaintiff's argument is not well-taken.

{¶17} Ohio Adm.Code 5120-9-01 (C) (3) authorizes COs to control or subdue inmates who refuse to obey the institution rules and regulations, including a direct order from a CO. Although plaintiff's version of the events in question differed from the testimony of defendant's employees, plaintiff admitted that he refused to comply with Lieutenant Cardona's order to allow defendant's medical staff to administer the PPD test.

{¶18} Defendant's infectious disease policy provides guidelines for the management and treatment of tuberculosis within its institutions. (Plaintiff's Exhibit 4.) According to defendant's policy, all inmates are required to have a PPD test when they are first incarcerated. Thereafter, mandatory PPD testing is conducted annually at all institutions. Defendant's policy also sets forth the procedure for its employees to follow when an inmate refuses PPD testing. The policy provides, in part: "When an inmate refuses TB [tuberculosis] skin testing, the respective Health Care Administrator will notify the Warden, Medical Director and Infectious Disease Coordinator. The Infectious Disease Coordinator will then interview and counsel the inmate(s). If the inmate continues to refuse TB testing after additional counseling, *then force may be used to administer the TB test.*" (Emphasis added.)

{¶19} This court has previously noted that "corrections officers have a privilege to use force upon inmates under certain conditions. *** However, such force must be used in the performance of official duties and cannot exceed the amount of force which is reasonably necessary under the circumstances. *** Force may be used to control or subdue an inmate in order to enforce the institution's rules and regulations. *** Obviously, 'the use of force is a reality of prison life' and the precise degree of force required to respond to a given situation requires an exercise of discretion by the corrections officer." *Mason v. Ohio Dept. of Rehab. & Corr.* (1990), 62 Ohio Misc.2d 96, 101-102. (Citations omitted.)

{¶20} CO Jennifer Casedy testified that she was acting as an escort officer on the day of the incident and that she observed the procedure used to extract plaintiff from his cell. According to CO

Casedy, Nurse Lapushansky talked to plaintiff after he had refused to take the PPD test, and that then Lapushansky made a phone call to check plaintiff's medical records. CO Casedy testified that plaintiff was taken to a "strip cage" after he continued to refuse the test. CO Casedy further testified that plaintiff was restrained with handcuffs and leg chains and then was removed from the strip cage and placed face down on a mattress before the test was administered. CO Casedy stated that plaintiff was "highly agitated," "yelling," and "struggling" and that she did not see anyone either strike plaintiff in the face or press a knee against plaintiff's back.

{¶21} Nurse Lapushansky testified that her job duties included the implementation of defendant's infectious disease policy. According to Lapushansky, she conferred with Nurse Neitzel, OSP's Health Care Administrator and provided additional counseling to plaintiff after he had refused to submit to the test. Nurse Lapushansky also authenticated plaintiff's medical records which documented the abrasions that plaintiff received as a result of the extraction.

{¶22} With respect to the July 30, 1999, incident, there is no dispute that plaintiff sustained some minor injuries as a result of the extraction. The issue, however, is whether the force utilized by the extraction team was excessive under the circumstances. The testimony as to this incident was conflicting.

{¶23} Plaintiff's credibility regarding his version of the extraction was undermined by the testimony of Nurse Lapushansky and the information contained in the medical records. Specifically, plaintiff's assertion that he was hit repeatedly in the face was not consistent with the medical reports made shortly after the

incident. The court finds that CO Casedy's testimony was credible and that the minor abrasions documented in plaintiff's medical records are consistent with Casedy's testimony that plaintiff struggled and was uncooperative during the extraction.

{¶24} The court further finds that defendant's employees had a duty to extract plaintiff from his cell to administer the PPD test when he refused to comply with Lieutenant Cardona's direct order to submit to the test. The court concludes that plaintiff has failed to prove that defendant's COs or medical staff used excessive force or acted negligently in their efforts to extract him from his cell and administer the PPD test.

{¶25} For the foregoing reasons, the court finds that plaintiff has failed to prove, by a preponderance of the evidence, that defendant breached any duty of care owed to him and accordingly, judgment is recommended in favor of defendant.

{¶26} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision. A party shall not assign as error on appeal the court's adoption of any finding or conclusion of law contained in the magistrate's decision unless the party timely and specifically objects to that finding or conclusion as required by Civ.R. 53(E)(3).*

STEVEN A. LARSON
Magistrate

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MAGISTRATE DECISION

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