

{¶4} 4) Defendant explained MCI is not a non-smoking institution. Smoking is permitted in designated areas. Defendant related plaintiff does not suffer from a medical condition requiring him to reside in a non-smoking housing area. Furthermore, plaintiff was examined and treated by MCI medical personnel and did not display physical symptoms associated with toxic smoke inhalation. Although the office area where Sgt. Smotherman smoked may have constituted a smoking restricted area, Smotherman claimed ignorance of this particular restriction.

{¶5} 5) Defendant asserted plaintiff has not proven he suffered any physical or psychological condition from exposure to cigarette smoke. Defendant offered a written opinion on the matter from Dr. Lenzy G. Southall, the Medical Director at the North Central Correctional Institution. Dr. Southall wrote:

{¶6} “Inmate Tate’s complaints were non-specific and therefore could be attributed to any number of Inmate Tate’s medical problems. There are no studies in the medical literature that conclusively indicates that 15-18 minutes of exposure to second hand cigarette smoke results in cancer or any other future diseases.

{¶7} “It is within a reasonable degree of medical certainty that Inmate Tate was not irreparably harmed by 15-18 minutes of second hand cigarette smoke.”

{¶8} 6) Plaintiff responded to defendant’s contentions. Plaintiff insisted defendant was charged with a duty to protect him from second hand cigarette smoke. Plaintiff again argued he suffered severe physical and psychological problems from his exposure to cigarette smoke at MCI. Based on his injuries claimed, plaintiff reasserted he is entitled to damages in the amount of \$2,500.00, the maximum allowable amount under R.C. 2743.10.

CONCLUSIONS OF LAW

{¶9} 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 proximately 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 or 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.

{¶10} 2) Health risks associated with environmental tobacco smoke may state a cause of action under Section 1983, Title 42 U.S. Code for violation of Cruel and Unusual Punishment clause of the Eighth Amendment. *Helling v. McKinney* (1993), 509 U.S. 25, 113 S. Ct. 2475, 125 L.E. 2d 22. However, claims under Section 1983, Title 42 are not actionable in the Court of Claims since states and state agencies are not persons within the meaning of Section 1983, Title 42, U.S. Code. *Burkey v. Southern Ohio Correctional Facility* (1988), 38 Ohio App. 3d 170.

{¶11} 3) 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 November 10, 2002, incident.

{¶12} 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:

Phillip Tate, #183-479
15708 S.R. 78 West
Caldwell, Ohio 43724

Plaintiff, Pro se

Gregory C. Trout, Chief Counsel
Department of Rehabilitation
and Correction

For Defendant

1050 Freeway Drive North
Columbus, Ohio 43229

DRB/RDK/laa

1/13

Filed 1/23/04

Sent to S.C. reporter 2/27/04