

[Cite as *Martin v. Ohio Dept. of Rehab. & Corr.*, 2006-Ohio-621.]

IN THE COURT OF CLAIMS OF OHIO
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SHAWN MARTIN :

Plaintiff : CASE NO. 2003-04899
Judge J. Craig Wright

v. :
JUDGMENT ENTRY

OHIO DEPARTMENT OF :
REHABILITATION AND CORRECTION :

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

{¶ 1} This case was tried to a magistrate of the court. On August 10, 2005, the magistrate issued a decision recommending judgment for plaintiff. The magistrate also recommended that plaintiff's award be reduced by 40 percent due to plaintiff's contributory negligence.

{¶ 2} Civ.R. 53(E)(3)(a) states: "A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, regardless of whether the court has adopted the decision pursuant to Civ.R. 53(E)(4)(c). ***" Both defendant and plaintiff have filed objections.

{¶ 3} Plaintiff suffered injury while working in the kitchen at defendant's Belmont Correctional Institution (BeCI). Plaintiff was using a large rubber container on wheels to transport hot water from a "tilt skillet," to a large industrial mixer for the purpose of "making butter." In the process, the container was upset, spilling scalding hot water on the floor. Plaintiff suffered burns to his hands, arms, feet, legs, and buttocks when he slipped and fell onto the wet floor.

{¶ 4} Defendant's first objection is to the magistrate's finding that use of large plastic containers to transport hot water was a common practice at the BeCI. The magistrate found that "[plaintiff] and other inmate kitchen workers occasionally used the plastic containers to hold water that had been heated in the tilt skillet and that defendant's employees allowed plaintiff to transfer the hot water from the tilt skillet to the mixer in a hazardous manner." The magistrate then concluded that defendant knew of the practice and that the practice created a foreseeable risk of harm to plaintiff.

{¶ 5} Defendant cites the testimony of Brian Boston, food service coordinator, and Kathleen Beigler, food service manager in support of its objection. Both Boston and Beigler acknowledged that water was occasionally transported in this type of container for purposes of cleaning pots and pans but denied any knowledge of inmates using them to transport heated water from the tilt skillet to the mixer. Both witnesses testified that such practice was unauthorized.

{¶ 6} Plaintiff testified that prior to the incident Boston had observed him using the container to transfer hot water from the tilt skillet. The magistrate also relied upon the testimony of inmates Robinson and Miller, who stated that they had observed other inmates using the containers to obtain hot water from the tilt skillet. Additionally, the magistrate cited the testimony of Trooper Mark Stelzer, who investigated the incident. Trooper Stelzer testified that a corrections officer (CO) at the institution told him "it was not uncommon" for the containers to be used in this way.

{¶ 7} Based upon the foregoing, the court finds that the magistrate did not err in resolving the conflicting testimony on the issue.

{¶ 8} In defendant's second objection, defendant argues that Trooper Stelzer's testimony regarding the out-of-court statement made by one of BeCI's COs was inadmissible hearsay which should have been excluded. However, Evid.R. 801(D)(2) reads:

{¶ 9} "(D) Statements which are *not* hearsay. A statement is not hearsay if:

{¶ 10} "(2) Admission by party-opponent. The statement is offered against a party and is (a) his own statement, in either his individual or a representative capacity, *** or (d) *a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, ***.*" (Emphasis added.)

{¶ 11} Under subdivision (d) of Evid.R. 801(D)(2), the CO's statement was not hearsay.

{¶ 12} In defendant's third and fourth objections defendant challenges the magistrate's finding as to the extent of plaintiff's contributory negligence. The magistrate found that plaintiff failed to use due care for his own safety by attempting to move a container with scalding hot water with one hand while holding a turkey sandwich in the other. Based upon the evidence presented, the magistrate determined the degree of fault attributable to plaintiff was 40 percent. Upon review of the record, the court finds that the magistrate's decision is supported by the greater weight of the evidence.

{¶ 13} For the same reasons given in overruling defendant's first objection, plaintiff's first objection challenging the

magistrate's conclusion on the issue of contributory negligence is also OVERRULED.

{¶ 14} In plaintiff's second objection, he argues that the magistrate erred by allowing Captain Dyer to testify at trial about the contents of a missing security videotape that allegedly recorded the incident. Prior to trial the tape had been destroyed by defendant in accordance with defendant's policy. According to Captain Dyer, he had viewed the tape in order to determine whether there was any "foul play" involved. Plaintiff argues that the admission of this testimony violates both the hearsay and best evidence rules. However, as defendant points out in its response, it was plaintiff who called Captain Dyer as a witness and asked him about what he saw when he viewed the videotape. As such, plaintiff waived any objection to this line of inquiry.

{¶ 15} In plaintiff's third objection, he argues that the magistrate erred by not admitting a proffered deposition, and in plaintiff's fourth objection he argues that the magistrate erred by not admitting three of plaintiff's exhibits. However, upon review of the record, the court finds that the magistrate did not err in making these evidentiary rulings.

{¶ 16} In plaintiff's fifth objection, he contends that the magistrate erred by not discussing the testimony of plaintiff's expert or commenting upon the expert's credibility in reaching a decision. Based upon the lack of such a discussion, the court presumes that the magistrate gave no weight to the testimony of plaintiff's expert. Upon review of that testimony, the court notes that plaintiff's expert did not inspect the kitchen where the incident took place, did not observe food preparation at the kitchen, and did not interview any of the institutional staff. As

such, the court does not find the testimony of plaintiff's expert to be persuasive and, therefore, finds that the magistrate did not err by omitting any discussion of such testimony.

{¶ 17} In conclusion, upon review of the record, the magistrate's decision and all objections, the court finds that the magistrate correctly analyzed the issues and applied the law to the facts. Therefore, the objections are OVERRULED and the court adopts the magistrate's decision and recommendation as its own, including the findings of fact and conclusions of law contained therein. Judgment is rendered in favor of plaintiff in an amount to be determined following a trial on the issue of damages. Any award shall be reduced by 40 percent due to plaintiff's own negligence. The court shall issue an entry in due course scheduling a date for a trial on the issue of damages.

J. CRAIG WRIGHT
Judge

Entry cc:

Richard F. Swope
6504 East Main Street
Reynoldsburg, Ohio 43068-2268

Attorneys for Plaintiff

John M. Alton
175 South Third Street, Suite 360
Columbus, Ohio 43215-5100

Douglas R. Folkert
Assistant Attorney General
150 East Gay Street, 23rd Floor
Columbus, Ohio 43215-3130

Attorney for Defendant

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LP/MR/cmd

Filed January 6, 2006

To S.C. reporter February 13, 2006