[Cite as *Bickerstaff v. Ohio Dept. of Rehab. & Corr.*, 2013-Ohio-5950.]

Court of Claims of Ohio
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LINDA J. BICKERSTAFF, Admx.
Plaintiff

v.

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION
Defendant

AND

VINCENT MASTASO, III
Plaintiff

v.

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION
Defendant

Case Nos. 2012-03409 and
2012-03417

Magistrate Anderson M. Renick

DECISION OF THE MAGISTRATE

{¶ 1} Plaintiffs brought this action alleging negligence.[1] The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability. Defendant's May 9, 2013 unopposed motion to admit the transcript and video deposition of Timothy Gravette is GRANTED, and the deposition shall be marked as Defendant's Exhibits B1 and B2, respectively.

[1] Pursuant to Civ.R. 42(A)(1), *Linda J. Bickerstaff, Admx. v. Ohio Department of Rehabilitation and Correction,* Case No. 2012-03409, was consolidated with *Vincent Mastaso, Ill v. Ohio Department of Rehabilitation and Correction,* Case No. 2012-03417, for the purposes of trial. During the trial, the court announced its decision to deny plaintiffs' May 3, 2013 motion in limine.

{¶ 2} At all times relevant, Vincent Mastaso and plaintiff's decedent Dalin Anderson were inmates in the custody and control of defendant at the Belmont Correctional Institution (BCI) honor camp pursuant to R.C. 5120.16. The honor camp is located adjacent to the BCI main compound where inmates with a higher security classification were housed. The inmates housed at the honor camp were permitted access to the recreation yard for several periods each day, including after the evening meal, from approximately 4:30 to 8:00 p.m. When the yard was open, the inmates were allowed to move unescorted between the yard and the dormitory building.

{¶ 3} On May 31, 2010, Mastaso and Anderson were among over 100 inmates who were participating in various recreational activities in the yard. At approximately 6:20 p.m., Mastaso, Anderson, and several other inmates were struck by lightning; Anderson's injuries were fatal.

{¶ 4} Corrections Officer (CO) Michael Remenar, who was assigned as a "yard officer" on the day of the incident, testified that in addition to monitoring the recreation yard, his duties included checking adjacent buildings and escorting inmates who worked the garbage detail. CO Remenar testified that at approximately 6:00 p.m. or soon thereafter, he entered the education building to make a phone call to another CO at the main compound. According to Remenar, while he was waiting for a return phone call, he heard a "loud noise" and a few minutes later he heard a call to close the yard. Remenar testified that he walked to the yard and blew his whistle and that he saw inmates running inside to escape the rain. Inmates returning from the yard subsequently informed Remenar that another inmate was "down" in the yard and when

he arrived at the scene, Remenar observed CO Bart DeVolld attempting to resuscitate the inmate as other inmates gathered nearby.

{¶ 5} DeVolld testified that he was working inside the south dorm when he responded to the yard after hearing inmates yelling for help. DeVolld noticed that inmates were seeking shelter indoors and he saw a group of inmates near inmate Dalin Anderson, who was on the ground. DeVolld testified that he performed CPR on Anderson, but he was unable to detect a pulse.

{¶ 6} Kathryn Cole, an assistant to BCI's warden, testified that she was serving as the acting institution investigator at the time of the incident and that she completed an investigation report which included witness statements obtained by the shift supervisor. As a part of her investigation, Cole reviewed a video that was taken by a camera which was mounted near the west dormitory and showed an area including a basketball court and a portion of the softball field; the video did not show the area of the lightning strike. (Plaintiffs' Exhibits 10A, 10C.)

{¶ 7} Plaintiffs assert that defendant's staff negligently failed to protect the inmates who were in the yard by ignoring the dangerous storm and allowing the recreation yard to remain open when the storm approached. Defendant contends that the lightning strike was not foreseeable and constituted an "Act of God."

{¶ 8} "[I]n order to establish actionable negligence, one seeking recovery must show the existence of a duty, the breach of the duty, and injury resulting proximately therefrom." *Strother v. Hutchinson*, 67 Ohio St.2d 282, 285 (1981). "Ohio law imposes a duty of reasonable care upon the state to provide for its prisoners' health, care, and

well-being." *Ensman v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 06AP-592, 2006-Ohio-6788, ¶ 5.

{¶ 9} Plaintiffs presented the testimony of Jeffrey Eiser, an expert on correctional facility security. Eiser reviewed defendant's post orders and opined that Remenar violated BCI policy by failing to notify his supervisor prior to entering the education building and that such conduct fell below the standard of care for protecting inmates from harm. According to Eiser, the most important element of security in a correctional facility is the correctional facility staff. Eiser opined that if BCI staff had adequately performed their duties on the date of the incident, the honor camp yard would have been closed prior to the fatal lightning strike. During cross examination, Eiser admitted that he did not visit BCI, that he was unaware of the layout of the main compound and its proximity to the honor camp, and that he did not review any inmate depositions as part of his investigation.

{¶ 10} Timothy Gravette, defendant's corrections expert, testified by deposition that he had worked at a federal honor camp where he had participated in closing a yard due to inclement weather. Gravette explained that prison administrators have limited resources and that the number of staff assigned to the BCI honor camp was appropriate inasmuch as the low security level inmates who are housed at the honor camp require minimal supervision. Gravette opined that a relief officer was not required to monitor the camp recreation yard during the periods of time that Remenar was performing duties away from the yard. Gravette acknowledged that BCI's post orders stated that the yard CO needed a supervisor's permission to enter the education building when it

was not in use; however, he opined that Remenar did not breach any duty owed to the inmates by entering the building on the day of the incident.

{¶ 11} Plaintiffs contend that defendant was negligent in failing either to provide sufficient staff or to use alternate means such as weather warning systems to monitor the recreation yard. However, it is well-settled that prison administrators must be accorded deference in adopting and executing policies and procedures to preserve internal order and to maintain institutional security. *Bell v. Wolfish*, 441 U.S. 520, 547, 60 (1979); *Deavors v. Ohio Dept. of Rehab. and Corr.,* 10th Dist. No. 98AP-1105 (May 20, 1999). The Tenth District Court of Appeals has observed that "each institution encounters health, safety, and security concerns unique to its specific population. Accordingly, case law has consistently recognized that prison officials should be granted deference in implementing rules addressing those unique situations." *Linger v. Andrews*, 10th Dist. No. 02AP-39, 2002-Ohio-4495, ¶ 23.

{¶ 12} With regard to staffing, the court notes that plaintiffs argue that Remenar's absence from his post was significant inasmuch as he was the only CO available to monitor the weather and close the yard in the event of inclement weather. However, no less than nine COs, who were posted approximately 100 yards away outside at the main compound, were able to monitor weather conditions at the time of the incident. The evidence shows that COs from both BCI's main compound and the honor camp carried radios which monitored the same frequency. The COs were, therefore, well-positioned to observe any threatening weather and able to notify the shift captain of such concerns. Furthermore, as Gravette noted, defendant's policy provided that only one yard officer was assigned to monitor the honor camp recreation areas and,

periodically during each shift, the yard was not monitored when the CO performed duties indoors, away from the yard. Inasmuch as the honor camp inmates were free to enter the dormitory building in the event of inclement weather, the court finds that defendant was not negligent in either adopting or implementing its policy for monitoring the yard.

{¶ 13} To the extent that plaintiffs argue that defendant is liable for Remenar's violation of defendant's own rules and policies by entering the education building without a supervisor's permission, prison rules and regulations, including defendant's post orders, "are primarily designed to guide correctional officials in prison administration rather than to confer rights on inmates." *State ex rel. Larkins v. Wilkinson*, 79 Ohio St.3d 477, 479, 1997-Ohio-139, citing *Sandin v. Conner*, 515 U.S. 472, 481-482 (1995). "A breach of internal regulations in itself does not constitute negligence." *Williams v. Ohio Dept. of Rehab. and Corr.*, 67 Ohio Misc.2d 1, 3 (1993).

{¶ 14} Based upon the evidence, the court finds that plaintiffs have failed to prove that defendant breached its duty of reasonable care by not closing the recreation yard prior to the fatal lightning strike. Furthermore, defendant asserts, as an affirmative defense, that the injuries in this case resulted solely from an Act of God.

{¶ 15} "The term 'Act of God' in its legal significance, means any irresistible disaster, the result of natural causes, such as earthquakes, violent storms, lightning and unprecedented floods." *City of Piqua v. Morris*, 98 Ohio St. 42, 47-48 (1918). If an Act of God "is so unusual and overwhelming as to do the damage by its own power, without reference to and independently of negligence by defendant, there is no liability." *Id*. at 49. However, if proper care and diligence on the part of defendant would have avoided

the act, it is not excusable as the Act of God. *Bier v. City of New Philadelphia*, 11 Ohio St.3d 134, 135 (1984). When the state becomes aware of a dangerous condition, it must take reasonable care to prevent injury to inmates. *Harwell v. Grafton Correctional Inst.*, 10th Dist. No. 04AP-1020, 2005-Ohio-1544, ¶ 11.

{¶ 16} Plaintiffs offered the deposition testimony of four inmates to support their assertion that the fatal storm did not develop suddenly. Each of those inmates testified that they noticed an approaching storm prior to the fatal lightning strike. Inmate William Rotan testified that he and another inmate watched a "storm rolling in from a distance" and they observed lightning that was visible for a period of 35-40 minutes. Inmate Eric Lieser testified that he recalled seeing lightning and hearing thunder for approximately 15 minutes prior to the incident. Inmate Corey Woodruff testified that he saw lightning and heard thunder for approximately 10 minutes before the fatal lightning strike and that he noticed dark clouds before the lightning and thunder. Inmate Joshua Thompson testified that he heard "low rumbling" thunder less than 15 minutes prior to the lighting strike.

{¶ 17} Although the testimony established that inmates who were present in the recreation yard had detected both lightning and thunder for a period of time before the storm passed over BCI, it is clear that those present were surprised by both the rapid change in the weather and the severity of the storm. According to Thompson, the "oddest part of the whole day" was that he did not see dark clouds before they appeared to form over the camp. (Plaintiffs' Exhibit 25G, pages 17-18.) Thompson recalled that it was a warm sunny day just prior to the storm and that "pretty much out of nowhere it started downpouring" rain. (*Id*. at 7-8.) Rotan, Lieser, and Woodruff also expressed

surprise at the sudden change in the weather. Lieser testified that "it was slightly bizarre how quickly the storm rolled in." (Plaintiffs' Exhibit 25K, page 51.) Similarly, inmate Richard Griffin testified that it had been a "nice" and "beautiful" day before the weather changed suddenly and that the development of the storm was "a freak thing" which no one saw coming. (Defendant's Exhibit 25I, page 15.) According to inmate Matthew Wilhoite, the weather had been sunny before the storm came "out of nowhere" and "rolled in real fast." (Defendant's Exhibit 25H2, page 12.)

{¶ 18} Plaintiffs' weather expert, Jeffrey Rogers, Ph.D., is a professor of geography at The Ohio State University and the State Climatologist for Ohio. Dr. Rogers identified four radar scan images that he obtained from the National Weather Service which show the path of the thunderstorm in question, moving in a northeasterly direction over BCI. Dr. Rogers testified that another thunderstorm which preceded the fatal storm had traveled in the same direction and passed just north of BCI, but not over the honor camp. According to Dr. Rogers, the storm clouds produced lightning and thunder that could have been detected by BCI staff prior to the fatal lightning strike. Specifically, Dr. Rogers opined that lightning was visible and thunder would have been audible from the honor camp from 6:06 p.m. to 6:20 p.m., the time of the fatal lighting strike. Dr. Rogers further opined that the storms moved at approximately 20 m.p.h., which he characterized as a relatively slow-moving storm. Based upon the radar images, Dr. Rogers concluded that the sky over BCI would have darkened noticeably several minutes prior to the fatal lightning strike and that heavy rain would have fallen for at least two minutes before the incident.

{¶ 19} At trial, Remenar identified the areas of the recreation yard which are depicted in the video that was obtained by Cole, including the basketball court, a portion of a softball field, and an exercise track. The video showed inmates playing basketball, walking, and running on the track prior to the storm. The time-stamp on the video indicates that at 6:00 p.m. (18:00) no shadows were visible on and around the basketball court and the court appeared dry. However, just before 6:15 p.m. the sun was shining sufficiently to create shadows that were clearly visible. At 6:19 p.m., no shadows were visible as the inmates played basketball on a dry court; however, approximately 10 seconds later, the video shows inmates running from the area, and dark spots appeared on the court as rain began to fall. By 6:20 p.m., the court appeared completely covered by water, as reflections are visible. The video does not include coverage for an approximately one-minute period of time between 6:20 p.m. and 6:21 p.m., but by 6:22 p.m., puddles of water had formed on and around the basketball court.

{¶ 20} The court finds that the video of the recreation yard corroborates the testimony that the storm appeared suddenly. The actions of the inmates depicted in the video are consistent with testimony of inmates who stated that, prior to the lightning strike, they did not believe the storm posed a threat to their safety. Based upon the totality of the evidence, the court finds that defendant's employees could not have reasonably anticipated or foreseen the sudden storm which produced the fatal lightning, and that the accident was due "directly and exclusively to such a natural cause without human intervention." *Piqua* at 48. Accordingly, the court finds that defendant had no

duty to close the yard and that the injuries caused by the lightning strike are solely attributable to an Act of God.

{¶ 21} For the foregoing reasons, the court finds that plaintiffs have failed to prove their claims by a preponderance of the evidence. Therefore, judgment is recommended in favor of defendant.

{¶ 22} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).*

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ANDERSON M. RENICK
Magistrate

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