

# Court of Claims of Ohio

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MATTHEW M. SOLARIK

Plaintiff

v.

DEPARTMENT OF REHABILITATION AND CORRECTION

Defendant

Case No. 2013-00487

Magistrate Robert Van Schoyck

## DECISION OF THE MAGISTRATE

{¶1} Plaintiff, an inmate in the custody and control of defendant, brought this action for negligence arising out of an alleged attack upon him by another inmate, Johnnie Cook, at the Toledo Correctional Institution (ToCI) on June 23, 2013. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} Plaintiff testified that he is in defendant's custody due to a conviction for identity theft and that he was transferred to ToCI in 2010, having previously been incarcerated at the Noble Correctional Institution and the Correctional Reception Center. Plaintiff stated that he lived in the "A-3 and 4 East" cellblock at ToCI, sharing a cell with inmate Randy Barney. Plaintiff stated that Randy Barney's brother, Jerry Barney, lived in the same cellblock and shared a cell with Cook.

{¶3} According to plaintiff, he had known of Cook for about one month at the time of the incident, but was not familiar with him and had no issues with him. Plaintiff testified that on the day the incident occurred, he overheard Cook and Jerry Barney arguing in the cellblock, and although he did not know what it was about at that time, it was his understanding that they had been having some sort of ongoing dispute about money. Plaintiff stated that later that day, around 4:00 p.m., Randy Barney informed

him that Cook had slapped Jerry Barney and threatened to hurt the people close to him if he were to move out of their cell. According to plaintiff, when he learned this information he did not perceive it as representing a threat to him, and did not think he had any particular reason to fear for his safety.

{¶4} Plaintiff testified that when he was in the dining hall around 5:00 p.m., he observed Jerry Barney approach the corrections officers' podium and speak to a "white shirt" officer, possibly a Captain Hahn, but did not hear the conversation. Plaintiff stated that after finishing his meal, he returned to the cellblock and saw Cook head toward the showers and saw Jerry Barney leave the area at the "pill call" time even though he was aware that Barney did not take medication.

{¶5} Plaintiff initially testified that he observed an altercation occur when Jerry Barney returned, but he admitted on cross-examination that he did not actually see it and instead overheard a commotion that prompted him to come out of his cell. Plaintiff stated that when he came out and looked through a window in the door or gate that separated the cellblock from the common area where the noise was coming from, he saw corrections officers placing Jerry Barney against a wall and putting him in cuffs, while Cook walked away and stood in front of the door as if he wanted the officer in the "control booth," who operated the mechanical door, to let him in the cellblock. According to plaintiff, he overheard Jerry Barney yell at the officers not to let Cook through the door because Cook would attack Randy Barney. Plaintiff testified that the door opened, however, and that Cook immediately came at him with a cutting weapon and made a deep cut across his left cheek, at which point Cook turned toward Randy Barney and chased after him. Plaintiff stated that after corrections officers eventually gained control of the situation, he was transported to the infirmary, where photographs were taken of the injury to his cheek (Plaintiff's Exhibits 2 and 3), and he was ultimately transported to an outside hospital where he received stitches.

{¶6} Plaintiff testified that there were no corrections officers inside the cellblock when he was attacked, as the officer who was stationed there during that shift, a Corrections Officer Leu, was not present at the time. Plaintiff stated, though, that he thought the corrections officer in the control booth was in a position that would have allowed him to see the attack by Cook. With respect to the weapon used in the attack, plaintiff testified that weapons in general were prevalent at ToCI during his time there, but he stated that prison staff did conduct periodic “shakedowns,” or searches, of the prison to search for such contraband.

{¶7} Jerry Barney testified that defendant transferred him to ToCI in 2011, and that he eventually became cellmates with Cook. Barney explained that he and Cook first met at the Lorain Correctional Institution, and that while sharing the cell at ToCI they briefly had an “intimate” relationship. According to Barney, the relationship grew strained and Cook started making statements to him to the effect that he needed to choose whether he wanted to have a relationship with Cook or his brother, Randy, and that Cook would hurt those who were close to him if he were to turn his back on Cook. Barney stated, however, that Cook never identified plaintiff as someone he might harm.

{¶8} Jerry Barney testified that on the day of the incident, Cook made similar statements to him, but this time laid hands on him while doing so. Barney stated that this prompted him to approach Captain Hahn in the dining hall and request that he be moved to another cell. According to Barney, he explained to Hahn that he was having problems with his cellmate, but he did not tell Hahn that there had been any kind of physical altercation between them or that there was any specific threat. Barney stated that Hahn told him to pack up his property and prepare for a move.

{¶9} According to Barney, when he went to pack up his belongings, Cook confronted him, demanding to know if he was moving, and then brandished the improvised cutting weapon, or “shank,” which Barney stated that he already knew about. Barney testified that after Cook then went to take a shower, he left the

cellblock. Barney stated that when he came back toward the cellblock, Cook was waiting on a stairwell with his hand in his waistband and said he was going to “fuck up” Randy Barney. Jerry Barney stated that he “thought it was all talk” and “didn’t take it as a serious threat,” but that he would not tolerate someone disrespecting his brother, so he told Cook he was going to “crash” him and then began throwing punches, but Cook did not fight back and corrections officers came and subdued Barney. Barney recalled that Corrections Officers Leu, McDonald, and Witmer were present.

{¶10} Barney testified that he knew Cook had the weapon on him, but that he did not tell the officers anything about Cook or tell them not to let Cook inside the cellblock; rather, he told the officers that there was nothing going on. Barney stated that he could see his brother and plaintiff standing near a picnic table on the other side of the door, inside the cellblock, and that he yelled at his brother to watch out. Barney testified that the mechanical door opened for Cook, and that he saw Cook then attack plaintiff, and saw his brother intervene and fight Cook.

{¶11} Randy Barney testified that plaintiff was indeed his cellmate at the time of the incident and that, like his brother, he had known Cook from their time at Lorain Correctional Institution. Barney testified that he watched the incident unfold while standing in the “day room” of the cellblock and looking out into the adjacent common area through a window, but that he could not hear anything that was said. Barney stated that he saw his brother take a swing at Cook, but Cook did not fight back. According to Barney, as corrections officers placed his brother in cuffs, Cook proceeded to the door, which was opened by the officer in the control booth. Barney stated that as Cook entered the cellblock, he thought Cook would be coming for him but Cook instead grabbed plaintiff and cut him. Barney related that Cook then came at him, but he grabbed a trash can and used it to fend off Cook until corrections officers, none of whom were inside the cellblock when the attack started, came in and intervened.

{¶12} Johnnie Cook testified by way of deposition that he entered defendant's custody in 2010 for various offenses, including four counts of murder, and was transferred to ToCI in 2011. Cook testified that he and Jerry Barney first met at the Lorain Correctional Institution and eventually came to be cellmates at ToCI. According to Cook, some inmates had been trying to extort the Barney brothers and he was informed that one of them had also raped Randy Barney. Cook stated that he had no personal problem with plaintiff, but that he came to believe, based upon things he was told by other inmates, that plaintiff was associated with the group that was preying upon the Barney brothers. Cook explained that, as a result, he told plaintiff one day in the presence of the Barney brothers that he would "fuck him up" if he ever messed with the Barneys.

{¶13} Cook testified that he subsequently saw Jerry Barney speaking with Corrections Officer Leu one afternoon, apparently on the day of the incident, and that when he confronted Barney afterward to ask what it was about, Barney said that he had asked Leu if he and his brother, as well as plaintiff, could move out of the cellblock. Cook stated that after learning this, he went to plaintiff and again told him that he would harm him if anything were to happen to the Barneys, and according to Cook he said it loud enough that it got the attention of a corrections officer who then asked what was going on, but he told the officer that everything was fine.

{¶14} Cook stated that Jerry Barney was away from the cell when he went back, and when Barney returned he confronted him again about moving, at which time Barney threw punches at him. Cook testified that he told Barney at that point that he would "fuck up" his brother and plaintiff, and then went downstairs to retrieve his weapon from a hiding spot. According to Cook, Barney was gone when he came back upstairs, so he went looking for Barney. Cook testified that when he found Barney, Barney came at him and he threw one punch in return, but four corrections officers came upon the scene almost immediately and apprehended Barney. Cook stated that

when the officers asked him what was going on, he said he did not know what it was all about and walked away.

{¶15} According to Cook, Jerry Barney told the corrections officers to watch him and not to let him back in the cellblock. Cook stated, though, that he approached the door and saw plaintiff and Randy Barney on the other side, and eventually the corrections officer in the control booth opened the door for him. Cook explained that it was customary for the door to be opened when inmates walked up and stood before it. Cook testified that he proceeded to cut plaintiff and then chase Randy Barney until being subdued by corrections officers. As depicted in a photograph taken afterward by prison staff, the weapon used by Cook appears to be an approximately one-inch long razor blade attached to the shaft of a plastic toothbrush. (Plaintiff's Exhibit 5.)

{¶16} William Leu, III testified that he is presently employed with the Lucas County Sheriff's department, but that at the time of the incident he worked as a corrections officer at ToCI. Leu stated that he was posted in cellblock A-3 East on the day in question, and that he remembered one of the Barney brothers telling him multiple times earlier in the day that he wanted to see a "white shirt" officer and that he responded by saying it would have to wait until a white shirt made rounds through the cellblock, but when a white shirt eventually came through to make rounds, he looked for whichever Barney brother it was but could not find him.

{¶17} Leu testified that shortly before the incident, he left the cellblock temporarily to escort inmates to and from the pill call. Leu explained that while on his way back, he heard loud voices coming from a central area outside the cellblock and then heard a call over the radio from the officer in the control booth saying that inmates were having words and were about to fight. Leu testified that as he and Corrections Officer Tyler Widmer, with whom he had been walking when the call went out, got to the scene, he heard Jerry Barney being loud and threatening Cook. Leu testified that, as a result, he and Widmer subdued Barney, who continued to be belligerent even after

Widmer placed him against the wall, and he directed Cook to return to the cellblock. Leu stated that he had not seen any punches thrown and that as far as he observed, the altercation was a verbal one. Leu further stated that he had no idea Cook had a weapon with him and did not know of any problems between Cook and plaintiff. According to Leu, when he saw Cook enter through the sliding door, he appeared to be compliant. Leu stated that he did not know what happened once Cook entered the cellblock until after a “signal three” alarm was sounded by Corrections Officer Terrance Brown, who was in the control booth.

{¶18} Tyler Widmer testified that he is employed by defendant as a corrections officer, currently working at the Allen-Oakwood Correctional Institution, but during the relevant time period he worked at ToCI. Widmer testified that he was in the process of escorting inmates to and from the pill call and had just come into view of the situation involving Jerry Barney and Cook when he heard a call come over the radio stating that Barney was trying to start a fight with Cook. Widmer stated that he had not seen Barney throw a punch or specifically heard anything Barney had said, but that the call over the radio said Barney had tried to hit Cook and should be put in cuffs. Widmer related that he placed Barney against the wall and cuffed him while another officer who had been walking with him directed Cook back to the cellblock to remove him from the area and defuse the situation. According to Widmer, Barney said nothing while being cuffed, Cook said nothing and did not display any belligerence, and he was not aware of any problems between these inmates. Widmer testified that after Cook entered the cellblock, he saw Cook brandish a weapon and fight with Randy Barney, who fended off Cook with a trash can. Widmer recalled that he then entered the cellblock and chased Cook, who was eventually cornered and placed in cuffs by he and other officers. Widmer prepared an incident afterward. (Defendant’s Exhibit A.) With respect to the weapon used by Cook, Widmer testified that the prison is regularly searched for contraband, and, to the extent that the weapon may have been hidden in a closet for

inmate porters, Widmer stated that defendant had a policy of inspecting such closets daily for contraband.

{¶19} Terrance Brown testified that he is employed by defendant as a corrections officer at ToCI, and that at the time of the incident, he was posted in the control booth from which the mechanical door to the cellblock was operated. Brown stated that he saw Jerry Barney come up and take a swing at Cook, but the punch did not connect. Brown, who related that he could not hear anything from inside the control booth, stated that he got on the radio and told corrections officers what he had seen, and he recalled that the first officers to respond to the call were Officers Leu, Widmer, and McCreary. According to Brown, Cook had evaded Barney's punch and from what he had seen there was no reason for Cook to be cuffed. Brown stated that when Cook approached the door, he opened it because Cook lived inside the cellblock and had showed no aggression. With respect to what occurred once Cook entered the cellblock, Brown explained that he could not see inside the cellblock very well and thus cannot say what happened.

{¶20} Corrections Captain Steven Hahn, who is employed by defendant at ToCI, testified that he "vaguely" remembers Jerry Barney approaching him and requesting that he be moved to another cell, but that Barney did not relay a safety concern to him. Hahn testified that he has the authority to arrange for cell moves for safety and security reasons, but that the warden's policy at ToCI is that cell moves for any other reason are within the authority of the inmate's unit staff. Hahn stated that when an inmate comes to him and requests a cell move for safety and security reasons, his practice is to take the inmate to the shift office and investigate the matter.

{¶21} With respect to the fact that Cook was not cuffed or otherwise held by the officers who intervened in the situation with Barney, preceding the attack on plaintiff, Hahn testified that defendant's policies would not have required Cook to be cuffed or held if the officers determined that he was not exhibiting aggression. Hahn also



testified that he responded when the “signal three” alarm was sounded after the attack, but that by the time he arrived to the scene the incident was over.

{¶22} “[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 upon the state a duty of reasonable care and protection of its prisoners. *Williams v. S. Ohio Corr. Facility*, 67 Ohio App.3d 517, 526 (10th Dist.1990). “The state’s duty of reasonable care does not, however, render it an insurer of inmate safety.” *Watson v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 11AP-606, 2012-Ohio-1017, ¶ 8.

{¶23} “Where one inmate attacks another inmate, actionable negligence arises only when there was adequate notice of an impending attack.” *Lucero v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 11AP-288, 2011-Ohio-6388, ¶ 18. “Notice may be actual or constructive, the distinction being the manner in which the notice is obtained rather than the amount of information obtained.” *Watson* at ¶ 9. “Whenever the trier of fact is entitled to find from competent evidence that information was personally communicated to or received by the party, the notice is actual. Constructive notice is that notice which the law regards as sufficient to give notice and is regarded as a substitute for actual notice.” *Hughes v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 09AP-1052, 2010-Ohio-4736, ¶ 14.

{¶24} Upon review of the evidence adduced at trial, the magistrate finds that defendant did not have adequate notice such that it knew or should have known of an impending attack. The magistrate finds that Jerry Barney approached Captain Hahn on the day of the attack to request a move to another cell due to unspecified problems he was having with Cook, and that he may have also approached Corrections Officer Leu that day to ask to see a white shirt officer for an unspecified reason, but that Hahn and Leu did not have reason to know of a threat to plaintiff’s safety and had no duty to take additional action. Indeed, the magistrate finds that neither Jerry Barney nor

plaintiff believed that plaintiff was at risk of being harmed by Cook, and that neither they nor anyone else notified any staff member of any such risk.

{¶25} Regarding the situation between Cook and Jerry Barney that preceded the attack upon plaintiff, the magistrate finds that from the control booth, Corrections Officer Brown observed Barney throw at least one punch, but did not observe Cook display any aggression, and that he consequently told other officers over the radio to cuff Barney. The magistrate finds that based upon what Corrections Officers Leu and Widmer heard over the radio, and saw and heard firsthand when they reached the scene, it was reasonable for them to subdue Barney and remove Cook from the area by sending him back to the cellblock where he lived. Moreover, the magistrate finds that Barney did not make any statement at that time from which officers knew or should have known of an impending attack or of the fact that Cook had a weapon. The magistrate finds that based upon what Corrections Officer Brown had observed up to that point, it was reasonable for him to open the door and let Cook back in the cellblock. Finally, the magistrate finds that Cook attacked plaintiff immediately upon entering the cellblock by cutting his face with the weapon, and Cook then pursued Randy Barney before being subdued by officers.

{¶26} Finally, to the extent that plaintiff apparently sought to show that defendant was negligent in its supervision of the prison to the extent that Cook was able to possess and use a weapon, the magistrate finds that defendant had a policy of regularly inspecting the prison for weapons and other contraband and that the evidence does not demonstrate that defendant failed to follow its policy or that defendant otherwise failed to use reasonable care to prevent the presence of such weapons in the prison. In short, the magistrate finds that Cook's use of a weapon in the attack was not shown to have resulted from negligence on the part of defendant.

{¶27} Based on the foregoing, the magistrate finds that plaintiff has failed to prove his claims by a preponderance of the evidence. Accordingly, judgment is recommended in favor of defendant.

{¶28} *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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ROBERT VAN SCHOYCK  
Magistrate

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