

# Court of Claims of Ohio

The Ohio Judicial Center  
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VENICE SMALL

Plaintiff

v.

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION

Defendant

Case No. 2013-00285

Magistrate Holly True Shaver

## DECISION OF THE MAGISTRATE

{¶1} Plaintiff brought this action alleging negligence. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} At all times relevant, plaintiff was an inmate in the custody and control of defendant at the Toledo Correctional Institution (ToCI) pursuant to R.C. 5120.16. On May 17, 2012, plaintiff, who was a level 3 security inmate, was assaulted by unidentified level 4A security inmates.

{¶3} “[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). “This duty does not, however, make ODRC the insurer of inmate safety.” *Kordelewski v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 00AP-1109 (June 21, 2001).

{¶4} “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 v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 11AP-606, 2012-Ohio-1017, ¶ 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.

{¶5} Plaintiff testified that he was a level 3 inmate housed in A1 Unit West. Plaintiff explained that ToCI houses both level 3 and level 4A inmates, but that level 4A inmates are housed in the C Unit. According to plaintiff, after he had eaten breakfast in the chow hall, he entered the hallway to return to his cell. Once he was in the hallway, he saw 10 to 12 level 4A inmates near the commissary. Plaintiff estimated that he was assaulted by three or four level 4A inmates that he could not identify. According to plaintiff, no Corrections Officers (COs) were with the level 4A inmates when he was assaulted. After the assault, plaintiff was taken to the medical department at ToCI, and was later transferred to The Ohio State University Medical Center for treatment. On cross-examination, plaintiff testified that he did not know why he was assaulted or that he would be assaulted before it happened.

{¶6} Kimberly Henderson testified that in May 2012 she was an administrative lieutenant and that she had worked at ToCI in various positions since October 2000. Henderson stated that, pursuant to defendant’s post orders, when level 3 inmates are called by unit to the chow hall, the CO on duty is required to check for a “hold on movement” via radio to the control room. According to Henderson, a hold on movement is initiated when 4A inmates are moved in groups from one area of the institution to another, to ensure that level 3 inmates and level 4A inmates are not in the same area at the same time. Although Henderson did not witness the assault, she testified that shortly after the assault she observed certain level 4A inmates in the

commissary without an escort. Henderson also stated that when she asked the 4A inmates who was responsible for the attack, none of them would identify the offenders. Henderson agreed that level 3 and level 4A inmates are not to be in the same area at any time. However, Henderson did not know whether there was a hold on movement in place at the time that the assault occurred. Although Henderson was questioned regarding the post orders in Defendant's Exhibit A, on direct examination it was noted that the effective date of those post orders was November 15, 2012, after plaintiff was assaulted. The post orders in effect at the time of plaintiff's assault are not as detailed as those contained in Defendant's Exhibit A, however, those post orders also prohibit level 3 inmates from being in the same area as level 4A inmates. (Defendant's Exhibit B.)

{¶7} Inmate Keith Oldham testified that he was a level 3 inmate on the day of the incident, and that he witnessed the attack. According to Oldham, as he was walking back to his cell from breakfast he heard a scuffling sound and saw that two or three inmates had plaintiff on the floor. According to Oldham, the offenders ran into the commissary after they assaulted plaintiff. Oldham testified that if there had been a hold on movement in place, he would not have been in the hallway walking back to his cell.

{¶8} Inmate Percy Jones testified that on the day of the incident he was a level 3 inmate and was walking in the hallway to return to his cell after breakfast. According to Jones, the gate to C Block, where level 4A inmates are housed, was open; that there was no CO present; and that he witnessed a scuffle with a couple of level 4A inmates.

{¶9} CO David Martin testified that on May 17, 2012, he was working as Unit 3C support. Martin stated that he escorted a group of approximately 20 level 4A inmates to the commissary, and once they were in the commissary and the doors had been locked, a call came over the radio for him to escort one level 4A inmate to visitation. Martin testified that every level 4A inmate that he had taken to the commissary was

locked inside the commissary and that the gate to C Block was closed. According to Martin, the gate to C Block is opened by control center only when a CO is present as an escort. Martin testified that he chose to leave the commissary and take a 4A inmate to visitation because he was the only CO available inasmuch as there was no “rover” on duty that day. Martin testified that he locked the door to the commissary from the outside before he left the commissary to escort a level 4A inmate to visitation, and that commissary staff members were supervising the 4A inmates while he escorted the 4A inmate to visitation. However, Martin did state that the commissary staff members were physically separated from the inmates behind a shield in the commissary. Martin estimated that it took him approximately one minute to take the 4A inmate to visitation. Martin also stated that although he locked the door to the commissary from the outside, that door can be opened from inside the commissary. According to Martin, the commissary staff members should have prevented the commissary door from being opened.

{¶10} Upon review of the evidence, the court finds that it is more likely than not that there was no hold on movement in effect when plaintiff was in the hallway returning to his cell. In other words, the court finds that the level 3 inmates were not out of place when they were in the hallway, and, according to defendant’s own post orders, no 4A inmates should have been in the hallway at that time.

{¶11} The court further finds that the testimony of inmates who stated that the gate to C Block was open is not particularly persuasive. The court finds that the greater weight of the evidence shows that plaintiff was attacked by 4A inmates who had been escorted to the commissary by CO Martin. Based upon plaintiff’s testimony that the inmates who assaulted him were standing near the commissary, and CO Martin’s testimony that the gate was closed, the court finds that it is more likely than not that plaintiff was assaulted by certain 4A inmates who had been escorted to the commissary by CO Martin and who chose to abruptly exit the commissary and attack plaintiff

because of his proximity to them. However, the court further finds that plaintiff has brought forth no evidence to show that defendant had actual or constructive notice of an impending attack. Indeed, the evidence shows that plaintiff was assaulted at random, that he did not know his assailants, and that he described the attack to medical personnel as happening “out of nowhere.” (Plaintiff’s Exhibit 4.) Therefore, the court finds that plaintiff has failed to prove that defendant had adequate notice of an impending attack.

{¶12} With regard to plaintiff’s argument that the attack on plaintiff was foreseeable because CO Martin negligently left the 4A inmates in the commissary unsupervised, the court finds that CO Martin acted reasonably for the following reasons.

CO Martin testified credibly that he was called to escort a 4A inmate to visitation and that no other CO was available to do so. The court finds that Martin’s testimony was credible that he was the only CO available to take the 4A inmate to visitation and that he locked the remaining 4A inmates in the commissary with the understanding that the commissary staff members would supervise the 4A inmates while they were in the commissary.

{¶13} Finally, plaintiff asserts that defendant breached a statutory duty of care found in R.C. 2921.44(C), dereliction of duty. However, dereliction of duty is a criminal offense, and this court lacks jurisdiction over criminal matters against the state. See *Howard v. Supreme Court of Ohio*, 10th Dist. Franklin No. 04AP-1093 & 04AP-1272, 2005-Ohio-2130 ¶ 17.

{¶14} In the final analysis, the magistrate finds that plaintiff has failed to prove his claim of negligence by a preponderance of the evidence. Accordingly, judgment is recommended in favor of defendant.

{¶15} *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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HOLLY TRUE SHAVER  
Magistrate

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