

[Cite as *Short v. Ohio Dept. of Rehab. & Corr.*, 2015-Ohio-5646.]

JOSHUA SHORT

Plaintiff

v.

OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION

Defendant

Case No. 2014-00755

Magistrate Robert Van Schoyck

DECISION OF THE MAGISTRATE

{¶1} Plaintiff, who at all times relevant was an inmate in the custody and control of defendant, brought this action for negligence alleging that he was struck and injured by broken glass as a result of a corrections officer breaking a window at the Southeastern Correctional Institution (SCI) on August 18, 2013. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} At trial, plaintiff testified that for about a month and a half or two months leading up to the incident, he had been assigned to work as a bathroom porter in the dormitory where he lived at SCI, known as the F2 Dorm or F2 Unit. As plaintiff explained, he and the other bathroom porters in the dormitory were responsible for sweeping and mopping the bathroom floors and cleaning the sinks, toilets, and showers there, and they typically did so as a group during the institutional “count times” that occurred at certain points throughout the day, when corrections officers would lock them inside the bathroom while the officers made a head count of the rest of the inmates in the dormitory.

{¶3} Plaintiff testified that on the day of the incident, he was part of a group of porters who cleaned the bathroom during a count that occurred at 4:00 p.m. Plaintiff recalled that the group included inmates William Barr, Nicholas Fagaly, a couple of others whose names he could not recall, and an inmate named Timothy James, who

went by the nickname "Murder." Plaintiff stated that Corrections Officer Anthony Kalisik, with Corrections Officer Joshua DeWitt standing by his side, let the porters into the bathroom as usual and locked the door behind them prior to commencing the head count in the dormitory. Plaintiff stated that all the porters then went to work, and that his role that day entailed sweeping and mopping the floor. Plaintiff further stated that the porters would rotate their roles every so often, and he explained that they would carry their supplies with them when they entered the bathroom and carry them out when they left.

{¶4} Plaintiff stated that when he and the other porters finished their work, they set their supplies by the door and waited to be let out. As plaintiff recalled, Barr, Fagaly, and a couple of other porters stood near the door, while plaintiff and James stood about ten feet away from the door, in front of a window that separated the bathroom from an office used by the corrections officers on the other side of the wall. Plaintiff explained that he and James went to the window in order to let DeWitt and Kalisik know that the porters had finished cleaning and were ready to be let out. Plaintiff stated that there was a button in the office that the officers could press to unlock the door.

{¶5} Plaintiff described the window as being about two feet wide by four feet tall, and having metal bars on the side facing the bathroom. Plaintiff stated that the lower half of the window was tinted such that an officer seated at the desk could not be seen unless you stood very near the window. Plaintiff stated that when he and James, who stood to his right, put their faces up against the bars, about five or six inches from the glass, he could see both officers near the desk. According to plaintiff, he and James remained there looking directly into the window, basically standing shoulder to shoulder. Plaintiff testified that as they waited, James began to rap or sing to himself and started "beatboxing," or making accompanying rhythmic sounds, which included tapping the outer edge of his hand on the window to produce a bass sound. According to plaintiff,

James did not strike the window with great force and he tapped on the window for no more than about five seconds.

{¶6} Plaintiff testified that about ten seconds after James stopped tapping on the window, DeWitt struck the window with his hand and broke it, sending shattered glass all over the bathroom. Plaintiff stated that he was struck by glass in or around his eye on the right side of his face. According to plaintiff, he immediately bent over in pain and realized he was bleeding. Plaintiff stated that he then went to the sink where he rinsed his face and tried to determine the extent of his injuries.

{¶7} Plaintiff recalled that several corrections officers, as many as six or seven, eventually rushed into the bathroom. Plaintiff further recalled that one of the officers, or possibly a supervisor (also known as a “white shirt”), had a camera and took pictures of the glass laying all over the bathroom floor, as well as pictures of plaintiff’s face. Plaintiff testified that another corrections officer subsequently escorted him to the infirmary, where a nurse examined him and telephoned the prison doctor, and soon afterward officers transported him by van to an outside hospital where he received treatment before returning to the prison later that same day.

{¶8} Plaintiff testified that he filed an Informal Complaint Resolution form with prison officials the following day, complaining about what had happened. (Plaintiff’s Exhibits 1, 2.) Plaintiff also offered at trial the subsequent grievance documentation that followed as he appealed the disposition of his complaint. (Plaintiff’s Exhibits 3-5.) Plaintiff further testified that approximately two days after the incident, a Corrections Lieutenant Davis took additional pictures of his face. Plaintiff also testified that Stanley Miller, who served at that time as a corrections captain at SCI, questioned him about the matter at some point.

{¶9} Inmate Nicholas Fagaly testified that he was moved to the F2 Dorm about one month before the incident and started working as a bathroom porter around the time he arrived there. Fagaly stated that he was acquainted with plaintiff from working

together during that time, and that although he had heard of plaintiff one time before going to prison in regard to some motorcycles being for sale, he never met plaintiff before coming to SCI.

{¶10} Fagaly testified that he cleaned the bathroom just before the incident as part of a crew of bathroom porters that also included plaintiff, William “Bill” Barr, two others whose names he could not remember, and an inmate known to him only as Murder (i.e., Timothy James). Fagaly recalled all the porters waiting for the bathroom door to be unlocked once they had finished cleaning, at which time he stood several feet away from the window, talking to Barr. Fagaly stated that plaintiff and James were standing at the window. Fagaly explained that the lower half of the window was tinted such that he could not see through it from where he stood, but that if you were up close to the window you could see through to the officers’ desk to some degree.

{¶11} Fagaly stated that he was engaged in conversation and was not particularly focused on James, but that he saw and heard James beatboxing, reaching through the bars over the window to tap a rhythmic beat on the glass for about 20 seconds. Fagaly testified that James did not tap hard on the glass, though. According to Fagaly, a few seconds after James stopped beatboxing, during which time he did not hear any other sounds, the window suddenly blew out into the bathroom and glass went all over the bathroom. Fagaly stated that there were glass fragments that fell inside his shirt pocket, but that he was not injured.

{¶12} Fagaly stated that he and some of the other porters started sweeping up the glass with brooms and dustpans, but that plaintiff complained that his eye hurt and went to the sink to wash his face. Fagaly stated that the porters were not directed to clean up any glass on the other side of the window, as any cleaning to be done in the office was the responsibility of a different porter. Fagaly further stated that in the days after the incident, he observed redness in plaintiff’s eye and scratches on his face.

{¶13} William Barr testified by way of deposition.¹ (Plaintiff's Exhibit 14.) Barr testified that at the time of the incident, he was an inmate living in the F2 Dorm and was assigned to serve as a bathroom porter there. Barr stated that plaintiff mostly kept to himself and that they did not socialize much while at SCI, but that they first met in the city of Hamilton and knew one another for about six months before they both went to prison for drug-related felonies that they were involved in together.

{¶14} Barr testified that a crew of about six porters usually cleaned the bathroom during the institutional counts, and that although he could not remember the names of all those present in the bathroom during the 4:00 p.m. count on August 18, 2013, they included himself, plaintiff, Nicholas "Fat Mack" Fagaly, and an inmate he knew only as Murder (i.e., Timothy James). Barr also remembered there being others present, some of whom he thought were just showering.

{¶15} According to Barr, after all the cleaning had been done, he and Fagaly stood by the door, about eight or ten feet from the window, and talked while everyone waited for the door to be unlocked. Barr stated that plaintiff and James were standing in front of the window at that time hollering that they were ready to be let out. As Barr described, the window was tinted in such a way that you had to be very near it to see through to the officers' desk, and plaintiff and James were probably six to eight inches away from the window. Barr testified that James was rapping and beatboxing, tapping on the window for about 30 seconds before the incident, and he stated that this was something James had done on previous occasions. According to Barr, from where he stood by the door he could not see through the window nor did he hear anything from the other side of the window.

{¶16} Barr likened the sound of the window breaking to a shotgun blast, and he stated that glass went all over the bathroom, even to the far side of the room that he estimated to be 20 to 25 feet away. Barr stated that when he looked through the

¹The objections raised in the deposition transcript at page 25 are OVERRULED.

window frame immediately afterward, he saw Kalisik standing and DeWitt sitting at the desk. According to Barr, plaintiff's face was scratched and bleeding, and there appeared to be something wrong with his eye, and Barr stated that he also saw another inmate whose leg was bleeding. Barr testified that while plaintiff was at the sink, he and others started sweeping up the glass from the bathroom floor with a broom and dustpan, and it appeared to him that the vast majority of the glass must have landed inside the bathroom rather than the office. Barr stated that within five or ten minutes after the incident, corrections officers whom he did not know came to the scene and let all the inmates out of the bathroom and took down their names.

{¶17} Corrections Officer Anthony Kalisik testified that at the time of trial he had been employed with defendant at SCI for two and a half years, and that on the day of the incident, August 18, 2013, he and DeWitt worked in the F2 Dorm during the second shift, from 2:00 p.m. to 10:00 p.m. Kalisik stated that during institutional counts, which during the second shift occur at 4:00 p.m. and 9:00 p.m., the inmates in the dormitory are supposed to stand at their beds and be counted. Kalisik explained that the dormitory has a north wing and a south wing, each with approximately 134 beds, and on average it takes about 15 to 20 minutes to complete the count.

{¶18} Kalisik testified that when he and DeWitt completed the 4:00 p.m. count that day, they went to the office and he sat down to eat his lunch while DeWitt sat down by a computer in front of the window, but he does not know what DeWitt was doing, as he was focused on his food and did not pay particular attention to DeWitt. According to Kalisik, from where he sat, DeWitt and the window were to his left and he could see the window but was not looking directly at it. Kalisik testified that the window was tinted in such a way that it was supposed to allow a person in the office to see into the bathroom, but obscure the view from the bathroom into the office. Kalisik stated that the office lights were turned off at that time, as they usually were, because that made it more difficult for inmates to see inside the office.

{¶19} According to Kalisik, he was busy eating when he heard the window break and he does not know what caused it to happen. Kalisik stated, however, that he did hear someone thumping on the window for about 10 to 15 seconds before it happened and that from his peripheral vision he saw DeWitt stand up before it happened. Kalisik recounted that as soon as he heard the window break, he stood up and saw DeWitt still standing by the computer, and he leaned over and looked through the window frame and saw James standing on the other side. According to Kalisik, James said “I’m sorry, I’m sorry.” Kalisik stated that he did not look into the bathroom to see if there was glass on that side, but that there was glass on the windowsill and on the desk and floor in the office, and he saw glass on DeWitt as well. Kalisik stated that backup was called and that several officers, as well as a white shirt supervisor, responded to the scene.

{¶20} Kalisik testified that he had sustained a cut on his wrist at some point, possibly when he leaned up against the windowsill to look through it or when he picked up glass shards from the desk, but that he is not sure how it happened and he only became aware of it when DeWitt pointed out that he was bleeding. Kalisik stated that he also observed cuts on the palm of DeWitt’s hand. Kalisik related that once backup arrived, he and DeWitt went to the infirmary for treatment of their injuries. Kalisik testified, though, that he ended up having to go to the Fairfield Medical Center in Lancaster and get stitches on his wrist, and he stated that he saw plaintiff at the hospital too.

{¶21} Corrections Officer Joshua DeWitt testified that at the time of trial he had been employed with defendant for nearly five years, first at the London Correctional Institution and then at SCI, and that on the day of the incident, August 18, 2013, he and Kalisik were assigned to work in the F2 Dorm at SCI during the second shift. DeWitt testified that after he and Kalisik finished their count of the inmates in the dormitory, they went to the office, where he sat down at the computer in front of the window to work on some documentation he needed to complete in connection with the count.

{¶22} DeWitt stated that while he was trying to work, James started beatboxing by thumping on the window, and he added that this was something James and other inmates had done before. DeWitt related that he found this to be disruptive and he consequently stood up and looked at James through the window and made a throat slash gesture to indicate to James that he needed to stop. According to DeWitt, James initially stopped but then resumed, and DeWitt then stood up and tapped or smacked the window with the palm of his hand in an effort to get James' attention. DeWitt testified that the window shattered at that point, but that he is not sure whether it was contact from himself or from James that caused it to happen.

{¶23} DeWitt testified that when he looked through the window frame after the glass fell out he saw James standing nearby and he saw plaintiff leaning over at or near one of the sinks. DeWitt stated that he called for backup and asked that someone bring a camera to take pictures, but that he does not know whether any were taken. As DeWitt explained, he and Kalisik left and went to the infirmary once backup arrived because Kalisik had a large cut on his right arm and DeWitt had several minor cuts on the palm and fingers of his left hand.

{¶24} Stanley Miller, who now serves as the Inspector of Institutional Services for SCI, testified that at the time of the incident he served as the second shift corrections captain. Miller stated that he does not know if he was on duty when the incident happened and that he only spoke with plaintiff about the matter in passing at some point, informally. Miller was able to authenticate several pictures of the bathroom and office that were taken well after the incident, after the window had been repaired. (Joint Exhibits 1-7.)

{¶25} "To prevail in a negligence action, the plaintiff must show (1) the existence of a duty, (2) a breach of that duty, and (3) an injury proximately resulting from the breach." *Price v. Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 14AP-11, 2014-Ohio-3522, ¶ 9, quoting *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, ¶ 21. "In the

context of a custodial relationship between the state and its prisoners, the state owes a common-law duty of reasonable care and protection from unreasonable risks.” *Woods v. Ohio Dept. of Rehab. & Corr.*, 130 Ohio App.3d 742, 744-745 (10th Dist.1998). “‘Reasonable care’ is the degree of caution and foresight that an ordinary prudent person would employ in similar circumstances.” *Taylor v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 11AP-1156, 2012-Ohio-4792, ¶ 15. “The state, however, is not an insurer of inmate safety and owes the duty of ordinary care only to inmates who are foreseeably at risk.” *Franks v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 12AP-442, 2013-Ohio-1519, ¶ 17.

{¶26} Upon review of the evidence presented at trial, the magistrate finds as follows. On August 18, 2013, plaintiff performed a work assignment as part of a crew of bathroom porters who were responsible for cleaning the bathroom in the F2 Dorm at SCI during the 4:00 p.m. institutional count. As was standard, Corrections Officers DeWitt and Kalisik locked the porters in the bathroom once they were all assembled. While the porters cleaned the bathroom, DeWitt and Kalisik conducted a head count of all the inmates in the dormitory and then went inside an office adjacent to the bathroom.

{¶27} There was a window between the bathroom and the office that was tinted in a way that allowed those inside the office to look into the bathroom, but prevented those in the bathroom from looking into the office unless they were very near the window. Once the porters finished their work, plaintiff and James went and stood in front of the window with their faces close to or against the bars to let DeWitt and Kalisik know that the porters, the rest of whom were standing near the bathroom door, were finished and ready for the bathroom door to be unlocked. Inside the office, DeWitt was seated at a desk facing the window working on documentation related to the count, while Kalisik was seated to DeWitt’s right, eating his lunch.

{¶28} For a period of time while James stood at the window, he beatboxed, in part, by tapping the outer edge of his hand on the window in a rhythmic pattern. James likely did this for a total of about 10 to 15 seconds, consistent with Kalisik's recollection, but at the very most it lasted no more than 30 seconds. DeWitt found this to be disruptive and consequently attempted to get James' attention, initially by making a throat slash gesture through the tinted window, and then standing up and smacking the palm of his hand against the window with such force that it caused the glass to break.

{¶29} While defendant argued that it was not proven who caused the glass to break, plaintiff, who was looking directly into the office with his face inches away from the window, observed DeWitt strike the window with his hand at the moment the glass broke. Moreover, DeWitt sustained injuries to his hand that were consistent with his striking and breaking the window. The fact that glass shattered outward into the bathroom at such a trajectory and distance that a piece landed in Fagaly's shirt pocket approximately 10 feet away is another indication that the window was struck from inside the office with considerable force. Indeed, glass was strewn over the entire bathroom, and while there was also broken glass inside the office, clearly the bars on the bathroom side of the window would have deflected some of the glass back into the office. Moreover, plaintiff and Fagaly each testified that James did not tap on the window with great force and that he stopped a few seconds before the window broke. And, while Kalisik recalled James uttering "I'm sorry" immediately after the window broke, it is probable that James was startled by what DeWitt had done and was apologizing for upsetting DeWitt.

{¶30} The magistrate finds that there was no intent on the part of DeWitt to break the window or injure anyone. Rather, DeWitt's actions were intended merely to signal to James that he needed to stop tapping on the window. Nevertheless, despite the fact that DeWitt could see plaintiff and James with their faces up against the bars just inches away from the glass, DeWitt was frustrated and struck the window with a sudden,

unreasonable degree of force, sufficient to shatter the glass and propel it toward plaintiff's face. By doing so, DeWitt did not exercise reasonable care for plaintiff's safety. As a proximate result of the duty of care being breached, plaintiff was struck and injured by glass in or around his eye on the right side of his face. Accordingly, the magistrate finds that plaintiff established the elements of his negligence claim arising from the harm proximately caused by the August 18, 2013 accident.

{¶31} To the extent that the complaint also includes an allegation that defendant was "negligent in delaying medical treatment and exacerbating Plaintiff's pain, suffering and impaired vision" (Complaint, ¶ 4), there was not shown to be any unreasonable delay in the medical care and treatment plaintiff received after the accident. The magistrate finds that plaintiff did not demonstrate by a preponderance of the evidence that defendant breached a duty of care owed to him with regard to his medical care and treatment at any time after the accident, much less that he suffered harm proximately caused by any such delay. Accordingly, plaintiff did not meet his burden in proving this claim.

{¶32} Based upon the foregoing, the magistrate finds that plaintiff has proven his claim of negligence by a preponderance of the evidence with respect to the harm proximately caused by the August 18, 2013 accident, but that he did not establish any negligence relative to the alleged delay in his medical treatment after the accident. It is recommended that judgment be entered accordingly.

{¶33} 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).

ROBERT VAN SCHOYCK
Magistrate

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Filed October 22, 2015
Sent To S.C. Reporter 2/23/16