[Cite as *Smith v. Ohio Dept. of Rehab. & Corr.*, 2017-Ohio-1128.]

RONALD SMITH, JR. Plaintiff v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION Defendant	Case No. 2015-01045 Magistrate Gary Peterson DECISION OF THE MAGISTRATE

{¶1} Plaintiff, an inmate in the custody and control of defendant, brought this action for negligence claiming that he choked on a piece of a plastic bag that was served to him in his evening meal on March 23, 2015, at the Lebanon Correctional Institution (LeCI). The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} Plaintiff testified that on March 23, 2015, all inmates in his cell block were called to the evening meal and that he subsequently proceeded to the chow hall. Plaintiff stated that Aramark, which he described as a "separate employer" has entered into a contract with defendant, the Ohio Department of Rehabilitation and Correction (DRC), to provide meal service at LeCI. Plaintiff reports that he was served his evening meal and commenced eating. According to plaintiff, as he attempted to swallow a bite of his food, he began to "gag" and subsequently "threw up" an object that was in his food. Plaintiff testified that he removed the object from his food and discovered that it was a piece of a plastic bag. Plaintiff acknowledged that he did not know how the plastic bag ended up in his food. Plaintiff subsequently notified Aramark employee Ms. Jones regarding the plastic bag in his evening meal. Plaintiff asserted that Ms. Jones is responsible for overseeing the food service lines and ensuring that the food is properly prepared.

{¶3} Plaintiff reported that he was thereafter escorted to the medical infirmary where he received medication for his stomach and throat. Plaintiff testified that he remained on such medications for the following three weeks. Additionally, plaintiff stated that due to ongoing complications regarding his throat, he was admitted to the hospital approximately two months prior to the trial in this matter. Plaintiff reported that the ongoing complications included swelling that has "really messed up" his throat. Plaintiff testified that he continues to suffer complications as a result of this incident. No other witnesses testified and no exhibits were offered into evidence.

{¶4} As previously stated, plaintiff brought this action claiming negligence. As a threshold matter, defendant asserts that it cannot have respondeat superior liability for any negligent action committed by Aramark personnel, as defendant contends that Aramark, as the food service provider at LeCI, is an independent contractor. Therefore, whether liability may be imputed to defendant depends upon whether the relationship between the state of Ohio and Aramark is that of principal and agent, or that of employer and independent contractor.

{¶5} "Generally, an employer or principal is vicariously liable for the torts of its employees or agents under the doctrine of respondeat superior, but not for the negligence of an independent contractor over whom it retained no right to control the mode and manner of doing the contracted-for work." *Clark v. Southview Hosp. & Family Health Ctr.*, 68 Ohio St.3d 435, 438 (1994).

{¶6} "The Ohio Supreme Court has set out a test to distinguish an agency relationship (sometimes also referred to as a master-servant relationship) from an employer-independent contractor relationship: 'Did the employer retain control of, or the right to control, the mode and manner of doing the work contracted for? If he did, the relationship is that of principal and agent or master and servant. If he did not but is interested merely in the ultimate result to be accomplished, the relationship is that of employer and independent contractor.'" *Title First Agency, Inc. v. Xpress Closing Serv.,*

Inc., 10th Dist. Franklin No. 03AP-179, 2004-Ohio-242, ¶ 11, quoting *Councell v. Douglas*, 163 Ohio St. 292 (1955), paragraph one of the syllabus.

{¶7} "In determining whether an employer has the degree of control necessary to establish agency, courts examine a variety of factors, including: whether the employer or individual controls the details of the work; whether the individual is performing in the course of the employer's business rather than in an ancillary capacity; whether the individual receives compensation from the employer, and the method of that compensation; whether the employer or individual controls the hours worked; whether the employer or individual supplies the tools and place of work; whether the individual offers his services to the public at large or to one employer at a time; the length of employment; whether the employer has the right to terminate the individual at will; and whether the employer and individual believe that they have created an employment relationship." *Wright v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 14AP-153, 2014-Ohio-4359, ¶ 10.

{¶8} Applying the factors identified in *Wright* to the evidence presented here, the magistrate finds that plaintiff failed to prove by a preponderance of the evidence that Aramark is an agent of defendant. Plaintiff did not present the court with the contract between Aramark and DRC, or with evidence regarding who controls the details of the work, method of compensation, who controls the hours worked, who supplies the tools, length of employment, and who has the right to terminate an individual at will. Indeed, plaintiff failed to present evidence regarding any of the factors identified in *Wright*. Plaintiff merely asserts, without any evidence, that defendant is responsible for the acts of Aramark personnel.

{¶9} Furthermore, even if it had been proven that Aramark was an agent of the state, for the reasons set forth below the magistrate finds that plaintiff failed to prove that Aramark's employees acted negligently, and, as a result, no liability can be imputed to defendant. *See Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, ¶ 20 ("If there

is no liability assigned to the agent, it logically follows that there can be no liability imposed upon the principal for the agent's actions.").

{¶10} "To recover on a negligence claim, a plaintiff must prove by a preponderance of the evidence (1) that a defendant owed the plaintiff a duty, (2) that a defendant breached that duty, and (3) that the breach of the duty proximately caused a plaintiff's injury." *Ford v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 05AP-357, 2006-Ohio-2531, ¶ 10. "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. Franklin No. 06AP-592, 2006-Ohio-6788, ¶ 5. "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." *Jenkins v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 12AP-787, 2013-Ohio-5106, ¶ 8. "The state's duty of reasonable care does not render it an insurer of inmate safety." *Allen v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 14AP-619, 2015-Ohio-383, ¶ 17. "Reasonable care is that degree of caution and foresight an ordinarily prudent person would employ in similar circumstances, and includes the duty to exercise reasonable care to prevent an inmate from being injured by a dangerous condition about which the state knows or should know." *McElfresh v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 04AP-177, 2004-Ohio-5545, ¶ 16.

{¶11} Based upon the evidence presented at trial, the magistrate finds that on March 23, 2015, plaintiff, while attempting to swallow his food during his evening meal, gagged and threw up an object that was in his meal. Plaintiff later discovered that the object was a piece of a plastic bag. However, plaintiff admitted that he did not know how the object ended up in his evening meal. Additionally, plaintiff presented no evidence regarding how the evening meal was prepared or served, and plaintiff presented no evidence regarding the origin of the plastic bag. Moreover, plaintiff failed to present any evidence that any Aramark or DRC employee had notice of the plastic

bag in plaintiff's meal. *Forester v. Ohio Dept. of Rehab. & Corr*., 10th Dist. Franklin No. 11AP-366, 2011-Ohio-6296, ¶ 8 (the state is not an insurer of inmate safety, but must take reasonable care to prevent injury to the inmate once it becomes aware of a dangerous condition). Accordingly, plaintiff failed to establish how the actions or inactions of any Aramark or DRC employee resulted in a breach of the duty of care to plaintiff.

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

{¶13} *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).*

GARY PETERSON
Magistrate

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