

[Cite as *Hamlin v. Dept. of Rehab. & Corr.*, 2017-Ohio-8957.]

KYLE HAMLIN, Admr., etc.

Plaintiff

v.

OHIO DEPARTMENT OF  
REHABILITATION AND CORRECTION

Defendant

Case No. 2014-00765

Judge Patrick M. McGrath

DECISION

{¶1} This cause came to be heard on a complaint brought by plaintiff as administrator of the estate of Brad Lee Hamlin (Hamlin). Plaintiff brings claims for negligent hiring, retention, and supervision, negligence, and wrongful death. Plaintiff alleges that defendant failed to protect Hamlin from harm while he was incarcerated at the Toledo Correctional Institution (TCI). On June 3, 2016, the court granted defendant's motion for summary judgment with respect to plaintiff's negligent hiring, retention, and supervision claim, as well as finding that to the extent defendant was negligent with respect to the decision to lower inmate assailant Lawrence Hensley's security classification, defendant is entitled to discretionary immunity and summary judgment on that issue. The issues of liability and damages were not bifurcated, and the case proceeded to trial on plaintiff's remaining claims on February 13-16, 2017.

### **Background**

{¶2} At all relevant times, Hamlin was an inmate in the custody and control of defendant, the Ohio Department of Rehabilitation and Correction (ODRC), at TCI, housed in the A3/4 East block. Hamlin was admitted to prison in July 2010 for burglary, and was serving a five-year sentence. Lawrence Hensley (Hensley) was incarcerated in 2000 at the Southern Ohio Correctional Facility at Lucasville, Ohio (SOCF) for the 1999 kidnapping and murder of three Bible study students and their teacher. He was sentenced to life in prison for his crimes. Ultimately, Hensley and Hamlin were

assigned a Level 3 security classification, and were housed in the same cell block at TCI. There, on September 20, 2012, Hensley murdered Hamlin.

{¶3} Plaintiff claims that ODRC was negligent in failing to follow its security and privilege level review policies. Although ODRC enjoys immunity for discretionary decisions related to inmate classification, plaintiff argues that ODRC can be liable for negligently failing to apply or follow its own developed guidelines and requirements. *See Hughes v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 09AP-1052, 2010-Ohio-4736, ¶ 16; *Frash v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 14AP-932, 2016-Ohio-360, ¶ 23. Here, plaintiff alleges ODRC ignored and/or deviated from its own guidelines resulting in a misclassification of Hensley, placing a dangerous inmate into a lower security classification and general population in a medium security prison to the risk of plaintiff's decedent.

{¶4} The issues raised in this case required evidence and testimony about ODRC's security and privilege level classification policies, and the court discusses these policies below.

#### I. ODRC's Inmate Classification Policies

{¶5} ODRC separates inmates according to several risk factors and uses security and privilege classification to determine the appropriate security level for each inmate. "Appropriately classifying inmates is a means of protecting the public, ensuring staff safety, and achieving the Department's rehabilitative goals." (Plaintiff's Exhibit 4).

{¶6} The court qualified Eugene Miller (Miller), a corrections professional, as plaintiff's expert witness. Miller testified to his experience working in law enforcement and corrections. (Plaintiff's Exhibit 44). Miller held a variety of roles within the corrections industry, including prison administrator and superintendent, professor of various corrections and public safety courses, and director of private companies supplying prison design and equipment. He testified that he has been a criminal justice consultant since 1973, and he has testified on behalf of both plaintiffs and defendants in

trials. Miller explained that security classification is important because it allows prison officials to try to predict future behavior, allocate resources within the corrections system, and provide appropriate supervision for inmates. Miller explained that in corrections, as a general rule, if an action is not documented then it did not happen.

A. Security Classification Policy<sup>1</sup>

{¶7} ODRC policy 53-CLS-01 governs the security review process, and its purpose is to “establish guidelines for the fair, uniform, and objective security classification of inmates of the [ODRC].” The security level classification ranges from Level 1 to Level 5. Each security level classification is detailed in ODRC policy 53-CLS-01, and are described below.

Security Level	Description
Level 1A	The lowest security level in the classification system. Inmates have the most privileges allowed.
Level 1B	The second lowest level in the classification system.
Level 2	A security level for inmates who are deemed in need of more supervision than level 1, but less than Level 3.
Level 3	The security level that is the next degree higher than Level 2, and requires more security/supervision than Level 2, but less than Level 4.

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<sup>1</sup>There are two versions of 53-CLS-01 involved in this case. Plaintiff’s Exhibit 4 is the policy in effect beginning April 28, 2011. Plaintiff’s Exhibit 5 is the policy in effect beginning May 23, 2012.

Level 4	Level 4 is the security level for inmates whose security classification score, at the time of placement, indicates a need for very high security. It is also a classification for those who are involved in, but not leading others, to commit violent, disruptive, predatory, or riotous actions, and/or a threat to the security of the institution as set forth in the Level 4 criteria.
Level 5	A security level for inmates who commit or lead others to commit violent, disruptive, predatory, or riotous actions, and/or a threat to the security of the institution as set forth in the Level 5 criteria.

(Plaintiff's Exhibit 4).

{¶8} Based on ODRC policy, the factors to consider for security level reviews include, but are not limited to, history of assaultive behavior, age, escape history, enemies of record, gender, medical status, and mental and emotional stability. "The process shall consider behavior and such other objective factors as are available and relevant when assessing an inmate's institutional security needs." (Plaintiff's Exhibit 4). Each inmate is assigned an initial security classification upon entering ODRC's custody, and then receives an annual security review. The written security classification review process is carried out on, and supplemented by, review forms, and these policies and forms create the rules that ODRC employees are required to observe in carrying out security reviews.

{¶9} When completing an annual security classification review, the reviewing committee begins by answering several questions on the first page of the form regarding the inmate's history and recent conduct. Each answer corresponds to a numerical score on the form, and the total score provides a suggested disposition for the inmate - either to increase, maintain, or decrease the inmate's security level. The human element of the inmate should be considered in an inmate's security review, and this is reflected in ODRC employees' ability to override the security classification form

score based on knowledge of the individual inmate. If an override occurs, the “justification/basis for any override shall be documented on the [form].” (Plaintiff’s Exhibit 4, p. 6). An override can occur if the inmate caused or attempted to cause serious physical harm to another.

{¶10} Cynthia Davis, Unit Chief at SOCF, testified that she acted as the Warden’s Designee for security and privilege reviews for many years, and that she is required to follow the applicable ODRC policies. She explained that security level reviews typically provide a twelve-month snapshot of an inmate’s behavior. She stated, consistent with ODRC policy, that for a security level review, a committee makes a security level recommendation to her, and she approves or denies the recommendation. If she recommends a change to an inmate’s security level, the decision gets referred to the Bureau of Classification for a final decision.

{¶11} Related specifically to the security review process, Davis testified that the review centers on behavior over the last year, stability factors such as age, education, and job performance, and acts of violence or misconduct in the past five years. With respect to this five-year look back, she testified that reviewers do not always look back through the entire five-year period because if there is a violent act in the last twenty-four months, the inmate receives the maximum amount of points for this category. According to Davis, other violent acts that occurred outside this twenty-four-month period would not increase an inmate’s score. She said that sometimes a case manager will note older violent acts, and the reviewers should look at more than just the inmate’s score. While she usually agrees with the committee’s score, she can exercise a discretionary override.

#### B. Privilege Level Review Policy

{¶12} Privilege level reviews are governed by 53-CLS-02 and these reviews operate similarly to security level reviews. (Plaintiff’s Exhibit 2). However, privilege level reviews generally occur every six months. The privilege level policy in place from

April 13, 2008 to October 18, 2012, did not provide for any special privilege level reviews. *Id.* However, the privilege level policy effective October 19, 2012, permitted special privilege level reviews on dates other than the scheduled six-month intervals. (Plaintiff's Exhibit 3, p. 3).

{¶13} The purpose of privilege levels is to establish an incentive program based on an increased level of privileges for demonstrated appropriate inmate behavior and program compliance. Inmates can be assigned one of four privilege levels – 4A, 4B, 5A, or 5B. Privilege level 4A is the level with the most privileges, and 5B is the level with the least. An inmate classified as 4A is eligible, at the next security review, to be moved to a Level 3 inmate. The applicable prison warden/designee makes the final decision with respect to an inmate's privilege level.

{¶14} Davis also has a role in privilege level reviews at SOCF. She testified that inmates are reviewed every six months, unless a special review is conducted. She makes the final privilege level decision, however the review process begins with the case manager. Davis testified that the case manager looks at the past six months of behavior and/or rules issues and why the inmate ended up at the current privilege level. However, she also testified that the form for privilege level reviews instructs the person filling out the form to consider the last five years of the inmate's conduct.

{¶15} Dawn Frederick, ODRC employee and case manager for Hensley, testified that from 2007-2012 she saw Hensley almost daily. She handled security reviews, visitation, and served as a liaison between inmates and security. She explained that privilege level reviews allow the case manager to establish incentives based on an increased level of privilege. She testified that any staff member can request a special privilege level review for an inmate, and special privilege level reviews are more common for inmates with mental health issues because those inmates may do better in the prison setting with more freedom. She explained that this specifically applies in the

Level 4A/4B setting because Level 4A inmates have less lock down time than Level 4B inmates.

{¶16} Ed Sheldon was the Warden at TCI from 2011-2015, and has 28 years of experience in the Ohio corrections system. He testified that Level 4 inmates are housed by themselves for the safety of the inmates and staff. Further, Level 4B inmates' movement is restricted and they spend approximately 22 hours per day in their cells. Level 4A inmates have more time out of their cells, and they live in a structured environment with the ability to go to the dining room to eat, access the library, and participate in programming activities. While Level 4 inmates are restricted, Sheldon testified that Level 3 inmates have more freedom of movement and the ability to congregate.

## II. Lawrence Hensley

{¶17} Davis testified that Hensley was a violent inmate in prison, and he entered the prison system at Level 4A because of his initial screening and the violent nature of his offenses. He was convicted of the kidnapping and murder of three Bible study students and their teacher. Hensley had a long and violent history while in the custody and control of ODRC. In April 2000, approximately six weeks after entry into the prison system, he was found guilty by the Rules Infraction Board (RIB) of assault with the intent to kill another inmate by beating the inmate with a can of chili stuffed into a sock. (Plaintiff's Exhibit 16). Six years later, in September 2006, he attempted to murder another inmate, repeatedly stabbing the inmate with a shank and stomping on his head and neck. (Plaintiff's Exhibit 18). Three years after that, in January 2009, Hensley poisoned two inmates and strangled one with a laundry bag cord resulting in two more guilty findings for attempted murder. (Plaintiff's Exhibit 21). Warden Sheldon testified on cross-examination that Hensley had a violent history and four attempts to murder inmates is consistent with a high security inmate.

{¶18} Plaintiff's expert, Miller, characterized Hensley as a violent, maximum security inmate and Hensley should have exhibited at least five years of incident-free behavior before becoming eligible to become a Level 3 inmate. Further, he testified that the best predictor of future prison behavior is past prison behavior. In Hensley's case, Miller stated that the cumulative behavior and violent acts of Hensley show that he was not qualified to be a Level 3 inmate.

III. Hensley's November 1, 2006 Special Security Classification Review (Plaintiff's Exhibit 19)

{¶19} At the time of this security level review, Hensley was incarcerated at SOCF; a prison that housed Level 4A and 4B inmates. On September 15, 2006, Hensley was found guilty by SOCF's RIB of attempting to cause the death of another person and he received an override to Level 5. However, on October 27, 2006, at a special security level review, his security level was reduced from Level 5B to Level 4B per a mental health evaluation. Mental health staff believed that Hensley could be better managed and treated as a Level 4B at SOCF.

{¶20} A review of Plaintiff's Exhibit 19 shows that Hensley's current conduct behavior was marked as poor, the lowest on the scale, meaning that he "continues to receive guilt findings by Rules Infraction Board on a periodic basis." Further, the "Reasons for the Warden/Designee's Recommendation" stated that Hensley "presents a serious threat to the safety and security of the institution."

{¶21} Davis testified that the September 2006 attempted murder guilty finding resulted in Level 5 placement for Hensley, however his mental health status was listed at level C1, which corresponds with seriously mentally ill. Further, she stated that the security level override to Level 4B was appropriate due to Hensley's mental health.

IV. Hensley's February 18, 2009 Annual Security Classification Review (Plaintiff's Exhibit 23)

{¶22} Prior to this review, in January 2009, the RIB found Hensley guilty of poisoning two inmates and attempting to strangle one inmate to death. He also possessed a shank in his cell and said he intended to kill other inmates with the shank. These findings are listed on the first page of the security review form in the “Notes” section. Further, under “Level 1A Non-Discretionary Overrides,” the box next to “High notoriety case inmate” was checked. Based on this review, Hensley met the standard to be a Level 5 inmate, however an override of the score was recommended, and the form notes that Hensley “[d]oes not meet criteria for Level 5,” and he was assigned to Level 4B.

{¶23} With respect to this security review, Davis testified that Hensley’s attempted murder violation met the criteria for Level 5 placement, however Hensley was still categorized as seriously mentally ill, and thus was not eligible for Level 5 placement. Davis admitted that she did not write this information on the review form, but applied this information to place Hensley at Level 4B.<sup>2</sup>

#### V. Hensley’s February 1, 2011 Privilege Level Review (Plaintiff’s Exhibit 29)

{¶24} On February 1, 2011, a three-person privilege review committee met to conduct Hensley’s regular six-month privilege level review. The committee noted that in February 2009, Hensley gave inmates a mixture of cool-aid, prescription medication, and water, and checked the box that stated he has poor behavior, the lowest level available. The committee also checked boxes detailing that Hensley had enrolled, but not completed programs, but participated and completed one program in August 2005. The committee recommended that Hensley be retained at Level 4B because he needed more adjustment due to poor behavior.

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<sup>2</sup>Hensley had privilege reviews in February 2010 (Plaintiff’s Exhibit 25) and August 2010 (Plaintiff’s Exhibit 26). The result of the February 2010 review was that he was retained at Level 4B due to continued poor behavior. The result of his August 2010 review was a recommended release to Level 4A, with an override by the warden’s designee to Level 4B due to Hensley’s placement offense and extensive assault history while in the custody and control of ODRC.

{¶25} Davis testified that Hensley's conduct remained poor due to guilty RIB findings. In October 2010, Hamlin threw feces at four inmates and was guilty of a Rule 6 violation, which is an assault. With respect to the program information listed on this privilege review form, Davis testified that the program Hensley completed concluded six years before this review, and it was not necessarily appropriate to include this program on this privilege review.

VI. Hensley's February 24, 2011 Special Privilege Level Review (Plaintiff's Exhibit 30)

{¶26} On February 24, 2011, 23 days after his regular six-month privilege review, defendant conducted another privilege level review for Hensley. However, Frederick admitted that the regular privilege review was finalized on February 10, 2011, so there were only 14 days between the regular privilege review and the special privilege review. There is no explanation on the form of why this review was conducted shortly after Hensley's six-month privilege review. During this review, the committee noted Hensley's February 2009 attempted murder of two other inmates, but determined that his behavior was average because he had no aggressive/assaultive behavior in the last six months. The box was checked indicating that Hensley completed an August 2005 program, but there was no check mark indicating that Hensley enrolled, but did not complete programs. The committee determined that as of February 24, 2011, Hensley served sufficient time at Level 4B, and recommended release to Level 4A.

{¶27} Frederick testified that she completed this special privilege review form, and it was at the discretion of the institution to do a special privilege review. However, she testified that she did not know who requested this specific special privilege review. On cross-examination, she stated that prison staff has to have some objective factor in the record to conduct a special privilege review. Some factors include good behavior and the mental health program available at Level 4A, and these factors have to form the basis for the decision to conduct a special privilege review. She explained that page

three of the form is where the objective reason should be listed, but with respect to this special privilege review she does not know who asked for the review or if it was her. She stated that she did not have any specific recollection of Hensley from February 1 to February 24, 2011, the time between the regular privilege review and special privilege review.

{¶28} According to Frederick, she recommended that Hensley be moved to Level 4A because at this special privilege review Hensley had a four-month period without any violations. She admitted that it was a mistake to note on the form that Hensley did not have any violations in the past six months; the correct notation was no violations or tickets within the last four months. She testified that she differentiates between levels of misconduct; there is a difference between throwing feces at other inmates and attempting to strangle another inmate.

{¶29} She testified that Hensley went 23 months, from October 2010 to September 2012, without a rules violation. She explained that after the October 2010 rules violation for throwing feces at other inmates, he was a model inmate and showed great self-control compared to other Level 4 inmates. Further, she said she considered Hensley's two most recent attempted murders in this review, however his four-month period without any rule violations showed improvement for the types of inmates she dealt with daily. At this time, Hensley spent almost two full years at Level 4B, and Frederick stated that typically inmates only stay at Level 4B for 12 months. Based on his four months of incident-free behavior they thought they would give him a chance at Level 4A.

{¶30} On cross-examination, Frederick testified that she was not Hensley's only case manager; inmates could have more than one. Frederick stated that there are some inmates that are so violent that they cannot be moved to Level 4A within a year, however it is possible for an inmate who attempts to murder another inmate to get moved from Level 4B within one year.

{¶31} Davis testified that she did not know why this special privilege review occurred, but speculated that it would have to be something in the inmate's file that triggered the special review. She testified that the privilege review policy in effect at the time this special privilege review was conducted does not show a provision permitting special privilege reviews. She stated that she did not know why there was a score of zero for guilty findings when Hensley had assaultive behavior in the previous six months, specifically in October 2010. Davis believed Hensley served sufficient time at Level 4B, and he could be managed at Level 4A. She testified that Hensley was at Level 4B for twenty-four months, and inmates are typically kept at Level 4B for twelve months.

{¶32} Warden Sheldon also testified that he did not know why this special privilege review occurred or the rationale for conducting two privilege reviews in such a short time frame, but he testified that the unit management team should know the reason for the special privilege review. Additionally, Sheldon explained that the unit management team should document the reason for the special privilege review on the review form, and if the unit management team does not document the reason, that is a problem. Sheldon testified that the warden/warden's designee does not have to sign off on the special privilege review.

{¶33} Sheldon testified that the unit management team has discretion to conduct a special privilege review because they have the most contact with the inmate and know how to use incentives. He also stated that filling out the security and privilege review forms incorrectly could jeopardize the safety of inmates and staff. According to Sheldon, two weeks is not enough time for an inmate to experience a change in behavior such that a change in security level is warranted.

{¶34} Plaintiff's expert, Miller, testified that conducting a special privilege review is dictated by policy and he saw no objective reason for this review. Further, he stated that Hensley would have to have exhibited a miraculous conversion in behavior over a

13-day period to result in a special review. He explained, like other witnesses, that there should have been a documented rationale for this special privilege review. However, there was no documented rationale provided by ODRC.

VII. Hensley's February 2, 2012 Annual Security Classification Review (Plaintiff's Exhibit 32)

{¶35} At the time of this security review, Hensley was classified as a Level 4A inmate, and thus he was eligible to move to Level 3. The first step of this security review, allocating points on the first page of the document, resulted in Hensley earning a score of -1, corresponding with the category of considering a supervision decrease. Looking more closely at the form, the score reflects a violence conviction within the past 24 months, however the notes only reflect the October 14, 2010 feces throwing incident. The form does not include any notes about Hensley's attempted murder of two inmates in 2009, which was within the past five years, his attempted murder of one inmate in August 2006, or his attempted murder of one inmate in April 2000. As a result of this security review, Hensley was reduced to a Level 3 inmate, and subsequently transferred to TCI, a medium security prison.

{¶36} Davis's testimony confirmed that Hensley's mental health status was not listed on this security review form. Further, Davis testified that if Hensley did not have the February 24, 2011 special privilege level review, he would have probably stayed at a Level 4.

{¶37} Warden Sheldon testified that he would expect the security review team to consider Hensley's prior attempted murders during this security review, even though Hensley could not accumulate any more points for prior violence. He also testified that the prior attempted murders should be documented in the notes section for review. Additionally, Sheldon stated that the review team is required to consider and review the attempted murders that occurred within the last 60 months, and it would be

unacceptable if they were not considered. While the attempted murders would not have increased Hensley's score, Sheldon testified that they should be considered for the weight of the score. However, they were not considered.

#### VIII. Hamlin's Death on September 20, 2012

{¶38} Hensley was transferred to TCI in June 2012 and was assigned to share cell A3 East 21 with Scott Tristan (Tristan). They were cellmates for about two months before Hensley killed Hamlin. Corrections Officer Charles Bias (Bias) has worked at TCI for about 17 years, and on September 20, 2012, he was assigned to work first shift (6:00 a.m. to 2:00 p.m.) on the A3/4 East block, where Hensley, Hamlin, and Tristan lived. This was Bias' second shift that day, as he worked his regularly assigned third shift on a different block before being ordered to work the first shift. He testified that he did not know any of the inmates on the A3/4 block.

{¶39} Corrections officers are responsible for making security rounds on their assigned block at 30 minute intervals to ensure the safety of staff and inmates. (Plaintiff's Exhibit 8). Bias explained that rounds are recorded on the specific housing unit's log book. Bias testified that during his security rounds he walks around his assigned area to make sure everything is okay on his cell block. Further, Bias explained that corrections officers can be assigned other tasks to complete during security rounds, and on September 20, 2012, Sergeant Nolan instructed Bias to determine the name of an inmate for a conduct report that did not contain a name.

{¶40} Plaintiff's Exhibit 1 is the Ohio State Highway Patrol's investigation report of Hamlin's murder. According to Hensley's confession contained in this report, the following events preceded Hensley informing Bias at 12:11 p.m. that Hamlin was in his cell having a seizure. Hensley lured Hamlin into his cell by explaining that he wanted Hamlin to shave his back in exchange for commissary items. Hensley covered up the cell window, Hamlin asked about the window covering, and Hensley explained that he

did not want other inmates to think something sexual was going on in the cell. Then, Hensley had Hamlin turn around to demonstrate how much pressure to use while shaving, and Hensley applied a choke hold to Hamlin until Hamlin fell unconscious.

{¶41} Next, Hensley retrieved his cellmate's toothbrush, towel, and pillow and rubbed them over Hamlin to transfer DNA. Hamlin then began to wake up and struggle so Hensley grabbed the pillow again and suffocated Hamlin. Hensley placed his forearm on Hamlin's throat and applied pressure until he heard a snap. Hensley grabbed another inmate's spoon and rubbed it over Hamlin in an attempt to spread DNA, and also grabbed Hamlin's biceps, pressing them to create bruising to facilitate his alibi.

{¶42} Ohio State Highway Patrol Trooper Glen Carpenter (Carpenter) testified that Hensley admitted to him that these events occurred after he peeked out of his cell window to see if Tristan had returned early from chow. When Tristan returned, Hensley waited a few more minutes, urinated, then left the cell. Tristan testified, via deposition admitted at trial, that on September 20, 2012, a count of inmates began at 11:00 a.m. and ended at 11:30 a.m., and that inmates are locked in their cells during count. (Exhibit W-1, p. 47-49). Between 11:40 a.m. and 11:45 a.m., Tristan left the cell block to go to early chow. *Id.* at 49. He testified that it takes about 15 minutes to eat and return to the cell block, and he believed he returned from chow around 12:10 pm.

{¶43} When he returned to the cell block his cell door window was covered. *Id.* at 44, 49-50. He stated that he thought the window was covered because Hensley wanted privacy for himself while using the restroom. *Id.* at 16. Hensley exited the cell a few minutes after Tristan returned to the cell block, approached Tristan, and told him that Hamlin was in their cell having a seizure. *Id.* at 20. Tristan told Hensley to inform a corrections officer. *Id.* at 24-25. Bias opened Hensley's cell door, observed Hamlin, and called a medical emergency. *Id.* at 27. Bias called a man down at 12:13 p.m.

{¶44} Bias explained that A3/4 block is a two-story block with 24 cells per floor. Bias testified that he finished his round at 12:05 p.m., and that he was 100 percent sure that Hensley's cell window was uncovered at that time. He explained that while all of his other log book entries that day were in the same pen color, he just pulled out a different pen to mark that he completed his 12:05 p.m. security round. He testified that when he was notified that an inmate was having a seizure and he returned to Hensley's cell, there was cardboard covering the window.

{¶45} After Hamlin's death, Warden Sheldon went to Hamlin's home to speak with his family because he felt badly that the death occurred under his watch. However, he testified he did not know Hamlin; he typically only knew problem inmates. Further, Sheldon testified that he remembered that TCI started receiving Level 4 inmates and had to double up cells for Level 3 inmates. At that time, the prison population at TCI doubled, and Sheldon testified that TCI received no additional funding for new inmates, only new security cameras. TCI had the same amount of prison staff watching double the prison population. Sheldon testified that he believed that TCI became a violent prison.

{¶46} After Hensley murdered Hamlin, he was assigned to Level 5B, and Davis testified that Hensley would have had an evaluation for mental health at this time. Further, Davis stated that the assignment to Level 5B was proper.

### **Law and Analysis**

{¶47} Plaintiff alleges that ODRC was negligent in failing to prevent the attack on Hamlin. Specifically, plaintiff claims that ODRC negligently violated its own policies in its security and/or privilege level reviews of Hensley in February 2009, February 2011, and February 2012. To prevail on a negligence claim, the plaintiff must prove by a preponderance of the evidence that the defendant owed him a duty of care, that the defendant's actions or omissions resulted in a breach of that duty, and the breach

proximately caused the plaintiff's injury. *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 81, 2003-Ohio-2573.

{¶48} Additionally, it is established that “the state is not an insurer of inmate safety and owes the duty of ordinary care only to inmates who are foreseeably at risk.” *Woods v. Ohio Dept. of Rehab. & Corr.*, 130 Ohio App.3d 742, 745, 721 N.E.2d 143 (10th Dist.1998); see *Frash v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 14AP-932, 2016-Ohio-360, at ¶ 8 (“ODRC owes inmates a common-law duty of reasonable care and protection from unreasonable risks”). And, as the Tenth District Court of Appeals noted: “[s]uccinctly stated, the ODRC is not liable for the intentional attack on one inmate by another unless it had adequate notice, either actual or constructive, of an impending attack.” *Hughes v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 09AP-1052, 2010-Ohio-4736, ¶ 14; *Literal v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 16AP-242, 2016-Ohio-8536, ¶ 16.

{¶49} In *Literal*, the Tenth District Court of Appeals discussed *Frash I* and *II* and examined the “law of this district with regard to DRC liability for an assault by one inmate on another \* \* \*.” *Literal*, at ¶ 16-20, 27-30. In *Literal*, the Tenth District Court of Appeals reiterated the legal standard as to ODRC's liability for an assault by one inmate on another inmate, stating:

The law is well-settled in Ohio that ODRC is not liable for the intentional attack of one inmate by another, unless ODRC has adequate notice of an impending assault. *Mitchell v. Ohio Dept. of Rehab. & Corr.*, 107 Ohio App.3d 231, 235, 668 N.E.2d 538 (10th Dist.1995), citing *Baker v. State, Dept. of Rehab. & Corr.*, 28 Ohio App.3d 99, 28 Ohio B. 142, 502 N.E.2d 261 (10th Dist.1986). Notice may be actual or constructive, the distinction being the manner in which the notice is obtained rather than the amount of information obtained. *Hughes v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 09AP-1052, 2010 Ohio 4736, ¶ 14. Actual notice exists where the information was personally communicated to or received by the party. *Id.* “Constructive notice is that notice which the law regards as sufficient to give notice and is regarded as a substitute for actual notice.” *Id.*, citing *In*

*Re Estate of Fahle*, 90 Ohio App. 195, 197, 105 N.E.2d 429 (6th Dist.1950).

*Literal* at ¶ 16, quoting *Watson v. Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 11AP-606, 2012-Ohio-1017, ¶ 9. The legal standard, as stated in *Literal*, applies to Hamlin's claims of negligence in this case, and as the party asserting a claim of negligence, he has the burden of proving his claim. See *McFadden v. Elmer C. Breuer Transp. Co.*, 156 Ohio St. 430, 433, 103 N.E.2d 385 (1952). Also Hamlin is required to prove his negligence claim by a preponderance of the evidence. See *Watson* at ¶ 7.

{¶50} In *Hughes* at ¶ 17, the Tenth District Court of Appeals stated that “with respect to penal institutions, prison administrators must be accorded deference in adopting and executing policies and procedures to maintain order.”

{¶51} “Under the judicially created doctrine of discretionary immunity, [defendant] is generally immune from tort liability for decisions relating to policies and procedures.” *Franks v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 10AP-770, 2011-Ohio 2048, ¶ 14, citing *Hughes*, at ¶ 16. Indeed, “the state cannot be sued for its legislative or judicial functions or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion.” *Hughes*, at ¶ 16, quoting *Reynolds v. State*, 14 Ohio St.3d 68 (1984). However, “once the decision has been made to engage in a certain activity or function, the state may be held liable, in the same manner as private parties, for the negligence of the actions of its employees and agents in the performance of such activities.” *Reynolds*, at paragraph one of the syllabus. Further, prison administrators are provided “wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.” *Bell v. Wolfish*, 441 U.S. 520, 547 (1979).

{¶52} Generally, ODRC is “immune from liability arising from decisions regarding inmate transfer and placement under the discretionary immunity doctrine expressed in *Reynolds* \* \* \*.” *Troutman v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin Nos. 03AP-1240 & 04AP-670, 2005-Ohio- 334, ¶ 9. Most recently in *Frash I*, the Tenth District Court of Appeals stated that “when adopting a policy or procedure to ‘preserve internal order and maintain institutional security’ or by acting in accordance with such a policy or procedure, ODRC \* \* \* enjoys immunity.” *Frash*, at ¶ 16, citing *Franks*, at ¶ 14. The court continued, opining “[w]ere we to find that discretionary immunity applies every time a state employee exercising discretion in performing his or her job, we would be vastly expanding the scope of the discretionary immunity doctrine. Insofar as the Court of Claims applied immunity to claims that are really about negligence in adhering to policies relating to training, supervision, and **inmate placement**, it erred. *Id.* at ¶ 23 (citations omitted) (emphasis added).

{¶53} As discussed in its June 3, 2016 entry partially granting ODRC’s motion for summary judgment, the court recognizes that ODRC is entitled to immunity with respect to adopting policies and procedures to preserve internal order and institutional security. However, this court’s partial grant of summary judgment as it pertains to discretionary immunity only extends to the creation and execution of the inmate placement policy, not negligence in failure to apply the policy. Further, the Sixth District Court of Appeals determined that because a partial summary judgment is interlocutory in nature, a trial court can, sua sponte, “change, modify, or revise the partial grant of summary judgment at any time before a final judgment was entered in the case.” *Junkins v. Spinnaker Bay Condo. Ass’n.*, 6th Dist. Ottawa No. OT-01-007, OT-01-006, 2002-Ohio-872, p. 23. Thus, this court properly considered evidence at trial that addressed the issues of inmate placement.

{¶54} Further, the Tenth District Court of Appeals explained that once a policy or procedure is established, the state can be liable for the negligence of its employees in

the performance of such activities. Specifically, this case law applies to negligence relating to ODRC employees' performance of security and privilege reviews using the policies and procedures that ODRC implemented.

{¶55} The court finds that the privilege level review policy in place at the time of Hensley's February 24, 2011 special privilege level review did not contain a provision for special privilege level reviews, and thus were not permitted while that policy was in effect. As such, ODRC violated 53-CLS-02 in February 2011 because ODRC reviewed Hensley's privilege level twice in an approximately two-week period. Even if special privilege level reviews were permitted at that time, as they were in the subsequent privilege review policy, nobody at ODRC, including the warden's designee Davis or Hensley's case manager Frederick, could identify any reason for re-reviewing Hensley on February 24, 2011. The form for this privilege review reflects this fact, as there is no reason, explanation, or factor to explain why a review was appropriate in such a short time frame. Further, as explained at trial by Warden Sheldon, it is unlikely that a 14-day period is enough time to show an improvement in an inmate's behavior to warrant a reduction from Level 4B to Level 4A.

{¶56} In addition, the February 24, 2011 special privilege level review form contains numerous errors. First, his behavior is noted as "average," meaning that he had no aggressive or assaultive behavior in the past six months. Hensley had an RIB violation for assault in October 2010, within six months of this special review. While Frederick testified that she meant to put four months, ODRC policy requires the review to look back at least six months for aggressive or assaultive behavior. These errors allowed the review committee to determine that Hensley's behavior was no longer too poor to justify a move to Level 4A. Absent these policy violations during the February 24, 2011 privilege level review, Hensley would not have been eligible for Level 3 until 2013. As such, the court concludes that ODRC employees violated 53-CLS-02 during Hensley's February 24, 2011 special privilege review.

{¶57} The next failure by ODRC employees was Hensley's 2012 security review, which resulted in a violation of 53-CLS-01. Sheldon and Davis testified that the security review policy requires reviewers to look back five years to evaluate for a potential score override. In her testimony, Davis stated that she reviewed the past five years for an override, and while there was no note on the security review form about Hensley's 2009 attempted murders, she looks at the RIB history which would include the 2009 attempted murders. However, she admitted that during her deposition she testified that she only looks at the past year of the RIB report for security reviews, which violates the five years look back requirement. Sheldon testified that it would be unacceptable under the policy to ignore these acts that occurred in the last five years for purposes of an override.

{¶58} Based on the evidence and testimony reviewed by the court, the court finds that ODRC was negligent in reclassifying Hensley and assigning him a security classification that allowed him to be transferred to TCI and general population. The court understands ODRC is entitled to immunity for the exercise of executive or planning functions involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion. *Hughes*, at ¶ 16, quoting *Reynolds v. State*, 14 Ohio St.3d 68 (1984). However, the Tenth District Court of Appeals has also held that where the state decides to engage in a certain activity or function, the state can be held liable for the negligence of the actions of its employees in the performance of these activities. Simply stated, ODRC's failure to follow its own guidelines and policies is where liability lies and this case presents this scenario to the court.

{¶59} The court finds that ODRC was negligent in failing to follow its security and privilege classification policies with respect to Hensley. Most notably, ODRC employees failed to properly conduct a five-year look back on Hensley's 2012 security review, which would have revealed most of his violent behavior while incarcerated. This

is significant here because, due to Hensley's mental health status, he was ineligible for a Level 5. He would remain a Level 4 regardless of any assaultive behavior in prison, so it was extremely important to get a full picture of Hensley's behavior, and ODRC employees failed to comply with its policy. This conclusion is supported by plaintiff's expert, Miller, who concluded that ODRC employees should have looked at Hensley's cumulative behavior, and Hensley should have exhibited five years of incident free behavior to become a Level 3. Further, Miller concluded that Hensley was a violent inmate who should not have been eligible for a Level 3 security classification.

{¶60} ODRC employees also failed to follow ODRC guidelines and policies during Hensley's February 24, 2011 special privilege review less than two weeks after his regular February 2011 privilege review. This review was riddled with errors, and only looked back four months for aggressive or assaultive behavior, when the policy clearly requires a six-month look back. This is particularly important in this case because Hensley had an assault finding within six months, but not within four months. These errors committed by ODRC employees allowed Hensley to be improperly classified, and ultimately assigned a Level 3 security status in general population at a medium security prison, to the risk of plaintiff's decedent. As such, the court finds that ODRC employees were negligent in their performance of Hensley's privilege and security reviews, thus reclassifying him to an improper security level. As the court determined ODRC breached its duty to plaintiff's decedent, it now turns to notice.

### **Notice**

{¶61} "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* at ¶ 14.

{¶62} In *Literal*, the Tenth District Court of Appeals reiterated the legal standard as to ODRC’s liability for an assault by one inmate on another inmate, stating:

The law is well-settled in Ohio that ODRC is not liable for the intentional attack of one inmate by another, unless ODRC has adequate notice of an impending assault. *Mitchell v. Ohio Dept. of Rehab. & Corr.*, 107 Ohio App.3d 231, 235, 668 N.E.2d 538 (10th Dist.1995), citing *Baker v. State, Dept. of Rehab. & Corr.*, 28 Ohio App.3d 99, 28 Ohio B. 142, 502 N.E.2d 261 (10th Dist.1986). Notice may be actual or constructive, the distinction being the manner in which the notice is obtained rather than the amount of information obtained. *Hughes v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 09AP-1052, 2010 Ohio 4736, ¶ 14. Actual notice exists where the information was personally communicated to or received by the party. *Id.* “Constructive notice is that notice which the law regards as sufficient to give notice and is regarded as a substitute for actual notice.” *Id.*, citing *In Re Estate of Fahle*, 90 Ohio App. 195, 197, 105 N.E.2d 429 (6th Dist.1950).

*Literal* at ¶ 16, quoting *Watson v. Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 11AP-606, 2012-Ohio-1017, ¶ 9.

{¶63} A review of Hensley’s record of violent offenses while in ODRC custody, coupled with Hensley being given the opportunity to be housed at a Level 3, medium security prison in general population, leads the court to conclude that ODRC had notice of an impending assault to be committed by Hensley. Hensley was an extremely violent offender and inmate; a fact known by ODRC employees Davis and Frederick. Hensley was admitted into the custody and care of ODRC in 2000, and between 2000 and 2009, he attempted four murders and had at least one other assault prior to murdering Hamlin. Warden Sheldon, an experienced corrections professional, testified that, based on Hensley’s history, Sheldon would characterize him as a violent inmate.

{¶64} Thus, based on the voluminous evidence presented to the court at trial, the court finds that ODRC and its employees had knowledge that Hensley was an extremely violent inmate. It was foreseeable that a violent inmate, with a minimal period of time with good behavior before being transferred to a Level 3 prison, would commit another act of violence. The court concludes that ODRC failed to act appropriately to prevent this foreseeable harm. An additional fact contributing to ODRC's notice was the security round performed at the time Hensley murdered Hamlin, and the court now turns to that issue.

#### **Corrections Officer Bias' Security Round**

{¶65} The court concludes that based on the timeline and testimony presented at trial, plaintiff presented sufficient evidence to show that Corrections Officer Bias was distracted by other duties and did not notice a covered window to Hensley's cell during the time Hensley attacked Hamlin. On September 20, 2012, Bias was working his second consecutive shift at TCI. He worked his normal eight-hour shift, then stayed on to work the 6:00 a.m. to 2:00 p.m. shift on a different cell block, specifically the A3/4 East block, where Hensley, Hamlin, and Tristan lived. By the time Bias completed his round at 12:05 p.m., he had been working for 14 hours. Further, Bias did not know any of the inmates on the cell block where Hensley and Hamlin were housed. Finally, while Bias was completing his 12:05 p.m. round, he was, pursuant to an order from Sergeant Nolan, investigating who was living in a certain cell so an inmate name could be added to a conduct report. While Bias testified that he was a corrections officer for 17 years and had worked double shifts in the past, the court notes that Bias was tasked with determining an inmate's name on a block he was not familiar with, 14 hours into his work.

{¶66} Bias completed his security round at 12:05 p.m., he was informed by Hensley that Hamlin was having a seizure at 12:11 p.m., and he called a man down at 12:13 p.m. Prior to 12:11 p.m., Hensley was able to lure Hamlin into his cell, discuss

back shaving with him, cover up his cell window, apply a choke hold to Hamlin, rub a variety of items on Hamlin in an attempt to transfer DNA, smother and suffocate Hamlin with a pillow, place his forearm on Hamlin's neck until it snapped, and press into Hamlin's body to further his alibi. Hensley then checked to see if his cellmate returned from early chow, and when Tristan returned, Hensley urinated and then left his cell.

{¶67} Tristan returned from early chow and waited on the bleachers for three to four minutes, at which point Hensley told Tristan that Hamlin was having a seizure in their cell. Hensley went to alert a corrections officer, but Bias was in a sergeant's office so it took Hensley longer to get to Bias. Hensley's disclosure to Tristan and alerting Bias took approximately four to five minutes. Therefore, from the time that Hensley lured Hamlin into his cell, to Hensley getting to Bias in the sergeant's office, took approximately 13 to 23 minutes. Thus, if Bias completed his security round at 12:05 p.m., then all of these activities were occurring while Bias was traversing the unit and talking to inmates. If Bias was traversing the unit and speaking with inmates, Bias would have noticed that Hensley's cell window was covered, and discovered Hensley and Hamlin in Hensley's cell. Therefore, the court finds that during his security round that concluded at 12:05 p.m., Corrections Officer Bias neglected to see that Hensley's cell window was covered by a piece of cardboard, allowing Hensley to assault and murder Hamlin.

{¶68} As such, the court concludes that plaintiff proved by a preponderance of the evidence that ODRC's negligence resulted in the death of Brad Lee Hamlin. This case was not bifurcated, and now the court turns to plaintiff's damages.

### **Damages**

{¶69} Plaintiff presents this case as one for wrongful death and survivorship, and damages in this case are available pursuant to R.C. 2125.02 and 2305.21. The court was provided with a variety of evidence to support plaintiff's wrongful death claim, but very limited evidence to support a claim for pain and suffering of plaintiff's decedent.

### I. Background

{¶70} Brad Lee Hamlin was the only child of Sharon and Kyle Hamlin. He was born in October 1987 into a close-knit family. His mother, Sharon Hamlin (Sharon), testified that he was a good son, and while he did not do well in school, he was an active child and very supportive of his family. His father, Kyle, explained that he quit his job as a trucker to be at home with his family when Hamlin was growing up. Kyle testified that as a child Hamlin would go with him on carpentry jobs. His grandmother, Donna, testified that she interacted with Hamlin his entire life. She explained that during his senior year of high school, she homeschooled him because the horticulture school he was attending closed.

{¶71} Sharon testified that Hamlin moved out just after he graduated from high school and he worked at a machine shop. He lived with his coworkers, and during that period she saw Hamlin high on drugs. Kyle testified that Hamlin was terminated from the machine shop and worked odd jobs after his termination. On cross-examination, Sharon testified that he worked on and off prior to his incarceration, and did not have steady employment. During this time, Hamlin had his driver's license revoked.

{¶72} Donna explained that when Hamlin started working at the machine shop he started to go downhill and become more distant. On cross-examination, Sharon testified that she did not know the drugs he was taking, the frequency, or type. She knew when he was on drugs by his actions and physical changes. Sharon testified that Hamlin tried to commit suicide in 2007 and 2010. Kyle testified on cross-examination that he did not talk with his son about drugs, and Hamlin told him about his drug use after he was arrested. Sharon also stated that Hamlin experienced depression while incarcerated. Defendant's Exhibit 1 (DRC\_000385) is an Initial Medical/Mental Health/Substance Abuse Screening form filled out for Hamlin on November 8, 2011. The form shows that in 2010 Hamlin used amphetamines, cannabis, and opiates daily.

{¶73} Hamlin had two children, a son, Tommy, and a daughter, Isabella. He did not have custody of either child. Hamlin visited Tommy a couple times per month prior to his incarceration. Sharon testified that Hamlin regularly participated in Tommy's school programs and spent time with him. However, he was not paying child support for Tommy. Sharon explained that when the family found out about the lack of child support, Hamlin's grandmother paid. Isabella was born on April 1, 2010, while Hamlin was incarcerated, and he never had the opportunity to meet her. Sharon testified that Hamlin spoke with her over the phone during his incarceration.

{¶74} Sharon explained that Hamlin's family visited him on a limited basis while he was in prison. However, both Sharon and Donna testified that the family spoke with him regularly over the phone. (Plaintiff's Exhibit 43). On cross-examination, Sharon admitted that Kyle and Donna never visited him in prison, and she only visited twice. According to Sharon, she did not visit a lot because she worked and there was not any weekend visitation. Kyle explained that he could not go visit Hamlin in prison because he did not know who it would be worse on, Hamlin or himself.

{¶75} According to Sharon, Hamlin was pulling himself together in prison and was studying horticulture. During their phone calls, Hamlin told Sharon he was getting into fights due to conflicts with other inmates, which was surprising to her because he never got into a fight at school or as a child. Sharon also testified that Hamlin told her that he was afraid and asked the warden to put him into protective custody. In November 2011, Hamlin's jaw was broken. Medical records stated that he fell off the bed, but Sharon believes he was attacked by another inmate and did not report it. Kyle also testified that Hamlin told him that he was in fear for his safety and was trying to get moved out of TCI because it was so dangerous. According to Kyle, after his scheduled release from prison Hamlin was planning to take care of his kids and Kyle was going to help Hamlin to gain employment and get his life back on track.

{¶76} Sharon, Kyle, and Donna were present when Hamlin was in the hospital after Hensley attacked him. She testified that Hamlin was unconscious and on a respirator. He was chained and handcuffed to the bed. They were told by the hospital staff that there was one test remaining to determine if Hamlin would make it or not, otherwise he would be brain dead. She explained that Isabella spoke to him and sang him her ABC's over the phone while he was unconscious. Further, she testified that Tommy shut down after the death of his father and had to get a counselor. She explained that Tommy tried to kill himself by tying a shirt around his neck and was acting out at home. Donna testified that she paid Hamlin's funeral bill on behalf of her son, Kyle. (Plaintiff's Exhibit 50).

## II. Law and Analysis

{¶77} “In order to sustain an action for negligence, a plaintiff must show the existence of a duty owing from the defendant to the plaintiff or injured party, a breach of that duty, and that the breach was the proximate cause of resulting damages.” *Sparre v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 12AP-381, 2013-Ohio-4153, ¶ 9. “It is axiomatic that every plaintiff bears the burden of proving the nature and extent of his damages in order to be entitled to compensation.” *Jayashree Restaurants, LLC v. DDR PTC Outparcel LLC*, 10th Dist. Franklin No. 16AP-186, 2016-Ohio-5498, ¶ 13, quoting *Akro-Plastics v. Drake Indus.*, 115 Ohio App.3d 221, 226 (11th Dist.1996). “As a general rule, the appropriate measure of damages in a tort action is the amount which will compensate and make the plaintiff whole.” *N. Coast Premier Soccer, LLC v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 12AP-589, 2013-Ohio-1677, ¶ 17. “[D]amages must be shown with reasonable certainty and may not be based upon mere speculation or conjecture \* \* \*.” *Rakich v. Anthem Blue Cross & Blue Shield*, 172 Ohio App.3d 523, 2007-Ohio-3739, ¶ 20 (10th Dist.).

{¶78} An action for wrongful death is not about the value of one's life. Rather it is about the value of one's life to others expressed in inexact monetary amounts. R.C. 2125.02 provides, in part:

(A)(2) The jury, or the court if the civil action for wrongful death is not tried to a jury, may award damages authorized by division (B) of this section, as it determines are proportioned to the injury and loss resulting to the beneficiaries in division (A)(1) of this section by reason of the wrongful death and may award reasonable funeral and burial expenses incurred as a result of the wrongful death. \* \* \*

\* \* \*

(B) Compensatory damages may be awarded in a civil action for wrongful death and may include damages for the following:

- (1) Loss of support from the reasonably expected earning capacity of the decedent;
- (2) Loss of services of the decedent;
- (3) Loss of the society of the decedent, including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education, suffered by the surviving spouse, dependent children, parents, or next of kin of the decedent;
- (4) Loss of prospective inheritance to the decedent's heirs at law at the time of the decedent's death;
- (5) The mental anguish incurred by the surviving spouse, dependent children, parents, or next of kin of the decedent.

Pursuant to R.C. 2125.02(A)(3)(b)(i), the "court may consider all factors existing at the time of the decedent's death that are relevant to a determination of the damages suffered by reason of the wrongful death."

*A. R.C. 2125.02(1) – Expected Earning Capacity of the Decedent*

{¶79} The court finds that plaintiff is not entitled to any damages for expected earning capacity of the decedent. Plaintiff failed to provide any evidence of plaintiff's salary during his employment at the machine shop, and plaintiff could not provide any

information beyond the fact that Hamlin worked odd jobs during the two years between his termination from the machine shop and his incarceration. Further, the evidence also shows that after Hamlin graduated from high school and moved out, he started using drugs and failed to uphold certain commitments, including paying child support for his son, Tommy. He also experienced significant mental health difficulties, and aside from addiction, participated in criminal activity to acquire money to buy drugs.

{¶80} Plaintiff presented sufficient evidence that Hamlin was taking classes in prison, and he had not used any illegal drugs for over two years prior to his death. However, this is not sufficient to show expected earning capacity of Hamlin. Accordingly, the court awards no damages for Hamlin's expected earning capacity.

*B. R.C. 2125.02(3) – Loss of Society*

{¶81} Kyle and Sharon, as parents of Hamlin, and Tommy and Isabella, as children of Hamlin, are rebuttably presumed to have suffered damage because of the wrongful death of their son and father. See R.C. 2125.02(A)(1). The court finds that Hamlin had a close relationship with his family during his life. As a child, he frequently spent time with family and had valuable, quality relationships with his mother and father. Hamlin was an only child, and the testimony of Kyle and Sharon showed that they both cared about him very much, and made personal sacrifices to be a part of his life growing up.

{¶82} Sharon, Kyle, and Hamlin's grandmother, Donna, all testified that Hamlin spoke to them on the phone frequently while incarcerated, and the phone records support this testimony. Further, while there was testimony that his family visited him in prison, the court is concerned by the fact that Kyle testified that he never visited Hamlin, and Sharon only visited a few times.

{¶83} While the court finds that the relationship between Hamlin and his parents remained strong while he was in prison and would continue to be a prevalent part of Hamlin's life upon release, the lack of visitation is troubling. Despite this, the court finds

that the extent and quality of the relationship between Hamlin and his parents was strong, and the quality of the relationships lost was high. Accordingly, the court determines that the loss of society was significant for Hamlin's parents.

{¶84} Turning to Hamlin's son, Tommy, there was specific testimony that he spent time with Tommy and was a part of his life until he entered the prison system. He played with Tommy, attended his school events, and took him camping and fishing. Additionally, he continued to speak with Tommy over the phone while he was incarcerated. His relationship with his daughter, Isabella, was limited because she was born while he was incarcerated and he did not have the opportunity to meet her. The evidence shows that he engaged with her over the phone while he was in prison, and she was present in his life enough to sing him the ABC's while he was unconscious in the hospital. The court finds that Hamlin had a meaningful relationship with his son Tommy, and he would have remained a part of his son's life upon release. However, due to the limited relationship between Hamlin and Isabella, the court finds that the extent and quality of the relationship between Hamlin and Isabella was minimal compared to his relationship with Tommy.

*C. R.C. 2125.02(5) – Mental Anguish*

{¶85} The court finds that Kyle, Sharon, and Tommy suffered mental anguish and emotional distress as a proximate cause of the wrongful death. Both Kyle and Sharon had an emotional relationship with Hamlin prior to entering prison, and were a significant part of his life. However, as noted, the court is concerned about the lack of visitation while Hamlin was incarcerated. Kyle testified that he never visited Hamlin in prison, but spoke with him on the phone a couple times per week. Similarly, Sharon spoke with him on the phone, but only visited him in prison a few times. Based on this testimony, the court finds that Kyle and Sharon are entitled to damages for the mental anguish they suffered because of his death.

{¶86} The court reaches a similar conclusion for Tommy. Tommy and Hamlin had an emotional and developed relationship prior to Hamlin's incarceration. There was testimony that Tommy spoke with Hamlin on the phone while he was in prison. Further, Sharon testified that after his father's murder he shut down, tried to kill himself to be with his father, and underwent counseling. It is clear to the court that Tommy had a meaningful relationship with his father, and thus Tommy is also entitled for the mental anguish he suffered because of his death.

{¶87} Turning to Isabella, at the time of Hamlin's murder Isabella was approximately seventeen months old and had never met her father. While there was testimony that she interacted with Hamlin on the phone, the court finds that there was not a significant amount of mental anguish suffered by Isabella because of the death of her father.

*D. R.C. 2305.21 – Hamlin's Pain and Suffering*

{¶88} Plaintiff seeks compensatory damages for Hamlin's conscious pain and suffering that he endured in connection with his wrongful death. "Physical or bodily pain and suffering in consequence of a wrong occasioning an injury to the person is a proper element of damages[.]" See *Flory v. New York C.R. Co.*, 170 Ohio St. 185, 189, 163 N.E.2d 902 (1959). Plaintiff presented evidence that Hamlin was first rendered unconscious when Hensley placed him in a choke hold. After he regained consciousness, he was smothered with a pillow until he was unconscious again. After five to ten minutes of struggle, he was unresponsive and transferred to the hospital, where he remained on a respirator until his death.

{¶89} The court finds that plaintiff presented little evidence regarding the pain and suffering that Hamlin endured because of being attacked by Hensley. The only evidence about what Hamlin endured in Hensley's cell was the OSHP report and Hensley's statement to the OSHP investigator. Further, plaintiff did not provide any evidence, medical or otherwise, to support plaintiff's claim for pain and suffering.

However, the court recognizes that Hamlin did endure pain and suffering as a result of Hensley's attack. As such, the court finds that plaintiff is entitled to minimal damages for Hamlin's pain and suffering.

### III. ODRC's Argument for Apportionment

{¶90} ODRC argues that "the court should apportion liability by finding that Hensley was at least 90 percent culpable for Hamlin's death. R.C. 2307.22(C) and 2307.23." The court finds ODRC's argument unpersuasive. ODRC's entire duty with respect to inmates under its custody and control is based upon its obligation to protect against foreseeable assaults from other inmates. Simply, violence against other inmates is the very thing ODRC is supposed to foresee and prevent. In this case, apportionment is contrary to this duty of care, and would effectively degrade or minimize ODRC's duty. As such, the court will not apportion damages in this case.

### IV. Conclusion

{¶91} Based on the evidence presented to the court at trial, the court awards \$325,000 as total damages for the loss of society and emotional distress of Hamlin's parents and children. Pursuant to R.C. 2125.03, the probate court shall allocate this amount as it deems appropriate. Further, the court awards \$25,000 for Hamlin's pain and suffering pursuant to R.C. 2305.21.

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PATRICK M. MCGRATH  
Judge

[Cite as *Hamlin v. Dept. of Rehab. & Corr.*, 2017-Ohio-8957.]

KYLE HAMLIN, Admr., etc.

Plaintiff

v.

OHIO DEPARTMENT OF  
REHABILITATION AND CORRECTION

Defendant

Case No. 2014-00765

Judge Patrick M. McGrath

JUDGMENT ENTRY

{¶92} This case was tried to the court on the issues of liability and damages. The court has considered all of the evidence, and for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of plaintiff in the amount of \$325,000 for the loss of society and emotional distress of Brad Lee Hamlin's parents and children, and in the amount of \$25,000 for Brad Lee Hamlin's pain and suffering. Court costs are assessed against defendant. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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PATRICK M. MCGRATH  
Judge

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Filed November 3, 2017

Sent to S.C. Reporter 12/12/17