

[Cite as *Hughes v. Ohio Dept. of Rehab. & Corr.*, 2010-Ohio-4736.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Charles Hughes,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 09AP-1052
v.	:	(C.C. No. 2007-03331)
	:	
Ohio Department of Rehabilitation and	:	(REGULAR CALENDAR)
Correction,	:	
	:	
Defendant-Appellee.	:	
	:	

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D E C I S I O N

Rendered on September 30, 2010

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*Swope and Swope*, and *Richard F. Swope*, for appellant.

*Richard Cordray*, Attorney General, *Eric A. Walker* and *Daniel R. Forsythe*, for appellee.

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APPEAL from the Court of Claims of Ohio.

McGRATH, J.

{¶1} Plaintiff-appellant, Charles Hughes ("appellant"), appeals from a judgment of the Court of Claims of Ohio ("Court of Claims"), in favor of the Ohio Department of Rehabilitation and Correction ("ODRC"). For the following reasons, we affirm the judgment of the Court of Claims.

{¶2} While appellant was incarcerated at Allen Correctional Institution ("ACI"), an inmate, Shawn Banks ("Banks"), attacked him on July 24, 2006. On March 22, 2007, appellant filed a negligence action in the Court of Claims against the ODRC for the

injuries he allegedly sustained as a result of Banks' actions. On October 23, 2008, the matter was tried to a magistrate. The following facts were adduced at trial before the magistrate and are germane to this appeal.

{¶3} Appellant and Banks lived in housing Unit 3A ("Unit 3A"), where the incident took place. Banks had recently been transferred to Unit 3A from ACI's residential treatment unit ("RTU"), which is a housing unit for inmates with mental health issues. Banks and appellant lived in a four-man cell, which included inmates Jose Martinez ("Martinez") and Kenneth Wright ("Wright").

{¶4} At the time of the incident, Banks had been on a psychotropic medication regimen. Martinez and Wright, however, testified that Banks ceased taking his medication several days prior to the incident. According to Wright, after Banks stopped taking his medication, he slept very little, mumbled to himself a lot, and seemed disgruntled and angry. Banks' behavior concerned Wright, who became nervous about sleeping in the same cell as Banks because he did not "know what [Banks] would do" at night. (Tr. 111.) Martinez observed similar behavior, testifying that Banks "wasn't himself, that he needed help." (Tr. 122.) Both Wright and Martinez testified that on July 23, 2006, the day before the incident, they individually voiced their concerns to William Snider ("Snider"), an ACI correctional officer.

{¶5} Snider testified that upon hearing these concerns, he referred the matter to his supervisor, Captain Walton, who instructed him to notify the mental health department. Snider contacted the mental health department and conveyed the information to a nurse, who requested that Banks be sent for an evaluation. According to

Snider, he then instructed Banks to report to the mental health department. Banks left Unit 3A, but did not present to the mental health department for his evaluation.

{¶6} Unit 3A is connected by a hallway to Unit 3B, and together they comprise a building referred to as "3 House." In each unit, one correctional officer supervises between 140-165 inmates. ODRC's policy allows for the correctional officer posted in either unit to leave his or her post if called to assist with a disturbance in the adjacent unit.

{¶7} On the date of the incident, Snider had been posted in Unit 3A. At approximately 1:30 p.m., the correctional officer in Unit 3B requested assistance breaking up a fight; Snider left Unit 3A to assist that officer, after which he went to complete paperwork in the sergeant's office in unit 3B. It was during this time, while Snider was absent from Unit A, that Banks assaulted appellant.

{¶8} The assault occurred after Banks lost playing a game of pool. Appellant was standing near the pool table and was waiting to play. After Banks lost, appellant reached for a ball rack to arrange the balls for a new game, at which point Banks proceeded to punch appellant twice in the head. Appellant fell to the floor and lost consciousness. According to inmate James Wright, after Banks punched appellant, someone told Banks to go to his cell, which he did.

{¶9} Snider returned to Unit 3A within a minute or two after the assault. He promptly requested additional assistance from correctional officers and medical personnel. Appellant was then transported to St. Rita's Medical Center in Lima, where he underwent emergency surgery for head injuries. Appellant testified that after he was treated at St. Rita's, he was taken to the Corrections Medical Center in Columbus, where he stayed until he returned to ACI on August 9, 2006.

{¶10} Major Mark O. Bishop ("Bishop"), chief of security for ACI, testified regarding the institution's security practices and procedures. Bishop testified, over objection, that Snider's actions were appropriate and in accordance with ACI procedure. Specifically, Bishop testified that Snider did not have a duty to personally escort Banks to the mental health department for evaluation. (Tr. 187.) Bishop explained that ACI is a minimum to medium institution, and, as such, inmates are permitted to walk freely.

{¶11} On July 1, 2009, the magistrate issued a decision, finding that the ODRC did not have notice of any impending assault, and, thus, appellant failed to prove his negligence claim. The magistrate, therefore, recommended judgment in favor of the ODRC. Appellant filed objections to the magistrate's report. The trial court overruled appellant's objections and adopted the magistrate's decision and recommendation as its own, including the findings of fact and conclusions of law. Appellant appeals the judgment of the trial court, asserting the following eight assignments of error:

ASSIGNMENT OF ERROR NO. 1:

THE COURT AND MAGISTRATE ERRED WHEN THEY IGNORED THE DUTY OF DEFENDANTS-APPELLEES TO ADEQUATELY SUPERVISE AND PROTECT INMATES SAFETY AND WELL-BEING.

ASSIGNMENT OF ERROR NO. 2:

THE COURT AND MAGISTRATE ERRED WHEN THEY FAILED TO FIND THE DEFENDANTS-APPELLEES HAD ADEQUATE WARNING THE ASSAILANT WAS SUFFERING FROM HALLUCINATIONS WHICH WOULD MORE PROBABLY THAN NOT RESULT IN INJURY TO OTHER INMATES.

ASSIGNMENT OF ERROR NO. 3:

THE COURT AND MAGISTRATE ERRED WHEN THEY FAILED TO FIND THAT THE DEFENDANTS-APPELLEES

WERE NOT NEGLIGENT IN FOLLOWING UP TO MAKE SURE INMATE BANKS REPORTED TO THE MENTAL HEALTH UNIT.

ASSIGNMENT OF ERROR NO. 4:

THE COURT AND MAGISTRATE ERRED WHEN THEY FOUND NO ACTUAL WARNING OF BEHAVIOR WHICH INDICATED POTENTIAL DANGER TO INMATES OR STAFF.

ASSIGNMENT OF ERROR NO. 5:

THE COURT AND MAGISTRATE ERRED WHEN THEY FOUND NOTHING IN THE RECORD WHICH INDICATED PAST VIOLENT BEHAVIOR OF ASSAULTIVE NATURE.

ASSIGNMENT OF ERROR NO. 6:

THE COURT AND MAGISTRATE ERRED WHEN THEY FAILED TO FIND DEFENDANTS-APPELLEES VIOLATED STANDARD OF ORDINARY CARE FOR PRISON ADMINISTRATORS, THEIR EMPLOYEES AND AGENTS.

ASSIGNMENT OF ERROR NO. 7:

THE MAGISTRATE ERRED BECAUSE THE DECISION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR NO. 8:

THE COURT AND MAGISTRATE ERRED WHEN THEY ADMITTED AND CONSIDERED TESTIMONY OF MAJOR BISHOP THAT C. O. SNIDER'S ACTIONS WERE PROPER.

{¶12} For ease of discussion, we shall combine those assignments of error which are interrelated. The thrust of appellant's first six assignments of error is twofold. First, that the ODRC had notice of Banks' impending attack on Hughes. Appellant contends that the information conveyed to Snider from Wright and Martinez regarding Banks' noncompliance with his medication regimen, agitated state, insomnia, mumbling, and otherwise erratic behavior, was sufficient to put the ODRC on notice. And, second, the

ODRC's policies are demonstrative of actionable negligence. Specifically, appellant contends that the ODRC was negligent in failing to ensure that Banks presented himself to the mental health department; an argument which inherently challenges the ODRC's allocation and location of correctional officers.

{¶13} Regarding the issue of notice, in the context of prison cases, this court has held that prison officials owe a duty of reasonable care to inmates, but they are not the insurers of inmates' safety. *Mitchell v. Ohio Dept. of Rehab. & Corr.* (1995), 107 Ohio App.3d 231, 235; *Williams v. S. Ohio Correctional Facility* (1990), 67 Ohio App.3d 517, 526, citing *Clemets v. Heston* (1985), 20 Ohio App.3d 132. In order to establish breach, the plaintiff must show that the actions giving rise to the injuries were foreseeable by prison officials. *Id.* Where one inmate attacks another inmate, actionable negligence arises only when there was adequate notice of an impending attack. *Mitchell*, citing *Baker v. Ohio Dept. of Rehab. & Corr.* (1986), 28 Ohio App.3d 99. Furthermore, "the special relationship evident between jailer and inmate does not expand or heighten the duty of ordinary reasonable care." *Woods v. Ohio Dept. of Rehab. & Corr.* (1998), 130 Ohio App.3d 742, 745, cause dismissed (1999), 85 Ohio St.3d 1414, citing *Scebbi v. Ohio Dept. of Rehab. & Corr.* (Mar. 21, 1989), Ct. of Claims No. 87-09439.

{¶14} Succinctly 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. *Mitchell* at 235. The distinction between actual and constructive notice is in the manner in which notice is obtained rather than in the amount of information obtained. 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. *In re Estate of Fahle* (1950), 90 Ohio App. 195, 197.

{¶15} In this case, we cannot say that the trial court erred in finding that the ODRC did not have adequate notice of Banks' impending attack on appellant. Despite appellant's assertions to the contrary, a review of the record does not disclose that the ODRC had actual or constructive notice that Banks posed a risk of physical threat or that Banks verbalized any threats. There is no evidence in the record that Snider received a warning that Banks was threatening to hurt or kill anyone, including appellant. The fact that the ODRC was aware that Banks was not taking his medication, mumbled to himself, and was acting erratically, does not translate into actual or constructive notice that Banks posed a risk of violence or that his attack on appellant was forthcoming.

{¶16} With regard to the ODRC's policies, the ODRC is generally immune from tort liability arising from decisions regarding its policies and procedures. This immunity, commonly referred to as sovereign or discretionary immunity, provides that "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." *Reynolds v. State* (1984), 14 Ohio St.3d 68; *Wallace v. Ohio Dept. of Commerce*, 96 Ohio St.3d 266, 2002-Ohio-4210, paragraph two of the syllabus; see also *Garland v. Ohio Dept. of Transp.* (1990), 48 Ohio St.3d 10, 12 ("We hold that a governmental entity is immune from *tort liability* when it makes a decision as to what type of traffic signal to install at a intersection.") (emphasis added); *Howe v. Jackson Twp. Bd. of Trustees* (1990), 67 Ohio App.3d 159, 162

("Historically, governmental units have been protected from *tort liability* under the judicially created doctrine of sovereign immunity.") (emphasis added).

{¶17} Further, with respect to penal institutions, prison administrators must be accorded deference in adopting and executing policies and procedures to maintain order. *Bell v. Wolfish* (1979), 441 U.S. 520, 547-48, 99 S.Ct. 1861, 1878 (stressing the need for prison administrators to be accorded deference in adopting and executing policies and practices to preserve internal order and to maintain institutional security); *Deavors v. Ohio Dept. of Rehab. & Corr.* (May 20, 1999), 10th Dist. No. 98AP-1105.

{¶18} Given the facts of this case, we conclude that decisions relating to the allocation and location of correctional staff concern prison security and administration and, as such, are executive functions that involve a high degree of official discretion. Accordingly, the ODRC is entitled to discretionary immunity.

{¶19} Based on the foregoing, we overrule appellant's first, second, third, fourth, fifth, and sixth assignments of error.

{¶20} In his seventh assignment of error, appellant argues that the judgment of the Court of Claims is against the manifest weight of the evidence. Appellant contends that because Snider was made aware that Banks had ceased taking his medication and was acting in a bizarre manner, the ODRC had notice that Banks posed a violent threat. Appellant also argues that Snider, and, hence, the ODRC, was negligent in failing to ensure that Banks presented himself to the mental health department, as well as for leaving unit 3A unmanned while Snider was completing paperwork in unit 3B.

{¶21} Judgments supported by some competent, credible evidence going to all essential elements of the case will not be reversed as being against the manifest weight

of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. This court, sitting as a "thirteenth juror," must weigh the evidence and determine whether the trier of fact "clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. The credibility of witnesses is an issue primarily for the trier of fact, who stands in the best position to evaluate such matters. *Seasons Coal Co. Inc. v. Cleveland* (1984), 10 Ohio St.3d 77. Thus, if the evidence is susceptible to varied conclusions, this court must interpret it in a manner consistent with the verdict and judgment. *Briscoe v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 02AP-1109, 2003-Ohio-3533, ¶19.

{¶22} Given our disposition of appellant's first six assignments of error, we do not find that the judgment of the trial court is against the manifest weight of the evidence. Accordingly, we overrule appellant's seventh assignment of error.

{¶23} In his eighth assignment of error, appellant argues that certain portions of Bishop's testimony were inadmissible, and, as such, consideration of that testimony constitutes error. The testimony with which appellant takes issue concerns Bishop's testimony that Snider's actions, as well as the allocation and location of correctional officers at ACI, were appropriate under the circumstances of this case and in accordance with ACI's rules and procedures.

{¶24} Bishop testified that he is the chief of security at ACI and is responsible for "overseeing and supervising correction captains, lieutenants, and sergeants." (Tr. 174.) Given his experience and position, we cannot say that the trial court erred in considering Bishop's testimony regarding the appropriateness of Snider's actions, as well as ACI's

policies and procedures relating to its allocation and location of correctional officers. Even if this testimony could be deemed inadmissible, we would find its admission to be harmless error. Accordingly, we overrule appellant's eighth assignment of error.

{¶25} Having overruled appellant's eight assignments of error, we affirm the judgment of the Court of Claims of Ohio.

*Judgment affirmed.*

TYACK, P.J., and BROWN, J., concur.

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