

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Bernard Watson,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 11AP-606
v.	:	(C.C. No. 2009-08080)
	:	
Ohio Department of Rehabilitation and Correction,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	
	:	

D E C I S I O N

Rendered on March 13, 2012

Swope and Swope – Attorneys at Law, and Richard F. Swope, for appellant.

Michael DeWine, Attorney General, Eric A. Walker, and James P. Dinsmore, for appellee.

APPEAL from the Court of Claims of Ohio.

FRENCH, J.

{¶ 1} Plaintiff-appellant, Bernard Watson ("Watson"), appeals the judgment of the Court of Claims of Ohio, which overruled his objections and adopted a magistrate's decision in favor of defendant-appellee, the Ohio Department of Rehabilitation and Correction ("ODRC"), on Watson's negligence claim. For the following reasons, we affirm.

I. BACKGROUND

{¶ 2} At all relevant times, Watson has been an inmate in the custody of ODRC at the Allen Correctional Institution ("ACI"). On December 18, 2008, Watson was assaulted by a fellow inmate, Tam Ally. Watson alleges that Ally acted erratically prior to the assault and that corrections officers were aware of this behavior. Watson maintains that such knowledge constituted constructive notice of an impending assault and that ODRC was negligent in failing to act on such notice and prevent the attack.

{¶ 3} Watson filed this action on October 6, 2009. The trial court bifurcated the issues of liability and damages, and the issue of liability was tried to a magistrate, who issued a decision on November 10, 2010, in which he recommended that judgment be entered in favor of ODRC. Specifically, the magistrate found that while Ally may have acted erratically before the assault, his behavior was not violent or dangerous and he did not demonstrate a threat to other inmates. Accordingly, the magistrate found that ODRC did not have actual or constructive notice of an impending attack and that Watson failed to prove his claim of negligence.

{¶ 4} Watson filed objections to the magistrate's decision, along with an affidavit of evidence and an affidavit of indigency. Pursuant to Civ.R. 53(D)(3)(b)(iii), objections to a magistrate's factual findings "shall be supported by a transcript of all the evidence submitted to the magistrate relevant to [those] finding[s] or an affidavit of that evidence if a transcript is not available." The transcript of the hearing before the magistrate is deemed unavailable for purposes of Civ.R. 53(D) because Watson claims to be indigent and unable to procure it. *See Gill v. Grafton Correctional Inst.*, 10th Dist. No. 09AP-1019, 2010-Ohio-2977. On June 17, 2011, the trial court overruled Watson's objections, adopted the magistrate's decision, and entered judgment in favor of ODRC.

II. ASSIGNMENTS OF ERROR

{¶ 5} Watson filed a timely notice of appeal and now assigns the following as error:

[I.] THE MAGISTRATE AND TRIAL COURT ERRED IN FAILING TO FIND DEFENDANTS-APPELLEES HAD CONSTRUCTIVE NOTICE THAT INMATE TAM ALLY WAS A DANGER TO INMATES ON THE SECOND TIER OF 4-B AT THE ALLEN CORRECTIONAL INSTITUTION.

[II.] THE MAGISTRATE AND TRIAL COURT ERRED IN FAILING TO ALLOW PLAINTIFF-APPELLANT TO ESTABLISH THAT THIS WAS AN IDENTICAL CASE WHERE ALLEN CORRECTIONAL INSTITUTION FAILED TO FOLLOW UP ON A MENTALLY ILL INMATE WHO FRIGHTENED INMATES, DIRECTED THE INMATE TO REPORT TO MENTAL HEALTH, BUT DID NOTHING TO ENSURE COMPLIANCE, RESULTING IN A NEAR DEATH ATTACK ON INMATE CHARLES HUGHES ON JULY 24, 2006, IN ALLEN CORRECTIONAL INSTITUTION.

[III.] THE MAGISTRATE AND TRIAL COURT ERRED IN FAILING TO FIND DEFENDANTS-APPELLEES NEGLIGENT FOR FAILING TO ENFORCE A DIRECT ORDER TO TAM ALLY TO GO TO THE MENTAL HEALTH UNIT, RESULTING IN ALLY'S ATTACK ON INMATE WATSON.

[IV.] THE JUDGMENT OF THE TRIAL COURT AND MAGISTRATE ARE CONTRARY TO LAW AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

III. DISCUSSION

{¶ 6} In accordance with Civ.R. 53, the trial court reviews a magistrate's decision de novo. *Mayle v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 09AP-541, 2010-Ohio-2774, ¶ 15, citing *State Farm Mut. Auto. Ins. Co. v. Fox*, 182 Ohio App.3d 17, 2009-Ohio-1965, ¶ 10 (2d Dist.). In ruling on objections to a magistrate's decision, the trial court must undertake an independent review of the matters objected to in order "to ascertain [whether] the magistrate has properly determined the factual issues and appropriately applied the law." Civ.R. 53(D)(4)(d). An appellate court, by contrast, applies an abuse of discretion standard when reviewing a trial court's adoption of a magistrate's decision. *Mayle* at ¶ 15, citing *State Farm* at ¶ 11. An abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). Claims of error by the trial court must be based on the trial court's actions, rather than on the magistrate's findings. *Mayle* at ¶ 15. Thus, we may reverse the trial court's adoption of the magistrate's decision only if the trial court acted unreasonably, arbitrarily or unconscionably. *Id.*, citing *State Farm* at ¶ 11.

{¶ 7} To prevail on his negligence claim, Watson must establish that (1) ODRC owed him a duty, (2) ODRC breached that duty, and (3) ODRC's breach proximately caused his injuries. *Briscoe v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 02AP-1109, 2003-Ohio-3533, ¶ 20, citing *Macklin v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 01AP-293, 2002-Ohio-5069. "The existence of a duty depends on the foreseeability of the injury, and the test for foreseeability is whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act." *McGuire v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 96API04-444 (Sept. 30, 1996), citing *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77 (1984). As the plaintiff, Watson had the burden to prove each element of his negligence claim by a preponderance of the evidence. See *Parsons v. Washington State Community College*, 10th Dist. No. 05AP-1138, 2006-Ohio-2196, ¶ 24.

{¶ 8} "In the context of a custodial relationship between the state and its inmates, the state owes a common-law duty of reasonable care and protection from unreasonable risks of physical harm." *McElfresh v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 04AP-177, 2004-Ohio-5545, ¶ 16, citing *Woods v. Ohio Dept. of Rehab. & Corr.*, 130 Ohio App.3d 742, 744-45 (10th Dist.1998). "Reasonable care is that degree of caution and foresight an ordinarily prudent person would employ in similar circumstances." *McElfresh* at ¶ 16. The state's duty of reasonable care does not, however, render it an insurer of inmate safety. *Williams v. S. Ohio Correctional Facility*, 67 Ohio App.3d 517, 526 (10th Dist.1990), citing *Clemets v. Heston*, 20 Ohio App.3d 132 (6th Dist.1985). Moreover, the special relationship between the state and its inmates does not expand or heighten the duty of ordinary reasonable care. *Woods* at 745, citing *Scebba v. Ohio Dept. of Rehab. & Corr.*, Ct. of Cl. No. 87-09439 (Mar. 21, 1989). However, "once [the state] becomes aware of a dangerous condition[,] it must take reasonable care to prevent injury to the inmate." *Briscoe* at ¶ 20, citing *Williams v. Ohio Dept. of Rehab. & Corr.*, 61 Ohio Misc.2d 699 (Ct. of Cl., 1991).

A. First Assignment of Error

{¶ 9} In his first assignment of error, Watson contends that the magistrate and trial court erred by finding that ODRC did not breach a duty to protect him from Ally's intentional assault. 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 (10th Dist.1995), citing *Baker v. State, Dept. of Rehab. & Corr.*, 28 Ohio App.3d 99 (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 (6th Dist.1950). Watson claims that Ally's strange behavior prior to the attack provided ODRC with constructive notice that Ally was a danger to other inmates and that ODRC was negligent in failing to act on such notice and prevent the assault.

{¶ 10} Watson's affidavit of evidence and the relevant exhibits reveal the following facts. Ally and his cellmate, Eric Charles Murray, lived on the second floor of ACI in housing Unit 4(B). From approximately 9:45 p.m. to midnight on December 17, 2008, Murray observed Ally pace the floor of their cell from the door to the window and intermittently crouch down as if he were "waiting for someone to come at him." Murray's deposition, 7. Ally neither spoke to nor even acknowledged Murray during this period. Murray went to bed around midnight. He awoke approximately two hours later and discovered Ally "boxing" Murray's coat and the metal mirror. Murray's deposition, 8. Murray was surprised Ally did not injure his hand while repeatedly striking the metal mirror. Murray also observed Ally occasionally crouch down and peer out the window as if he were looking for someone or something.

{¶ 11} Ally continued this behavior throughout the night. Around 5:30 a.m. on December 18, 2008, a corrections officer opened the cell door to allow Murray to go to work. When the door opened, Ally ran out of the cell, down the stairs, and out of Unit 4(B). When Murray returned from work around 8:30 a.m., he found Ally in the cell repeating his actions from the night before. Murray reported Ally's behavior to Corrections Officer Jon Alexander. Upon observing Ally's actions, Alexander called Shift

Captain John Alberts. After speaking with Alberts, Alexander told Ally to report to Alberts' office.

{¶ 12} Ally left Unit 4(B), but did not report to Alberts' office. He returned to his cell approximately five minutes later. Upon his return, Ally stood on his footlocker in his cell for approximately two hours, staring at the wall. He then repeated his behavior from the night before, i.e., intermittently crouching in the cell and "boxing" Murray's coat and the mirror. Murray deposition, 12. He abruptly stopped these actions and then utilized his footlocker and several other items to barricade the cell door. Around 1:30 p.m., Alexander observed the barricade and noted that Ally stood in a "defensive position." Plaintiff's exhibit No. 1. Alexander ordered Ally to remove the barricade and report to Captain Alberts.

{¶ 13} Captain Alberts sent Ally to the mental health department for evaluation because he was "acting peculiar." Affidavit of Plaintiff Watson, 2. Ally left Unit 4(B), but did not report to the mental health department as directed. When he returned to Unit 4(B) at approximately 2:15 p.m., he appeared to be upset and began mumbling and making comments to other inmates, including Watson. Shortly thereafter, Ally walked past Watson's cell, grabbed the cell door, and slammed it into Watson. Watson wrestled Ally to the floor and restrained him until corrections officers responded to the scene.

{¶ 14} Watson contends that Ally's actions prior to the assault provided ODRC with constructive notice that Ally was dangerous and posed a threat to him and other inmates. While Ally's behavior prior to the assault may have been bizarre and arguably had assaultive overtones, nothing in the evidence suggests that Ally posed a risk of physical violence or verbalized any threats toward any of the inmates, including Watson. Moreover, no evidence establishes that Ally had ever threatened or assaulted another inmate or anyone else during his incarceration at ACI.

{¶ 15} Watson does not dispute the fact that Ally never threatened him or any other inmate prior to the assault. Instead, Watson argues that Ally's bizarre actions alone were sufficient to place ODRC on notice that Ally was a danger to him and other inmates. In *Hughes*, this court rejected a similar argument, holding that "[t]he fact that the ODRC was aware that [the inmate] was not taking his medication, mumbled to himself, and was acting erratically, does not translate into actual or constructive notice that [the inmate]

posed a risk of violence or that his attack on [the injured inmate] was forthcoming." *Id.* at ¶ 15. We further noted that there was no evidence that ODRC was aware of any threats of violence by the assailant against any other inmate, including the victim. *Id.*

{¶ 16} Watson urges that we adopt a different standard than we employed in *Hughes*, i.e., one that "recognizes when there is clear evidence of bizarre threatening behavior, the custodian has a duty to isolate, examine the inmate and protect innocent victims." Plaintiff's Brief, 12. We are bound by the doctrine of stare decisis, however, and we will follow this court's precedent. Consistent with the holding in *Hughes*, the trial court properly held that "notice of Ally's erratic behavior did not provide [ODRC] with reason to believe that Ally posed a threat of violence or that an assault upon [Watson] was imminent." Judgment Entry, 2.

{¶ 17} Watson advances a second, somewhat related argument pertaining to the issue of constructive notice. Watson argues that "[c]onstructive notice of danger need not be specific as to any one inmate if it [is] so apparent it generates concern in inmates and officers." Plaintiff's Brief, 7. Watson urges that we adopt the "deliberate indifference" standard outlined in *Brown v. Budz*, 398 F.3d 904 (7th Cir.2005). In that case, Brown, a Caucasian inmate, was attacked and severely beaten by G.B., an African-American inmate who had previously attacked other Caucasian inmates. Brown filed a 42 U.S.C. 1983 action alleging that the defendants (various prison employees) failed to protect him from violence at the hands of another inmate, in violation of his due process rights, by allowing G.B., whom the defendants knew to have a propensity for violence and history of attacking Caucasian inmates, to freely roam the common areas of the prison. The district court granted the defendants' motion to dismiss for failure to state a claim.

{¶ 18} On appeal, the court found that Brown had sufficiently alleged that the defendants were deliberately indifferent to a substantial risk of serious harm for purposes of his failure to protect claim. In so finding, the court rejected the defendants' contention that they could not be liable for a failure to protect Brown absent knowledge that he was specifically at risk of attack. The court stated that "'where a specific individual poses a risk to a large class of inmates, that risk can also support a finding of liability *even where the particular prisoner at risk is not known in advance.*'" (Emphasis sic.) *Id.* at 915,

quoting *Greene v. Bowles*, 361 F.3d 290, 294 (6th Cir.2004). Thus, the court concluded that:

[A] deliberate indifference claim may be predicated on custodial officers' knowledge that a specific individual poses a heightened risk of assault to even a large class of [inmates] – notwithstanding the officials' failure or inability to comprehend in advance the particular identity of this individual's ultimate victim. Accordingly, we reject defendants' suggestions that deliberate indifference requires either the threatened [inmate] to advise his custodians of a pending threat, or a custodial officer to know in advance the identity of the particular plaintiff at risk. Deliberate indifference may also be predicated on the custodians' knowledge of an assailant's predatory nature. Therefore, Brown's complaint, by asserting that the defendants "had knowledge" of G.B.'s violent propensities as evidenced by his alleged history of attacking Caucasians, sufficiently alleges that defendants were aware of an excessive risk posed to Brown.

Id. at 915-16.

{¶ 19} We decline Watson's invitation to adopt the "deliberate indifference" standard set forth in *Brown*. *Brown* concerned a 42 U.S.C. 1983 action. This court's jurisprudence with regard to the state's duty of care to prison inmates generally, and its duty of care with regard to inmate assaults on one another specifically, is well-settled. As noted above, we are bound to follow the precedent set forth by our own prior decisions, and *Brown* is insufficient to overcome that precedent. Further, *Brown* is factually distinguishable from the instant case. In *Brown*, the defendants were well aware of the offending inmate's history of violence against a particular class of inmates, and the victim fell within that class. Here, Ally never exhibited violent tendencies or assaultive behavior toward Watson or any other inmate during his incarceration at ACI. Further, while Ally's actions prior to the assault were certainly bizarre, he did not threaten or act violently toward Watson or any other inmate.

{¶ 20} For the foregoing reasons, we conclude that the trial court did not abuse its discretion in determining that the magistrate properly concluded that ODRC did not have constructive notice of Ally's impending assault on Watson. Accordingly, we overrule the first assignment of error.

B. Second Assignment of Error

{¶ 21} In his second assignment of error, Watson contends the magistrate and trial court erred in failing to allow him to establish the factual similarities between the instant case and the *Hughes* case, which also involved an intentional attack of one inmate by another at ACI.

{¶ 22} In his second objection to the magistrate's decision, Watson argued that the magistrate erred in sustaining ODRC's objections to questions posed by Watson during his cross-examination of James LaPoint, the clinical director of Mental Health Administration for ACI, regarding the factual similarities between the instant case and *Hughes*. The trial court overruled the objection, finding that the affidavit of evidence provided insufficient facts upon which to determine the basis for ODRC's objection or the magistrate's reasoning in ruling on the objection. The trial court further found that to the extent Watson intended to offer evidence of previous assaults at ACI in order to prove that ODRC had constructive notice of an impending assault upon Watson, the magistrate's decision to sustain the objection was proper.

{¶ 23} We discern no abuse of discretion in the trial court's disposition of Watson's second objection to the magistrate's decision. The affidavit of evidence does not specifically delineate the question posed by Watson during his cross-examination of LaPoint, nor does it set forth ODRC's reason for objecting to the question or the magistrate's rationale in sustaining ODRC's objection. Accordingly, the trial court properly concluded that it had no basis to determine whether the magistrate erred in sustaining ODRC's objection. Further, as noted by the trial court, while evidence of previous occurrences at ACI may demonstrate that ODRC was aware of the risk of inmate assaults at ACI, such evidence was not relevant. ODRC's knowledge of an assault by a different assailant on a different victim, even at the same prison, does not establish constructive notice of an impending attack by Ally on Watson. We overrule Watson's second assignment of error.

C. Third Assignment of Error

{¶ 24} Under his third assignment of error, Watson argues that the magistrate and the trial court erred in failing to find that ODRC was negligent in failing to ensure that Ally reported to the mental health department for evaluation. Watson maintains that had

ODRC properly assessed Ally's mental condition prior to the assault, the assault would not have occurred.

{¶ 25} In overruling Watson's identical objection to the magistrate's decision, the trial court noted the magistrate's finding that ODRC policy requires that, absent an admission by an inmate that he intends to harm himself or others, the inmate is referred to the mental health unit for assessment and then returned to his housing unit. The magistrate found that because Ally made no admission that he intended to harm himself or others, ODRC's policy permitted Ally's return to his housing unit.

{¶ 26} The evidence Watson provided to the trial court regarding Ally's mental condition and his failure to report to the mental health unit for assessment is scant and consists of one statement in the affidavit of evidence from LaPoint's cross-examination, an incident report prepared by LaPoint following the assault, the rules infraction board's disposition following Ally's disciplinary hearing, and copies of notes taken during Ally's mental health evaluation conducted after the assault, at 3:08 p.m. on December 18, 2008. Plaintiff's exhibit Nos. 4-5.

{¶ 27} According to the affidavit of evidence, LaPoint testified that he did not examine Ally and did not find Ally's conduct to constitute evidence of mental illness. LaPoint's incident report states that Ally refused to cooperate with the order to submit to a mental health evaluation, that Ally's engaging in a fight with another inmate was not consistent with any mental health condition, and that Ally was not on the mental health caseload. The rules infraction board's disposition states that Ally was sent for a mental health evaluation after being observed in a defensive stance with his cell door barricaded, but refused to cooperate with staff. The notes from the mental health evaluation following the assault indicate that Ally was evasive and uncooperative during the assessment.

{¶ 28} Watson's evidence fails to establish that ODRC was negligent in failing to enforce the order that Ally submit to a mental health evaluation. The evidence before the trial court does not include any documentation or testimony regarding ODRC's policies and procedures with regard to inmates' mental health assessments; thus, the trial court had nothing to review in this regard. Further, to the extent Watson's argument implicates ODRC policies and procedures, they are entitled to deference. As this court noted in *Kordelewski v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 00AP-1109 (June 21, 2001),

"[p]rison officials are the acknowledged experts in the placement and management of their prisoners. 'Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgement are needed to preserve internal order and discipline and to maintain institutional security.'" *Id.*, quoting *Bell v. Wolfish*, 441 U.S. 520, 547, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

{¶ 29} In *Hughes*, this court rejected an identical argument raised by an inmate who had been injured in an attack by a mentally unstable inmate. Noting that the argument inherently challenged the ODRC's allocation and location of correctional officers, we concluded that penal institutions are protected from tort liability with regard to such decisions, as they involve prison security and administration involving a high degree of official discretion. *Id.* at ¶ 18. We concluded that ODRC was not negligent in failing to ensure that the inmate assailant present himself to the mental health department for evaluation.

{¶ 30} Moreover, nothing in the evidence before the trial court indicates that ODRC's failure to compel Ally's submission to a mental health assessment constituted negligence. As noted above, the evidence provides no indication that ODRC should have suspected that Ally would assault an inmate. For all the above reasons, we overrule the third assignment of error.

D. Fourth Assignment of Error

{¶ 31} Finally, in his fourth assignment of error, Watson maintains that the magistrate's decision, and the trial court's adoption of that decision, are contrary to law and against the manifest weight of the evidence. Judgments supported by some competent, credible evidence going to all the 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.*, 54 Ohio St.2d 279 (1978), syllabus. When applying this standard of review, an appellate court must presume the findings of the trier of fact are correct because it is best able to observe the witnesses and use those observations in weighing the credibility of the testimony. *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984).

{¶ 32} Here, where the trial court concluded that Watson failed to establish that ODRC breached its duty of care, our review is limited to determining if competent,

credible evidence supports the trial court's judgment. Making all reasonable presumptions in favor of the trial court's findings of fact and judgment, and for the aforesaid reasons, we conclude that competent, credible evidence supports the trial court's determination that ODRC did not breach its duty of reasonable care toward Watson. Accordingly, we overrule Watson's fourth assignment of error.

IV. CONCLUSION

{¶ 33} Having overruled each of Watson's assignments of error, we affirm the judgment of the Court of Claims of Ohio.

Judgment affirmed.

KLATT and TYACK, JJ., concur.
