[Cite as *Brown v. Ohio Dept. of Rehab. & Corr.*, 2014-Ohio-5964.]

Court of Claims of Ohio
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STEVEN S. BROWN

Plaintiff

v.

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION

Defendant

Case No. 2013-00150

Magistrate Robert Van Schoyck

DECISION OF THE MAGISTRATE

{¶1} Plaintiff, an inmate in the custody and control of defendant, brought this action for negligence arising out of an incident in which he was allegedly attacked by other inmates at the Toledo Correctional Institution (ToCI) on September 12, 2012. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} Plaintiff testified that he entered defendant's custody in 2001 after being convicted of involuntary manslaughter, and in the ensuing years he served time at several of defendant's facilities, including multiple stints at the Southern Ohio Correctional Facility (SOCF) in Lucasville. After defendant's Classification Committee reviewed plaintiff's security level in February 2012 and determined that he should remain classified at "level 4" status, plaintiff filed a Notice of Appeal to the warden of SOCF in which he complained that he deserved a lower security level and did not want to remain at SOCF, and his notice of appeal includes references to corrections officers (COs) issuing him "bogus" tickets for rule violations, destroying his legal papers, denying him access to the courts, and carrying out a retaliatory assault upon him, and

he also stated that he was "in danger from C/O's and violent inmates." (Plaintiff's Exhibit 5.)

{¶3} Plaintiff testified that on March 27, 2012, defendant transferred him from SOCF to ToCI. The Warden of ToCI, Edward Sheldon, testified that ToCI housed about 1,600 inmates at that time who were classified at security level 3 or 4, and he explained that under defendant's classification structure, inmates such as plaintiff who are designated as level 4 are considered "maximum security."

{¶4} According to plaintiff, early on in his time at ToCI he found that gangs and drug use were rampant, he witnessed violence between other inmates, and he was "shaken down" by gang members, particularly members of the Heartless Felons, who demanded that he give them some of the items he would purchase from the commissary. Plaintiff explained that he had felt safer at SOCF, and so not long after arriving at ToCI he began to raise concerns and express his desire for a transfer with several staff members, including Warden Sheldon, Sergeant Mike Brandel, and Corrections Officer Joshua Gajewski, although he acknowledged that he never identified any specific inmates with whom he had a problem, which he said was because he feared retaliation. Plaintiff, who stated that he is now 59 years old, also acknowledged that he made numerous complaints to ToCI staff about other issues too, especially his medical care.

{¶5} On April 6, 2012, plaintiff sent a "kite" (a handwritten form of institutional correspondence) addressed to Sheldon. Although plaintiff offered the cover of that kite at trial, it appears that the body of the kite was not provided due to a photocopying error. (Plaintiff's Exhibit 1.)

{¶6} Sheldon testified that he delegates the responsibility of reading and responding to kites to the Warden's Administrative Assistant, Ms. Rinna, but that she passes along to him any kites that are important enough for him to read. Sheldon also

testified that under the chain of command at ToCI, the responsibility for addressing issues such as extortion and theft among inmates is delegated to the housing unit staff. Sheldon stated that he does not believe he saw any kites that plaintiff addressed to him, and that, whether by means of a kite or otherwise, he has no recollection of plaintiff ever telling him that he was being extorted, threatened, or assaulted by other inmates.

{¶7} On May 17, 2012, plaintiff sent another kite addressed to Sheldon in which he wrote the following: "I request to go back to Lucasville. My cell has been robbed 3 times. I cant get medical care. I cant get proper Kosher Food. I cant get access to a Law Library. I cant get along with these inmates and Do better when I'm alone. C/O's stole my brand new tennis shoes when I went to the hospital unit. I hope I don't have to refuse to Lock and go to 4b. Please transfer me back to Lucasville." (Plaintiff's Exhibit 2.) The response, signed by Rinna, states: "We do not upgrade 4a inmates for issues such as these. Work w/your unit staff regarding theft of your property." (Plaintiff's Exhibit 2.)

{¶8} Plaintiff testified that on June 15, 2012, he "refused to lock," or return to his cell, for an institutional count because he thought that doing so might result in the ToCI authorities disciplining him and transferring him back to SOCF. Sergeant Brandel testified that he was stationed in Housing Unit C when this occurred and that officers summoned him to plaintiff's cell because plaintiff was requesting protective custody. According to Brandel, when an inmate requests protective custody, the usual practice is to place the inmate in segregation while the merits of the request are investigated. Brandel testified that in this case, he does not know whether plaintiff was taken to segregation or if an investigation was conducted. Brandel also testified, though, that he does not remember plaintiff telling him about any particular threat or attack, but just a general fear, and that he also does not remember plaintiff stating that he was being

extorted. Brandel prepared a conduct report immediately afterward in which he charged plaintiff with violating administrative rule 23 ("Refusal to accept an assignment or classification action") and, in the "supporting facts" section of the form, he wrote: "On Friday, 6/15/2012, I was called down to talk to Inmate Brown 411609 who was claiming that he was in fear for his life. When I arrived at his cell, he stated that he was refusing to lock, and that he wanted to go to PC." (Plaintiff's Exhibit 6.)

{¶9} Plaintiff testified that he was placed in a segregation unit afterward, but was eventually placed back in the general inmate population in Housing Unit 3-C-2. According to plaintiff, there were approximately 30 cells in his particular "pod," and about 10 to 15 of the inmates there were affiliated with the Heartless Felons. Plaintiff stated that three or four of those individuals routinely extorted him.

{¶10} Lieutenant Robert Copley testified that he served at that time as the Unit Manager for the housing unit, and he related that plaintiff's pod contained 48 single-occupancy cells exclusively for level 4 inmates such as plaintiff. According to Copley, plaintiff never told him at any point that he had been threatened or assaulted by another inmate, nor did he otherwise know of any such information pertaining to plaintiff.

{¶11} On June 18, 2012, plaintiff sent another kite addressed to Sheldon in which he wrote the following: "Sir, I was Forced to refuse to Lock due to the conditions here. These conditions include, 1) Denial of medical care/medication 2) No Law Library Access 3) unsafe/cell was robbed 4 times 4) Extorted by gang members 5) Violations of A.D.A. 6) Theft of person[a]l property by staff 7) Refusal to allow rabbi to visit and conduct services 8) Denial of proper Kosher Food. I've tried to resolve these issues to no avail and wish to leave this institution as soon as possible to a place that is safe for me and I can get medical care." (Plaintiff's Exhibit 3.) In a postscript, plaintiff added: "It is too bad that I've been forced to seek Administrative Segregation +

refuse to lock so I can be put in higher security so I can get medical care, see my Rabbi and get access to the courts by being able to access a law library." Rinna responded to this kite as follows: "We do not transfer for RFL – we can switch your unit if need be. Please work w/your unit staff to resolve your issues." (Plaintiff's Exhibit 3.)

{¶12} Plaintiff testified that after the ToCI Rules Infraction Board (RIB) found him guilty of the rule violation that Brandel had charged him with, he filed a "Notice of Disciplinary Appeal" on June 25, 2012, requesting that Warden Sheldon overturn the RIB decision. In this document, plaintiff complained in part that "this institution is not safe for me or any inmate wanting to do their time in peace," that "transferring max inmates to this institution, along with the denial of services, makes for a volatile situation that puts both inmates and staff in danger," and that he wanted to be protected from "gangs, mentally ill inmates, and abusive staff," but he also complained about various issues with his medical care, as well as staff "stealing" his property, making anti-Semitic remarks, issuing him a "bogus" conduct report, denying him access to a rabbi, denying him access to a law library, and committing "other civil + criminal violations." (Plaintiff's Exhibit 4.)

{¶13} On July 13, 2012, Sheldon issued a decision affirming the RIB decision. The decision states, in part, that the RIB appeal process was not the appropriate forum to address the medical issues that plaintiff raised, and it was "recommended that the inmate communicate with his unit staff regarding his issues with other inmates on the unit." (Plaintiff's Exhibit 7.)

{¶14} On August 18, 2012, plaintiff sent a letter to the legislative Correctional Institution Inspection Committee (CIIC) in which he complained, in part, as follows: "The Lack of C/O's here makes this a dangerous place. I'm almost 60 yrs old and prayed on constantly by young black gang bangers. My cell was robbed 4 times. I've been extorted out of hundreds of dollars. Others are stabbed and assault staff

regularly to get out of this institution. Some go on hunger strikes until they are moved back to Lucasville." (Joint Exhibit 2.) Most of the three-page letter, however, concerned plaintiff's medical care, and he also raised such other issues as the process of electing judges in Ohio, his feeling that defendant does not provide sufficient rehabilitative programs, and prison overcrowding; additionally, plaintiff requested a copy of the CIIC inspection report for ToCI in this letter.

{¶15} CIIC stamped plaintiff's letter as received on August 22, 2012. On August 23, 2012, Joanna Saul, the Director of CIIC, sent plaintiff a letter in response, and also forwarded a copy of his letter to Sheldon. (Joint Exhibit 1.) Additionally, Saul sent an e-mail on August 23, 2012, to an employee at ToCI to follow up on some of plaintiff's medical concerns. (Joint Exhibit 3.)

{¶16} On August 31, 2012, Sheldon sent a memo to defendant's Bureau of Classification requesting an "administrative" transfer of plaintiff to SOCF. Sheldon identified the reason for the request as follows: "Inmate Brown A-411609 has been recommended for transfer to Southern Ohio Correctional Facility. Inmate is not amendable at this institution and placement at another L4 facility is requested in order to assist in the inmate's rehabilitative efforts." (Plaintiff's Exhibit 9.)

{¶17} Plaintiff testified that before he knew about the transfer request, and about one week before the incident at issue in this case, three inmates followed him into his cell and attempted to steal items he had just purchased from the commissary. Plaintiff stated that these inmates did not attack him, and, in fact, that he was never physically attacked by any inmate prior to the date of the incident with which this case is concerned. Plaintiff testified that by screaming he was able to scare these inmates out of his cell, but he received a conduct report accusing him of fighting and was sent to segregation. But, plaintiff stated that once he discussed the matter with Sergeant

Brandel and explained what happened, the conduct report was dismissed and he returned to his cell.

{¶18} Plaintiff testified that on the day of the incident, September 12, 2012, there was an announcement made to the whole housing block that a large group of inmates, himself included, would be transferred to SOCF the following day. Copley, who at that time served as the Unit Manager, testified that plaintiff came to his office after the announcement was made and said that he did not want to go back to SOCF. According to Copley, they had a short discussion and he tried to allay whatever concerns plaintiff had about returning to SOCF. Plaintiff admitted that despite his earlier requests to return to SOCF, he did change his mind at some point and decided that he would rather stay at ToCI.

{¶19} Plaintiff testified that he returned to his cell and, although he had the ability to close and lock the door, he left the door open so that he could more easily see when the telephone became available because he wanted to call his sister and let her know he was being transferred to SOCF. According to plaintiff, three inmates entered the cell and demanded that he give them all of his personal property. Plaintiff testified that he never learned the names of these inmates, but he recognized them as being members of the Heartless Felons who lived in his pod. Plaintiff stated that when he refused to give the inmates his property, they punched and kicked him, but that after he screamed they ran out of the cell. Plaintiff stated that he lost consciousness and woke up in the infirmary.

{¶20} Angela Hambrick testified that at all times relevant she was employed as a corrections officer at ToCI, serving as a "relief" officer at different posts throughout the facility as needed. Hambrick testified that on the day of the incident, she was stationed in plaintiff's housing unit during the second shift. Hambrick recalled that she was stationed in that housing unit often around that time and was acquainted with plaintiff

before the incident, and that plaintiff had never told her he was fearful of any other inmates. Joshua Gajewski testified that he too was a corrections officer stationed in plaintiff's housing unit in September 2012, although unlike Hambrick he worked the first shift and was not on duty when the incident occurred. In any event, Gajewski stated that he had not been aware of any issues about extortion or threats involving plaintiff.

{¶21} Hambrick testified that when the incident occurred at approximately 9:05 p.m. on September 12, 2012, she was making rounds on the upper range and heard a noise on the lower range, whereupon she pressed her man-down alarm and came downstairs. According to Hambrick, she saw plaintiff lying on the ground in his cell and he was completely conscious, and he told her that he needed medical attention. Hambrick testified that she immediately ordered all inmates in the unit to "lock" in their cells and that, soon afterward, other officers and medical personnel responded to the scene. Hambrick then prepared an incident report. (Defendant's Exhibit I.)

{¶22} Copley testified that he was one of the employees who came to the scene in response to the alarm signal, and that when he got to the cell, he saw plaintiff on the ground with a bloodied face. According to Copley, plaintiff told those at the scene that he had been attacked by three black inmates. Copley stated that, after reporting the matter to the shift captain, he and corrections officers went door to door in the pod looking for bloodstains and checking inmates' knuckles, but no evidence was found.

{¶23} Plaintiff testified that once he was in the infirmary, photographs were taken to document his injuries (Plaintiff's Exhibits 10-12) and a nurse briefly examined him, but he did not feel that he received sufficient treatment for his injuries that night. Plaintiff stated that he remained in the infirmary until the following morning, when he joined the group of inmates being transferred to SOCF.

{¶24} Hannah Godsey, R.N., testified that at the time of the incident, she was employed as a "Nurse 1" at ToCI, and that she is now the Healthcare Administrator for

the institution. Godsey testified that she examined plaintiff in the infirmary after the incident and prepared a corresponding assessment form. (Defendant's Exhibit B.) Godsey stated that, as recorded in the form, she documented plaintiff's vital signs and other objective data, she recorded injuries to the area around plaintiff's left eye, she offered plaintiff ice and ibuprofen which he refused, and she telephoned the ToCI physician, Dr. Richard Pine, who typically works during the daytime and thus was not present that night. Godsey stated that plaintiff was in stable condition and was kept in the infirmary overnight for observation, and that when her shift ended, she briefed the third-shift nurse on plaintiff's status. Godsey recorded in the form that plaintiff asked to be sent to an outside hospital, and that upon being told he would remain in the infirmary, he became "very upset and started yelling at medical and security staff." Godsey testified that plaintiff's medical records include a progress note showing that Dr. Pine examined plaintiff the next morning, on September 13, 2012, before plaintiff left for SOCF. (Plaintiff's Exhibit 15.)

{¶25} Plaintiff testified that after arriving at SOCF later that day, a nurse conducted a routine examination of him in conjunction with his being processed into the new institution. Plaintiff stated that the nurse then set up a videoconference appointment with an emergency room physician at The Ohio State University Medical Center (OSUMC) who advised that he should be transported to an outside hospital. Lisa Bethel, R.N., the Healthcare Administrator for Ross Correctional Institution, where plaintiff is presently incarcerated, authenticated documents from plaintiff's medical file pertaining to the care that he received for his injuries the day after the accident, including one that shows he was sent to the Pike County Hospital that evening. (Plaintiff's Exhibit 13.) Indeed, plaintiff testified that he was diagnosed at the Pike County Hospital with a broken left orbital bone. Plaintiff further testified that he was later sent to OSUMC for treatment.

{¶26} "[I]n order to establish actionable negligence, one seeking recovery must show the existence of a duty, the breach of the duty, and injury resulting proximately therefrom." *Strother v. Hutchinson*, 67 Ohio St.2d 282, 285 (1981). Ohio law imposes upon the state a duty of reasonable care and protection of its prisoners. *Williams v. S. Ohio Corr. Facility*, 67 Ohio App.3d 517, 526 (10th Dist.1990). "This duty does not, however, make ODRC the insurer of inmate safety." *Kordelewski v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 00AP-1109 (June 21, 2001).

{¶27} "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 v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 11AP-606, 2012-Ohio-1017, ¶ 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 v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 09AP-1052, 2010-Ohio-4736, ¶ 14.

{¶28} Upon review of the evidence adduced at trial, the magistrate finds that defendant did not have adequate notice such that it knew or should have known of an impending attack. The magistrate finds that plaintiff, who was himself a maximum security inmate, notified ToCI staff of general fears he had about the inmate population, but he never relayed any particular threat of physical harm against him or identified an inmate with whom he had a problem. Liability cannot be imposed solely on the basis that that the prison population at ToCI is dangerous, because defendant is not an insurer of inmate safety. *Elam v. Dept. of Rehab. & Corr.,* 10th Dist. Franklin No.

09AP-714, 2010-Ohio-1225, ¶ 16. As the Tenth District Court of Appeals has noted, "it is the inevitable nature of penal institutions that they will contain a fair proportion, perhaps a preponderance, of violent and dangerous individuals." *Kordelewski v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 00AP-1109 (June 21, 2001). Although plaintiff's letter to CIIC expressed, in part, concern about gangs in general and "black gang bangers," again he did not identify any particular inmate or even a particular gang, and the mere fact that gangs or racial tension existed at ToCI cannot render defendant liable. *See Millette v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 07API03-302 (Sept. 30, 1997). Even if plaintiff's arguments that his age and health made him more vulnerable to being extorted or taken advantage of by younger inmates were accepted, the magistrate finds that these factors alone do not render defendant liable for the attack alleged in this case, nor did defendant have adequate notice of additional circumstances which, if taken together, would require it to have acted further.

{¶29} Moreover, the magistrate finds that in the instances when plaintiff did express some general fear for his safety, these statements were not entirely genuine and were made at least in part in an attempt to manipulate staff into transferring him first from SOCF and later from ToCI (indeed, plaintiff raised general concerns about his safety while at both institutions), raising or lowering his security level, or placing him in protective custody. To that end, plaintiff cited numerous problems with his treatment in defendant's facilities, not just safety concerns, and even when he did express concern for his safety, it was attributed at times to fears of not only other inmates, but also prison staff. The magistrate finds that plaintiff's credibility is also diminished by the fact that despite being told on multiple occasions to work with unit staff to resolve any issues he had with other inmates, he did not do so and instead continued to raise various issues to ToCI or CIIC officials, which indicates that his actions were intended to get their attention and prompt a transfer or move rather than to resolve any genuine

problems he was having with other inmates. The magistrate further finds that the fact plaintiff left his door open before the alleged attack shows that he was not as fearful for his safety as he claims.

{¶30} To the extent plaintiff argues that an investigation should have been opened on the day when he refused to return to his cell and requested protective custody, again, the magistrate reiterates that plaintiff's statements in connection with requesting protective custody lacked credibility, as plaintiff had threatened weeks earlier to do something along those lines in order to force the hand of prison officials into transferring him elsewhere or moving him somewhere where he could be "alone," as set forth in his May 17, 2012 kite to Sheldon; and, afterward, in a June 18, 2012 kite to Sheldon, plaintiff plainly stated that his actions were motivated by a desire to have his security level raised and to transfer out of ToCI for myriad reasons, none of which involved a specific threat to his safety. Moreover, plaintiff was placed in segregation after making the protective custody request, and the evidence does not conclusively show the absence of an investigation; regardless, whether or not a formal investigation occurred makes no difference because there was no credible threat to plaintiff's safety at that time which would have required defendant to keep him in protective custody or otherwise take further action.

{¶31} Finally, to the extent that the complaint includes an allegation of "delayed and denied medical treatment" (Complaint, ¶ 3), Hambrick recorded in her incident report that the incident occurred at approximately 9:05 p.m., and Godsey recorded in her nursing assessment that she examined plaintiff at 9:26 p.m. Plaintiff was observed overnight in the infirmary, he was seen by a physician at ToCI the next morning, and later that same day he was seen by a nurse at SOCF, a physician at OSUMC saw him via videoconference, and he was sent to an outside hospital. The magistrate finds that plaintiff has failed to demonstrate by a preponderance of the evidence that defendant

breached a duty of care owed to him with regard to his medical treatment at any time after the incident, much less that he suffered harm proximately caused by any such delay.

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

{¶33} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).*

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ROBERT VAN SCHOYCK
Magistrate

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