[Cite as *Gioiella v. Ohio Dept. of Rehab. & Corr.*, 2017-Ohio-4460.]

SARAH GIOIELLA, et al. Plaintiffs v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION Defendant	Case No. 2015-00611 Magistrate Robert Van Schoyck DECISION OF THE MAGISTRATE

{¶1} Plaintiff, Sarah Gioiella[1] (hereinafter "plaintiff"), brings this action asserting a claim for employer intentional tort under R.C. 2745.01. Plaintiff was injured in the course of her employment with defendant as a corrections officer at the Toledo Correctional Institution (ToCI) on November 22, 2013, when she was attacked by inmate Marquise Perry. Plaintiff claims that Perry threatened her previously and that prison authorities were aware of this but failed to take appropriate action to prevent the attack. Plaintiff's husband, Stephen Gioiella, also a party-plaintiff in this action, asserts a claim for loss of consortium. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} At trial, plaintiff testified that she began working for defendant on December 2, 2012. Plaintiff, who was 31 years old at the time of trial, stated that she had previously worked as a juvenile corrections officer and had a bachelor's degree in corrections. When she was hired by defendant, plaintiff stated, she attended defendant's Corrections Training Academy near Columbus for six weeks, followed by on-the-job training with several staff members at ToCI, and she also continued to receive periodic training thereafter. From her training, plaintiff stated, she knew that

[1]At all times relevant to this action, plaintiff was known as Sarah Roggelin.

working in a prison could be dangerous, and defendant trained her to be cognizant of inmate threats.

{¶3} Plaintiff recalled that beginning in March or April 2013, she was stationed in Housing Unit C West, working the first shift there, from 6:00 a.m. to 2:00 p.m. Plaintiff explained that the unit contained 24 cells on the first-floor range, known as C-1, and another 24 cells on the second-floor range, known as C-2. As plaintiff explained, the inmates in the unit were classified by defendant at security level 4A, meaning they were at security level 4 on a scale of 1 to 5 (lowest to highest), and the "A" designation pertained to their privilege level, such that 4A status afforded more privileges than 4B. By plaintiff's description, the inmates were typically allowed to be in the dayroom or common area of the unit for three hours a day, during which time they could shower, watch television and socialize, and they were also allowed out of their cells for one hour of recreation time a day, but they took their meals in their cells rather than the chow hall. Plaintiff also explained that the inmates from the first-floor and second-floor ranges had separate times to use the dayroom because they were not allowed to intermingle there.

{¶4} From plaintiff's recollection, inmate Perry moved into the unit about two or three months after she began working there, occupying a cell on the second-floor range. It was plaintiff's testimony that she looked up information about every inmate in the unit to know more about their backgrounds, and from this it was her understanding that Perry was in prison for murder, involuntary manslaughter, felonious assault, and other offenses. Plaintiff also recalled that Perry was a gang member. According to plaintiff, she did not get along well with Perry, as Perry was arrogant and verbally abusive toward her on several occasions, and in the weeks leading up to the attack this behavior escalated. Plaintiff stated, though, that as far as she can remember she never filled out a Conduct Report against Perry to ticket him for violating any prison rules, nor reported any threat by Perry until November 21, 2013, the day before the attack.

{¶5} Plaintiff testified that on that date Perry removed three packaged soups from another inmate's cell, and upon observing this she ordered Perry to return the soups. Plaintiff related that Perry argued with her but ultimately complied once she told him that she would issue him a Conduct Report for violating prison rules. As plaintiff explained, the rules prohibited Perry from taking items from another inmate and from entering another inmate's cell. According to plaintiff, there were 65 rules for inmates to abide by, and she had been trained to enforce them in a firm, fair, and consistent manner. Plaintiff stated that she had a reputation with the inmates in the unit such that they knew they could not get away with anything on her watch.

{¶6} Plaintiff testified that after telling Perry that she would issue him a Conduct Report, he came down the stairs to the first-floor range, puffed his chest out in an aggressive fashion, gestured toward her and said "You know what time it's about to be?" Plaintiff testified that she was at her desk at the front of the unit, perhaps no more than 10 feet from Perry, and that she felt threatened and thought he might attack her at that moment. Plaintiff stated that another inmate pulled Perry away and told him something to the effect of "you don't want to do that." Plaintiff acknowledged that it is not uncommon for inmates to talk about or threaten officers, and that in this instance Perry did not specifically say he would harm her, but she stated that based upon his words and body language, she took it as a serious threat.

{¶7} Plaintiff related that she proceeded to write both an Incident Report and a Conduct Report, the latter of which charged Perry with violating institutional rules 8 ("Threatening bodily harm to another (with or without a weapon)"), 21 ("Disobedience of a direct order"), 26 ("Disrespect to an officer, staff member, visitor or other inmate"), and 48 ("Stealing or embezzlement of property, obtaining property by fraud or receiving stolen, embezzled, or fraudulently obtained property"). (Plaintiffs' Exhibits 2, 9.)

{¶8} In both reports, plaintiff gave essentially the same description of the incident, writing in the Conduct Report the following:

{¶9} "ON 11/21/13 at approximately 1203 hours I, Officer Roggelin, did observe Inmate Perry #488417 enter cell C2W2 in which Inmate Rembert #181425 resides, Inmate Rembert at this time was at a Unity program,and exits the cell with 3 soups in his hand. I issued several direct orders that he return them to the cell and Inmate Perry refused. I informed Inmate Perry that he would be receiving a ticket to which he replied 'So do it.'. Inmate Perry did eventually return the contents to the cell. Inmate Perry did inform this officer that 'I know what time it's about to be…' or something to that effect. I, Officer Roggelin, took this to be a threatening statement. Inmate Rembert returned to the pod and informed this officer that Inmate Perry has a 'green light to go into my cell for anything at any time.' This does not negate the fact that Inmate Perry disobeyed a direct order and disrespected this officer. EOR."

{¶10} Plaintiff stated that she checked a box on the Conduct Report indicating that she wished to have input into the disciplinary proceedings because she was concerned that what she had written might not adequately convey the seriousness of the situation. According to plaintiff, she felt that Perry needed to be moved out of the unit immediately, and it was her expectation that the reports she submitted would result in his removal. Plaintiff testified that a physical threat to an officer constituted grounds for removing an inmate from a housing unit, and that she felt Perry had made such a threat against her.

{¶11} Plaintiff admitted that she had been trained to include all key details in Incident Reports and Conduct Reports, but that she omitted some details, including that Perry had to be turned away by another inmate. Plaintiff testified that Incident Reports were submitted to the ToCI shift office, and could be copied to others, and Conduct Reports were submitted to a sergeant who would serve as a hearing officer, Sergeant Marshal Klavinger in this case. Plaintiff explained that as the hearing officer, Klavinger had authority to impose punishment for rules infractions, including putting an inmate under cell isolation, but only after the hearing process played out and he issued his

decision. Plaintiff stated that she understood Klavinger could recommend that an inmate be moved out of a housing unit, but she did not know whether he had authority to actually order such a move himself, whereas she knew that lieutenants and other supervisory staff did have such authority. Plaintiff also stated that she did not know how much time Klavinger had to make a decision on a Conduct Report.

{¶12} According to plaintiff, in evaluating the Conduct Report Klavinger would have to use his discretion to decide whether the threat was credible, as opposed to the more common idle threats that she said inmates would commonly make against officers. Plaintiff testified that, in addition to submitting the Conduct Report to Klavinger, she also spoke with him that day, telling him about the incident and Perry's increasingly volatile behavior recently, and that she wanted him to be moved out of the unit, but she could not remember what Klavinger told her.

{¶13} Plaintiff acknowledged that she had the ability to select another post at ToCI, enabling her to work somewhere other than this particular unit. In explaining why she sought for Perry to be moved rather than seeking another work station for herself, plaintiff testified that when a corrections officer would have a dispute with an inmate, if the officer, rather than the inmate, moved out of the unit afterward, the officer would be perceived by inmates as cowardly and lose respect with the inmates, and it is important for officers to maintain respect and credibility with the inmates.

{¶14} Plaintiff testified that the next day, August 22, 2013, at 5:30 a.m. she reported for roll call, a time when all the officers getting ready to come on duty gather together and are briefed on recent events. According to plaintiff, roll call lasts about 30 minutes and is conducted by correctional lieutenants and captains, but she stated that they did not mention inmate Perry or the incident the day before, nor did she have any recollection of bringing that issue up herself.

{¶15} At 6:00 a.m., plaintiff testified, she started her shift in the unit, and she was confused to find that Perry was still there. Plaintiff stated that she had a conversation

with Corrections Officer Robert Wurzelbacher, who served that day as a support officer for the housing units in C block. Plaintiff related that the conversation concerned what they should do with respect to Perry, and that Wurzelbacher informed her that Klavinger had told him to keep an eye on her that morning. According to plaintiff, she and Wurzelbacher speculated that if Perry were to do something, the most likely time for it to occur would be the recreation movement, when all 48 inmates would be out of their cells and the environment was less controlled than the dayroom time when only 24 inmates were out of their cells at once. Plaintiff related that she and Wurzelbacher therefore devised a plan whereby she would temporarily go to the control room just before the recreation movement and Wurzelbacher would relieve her, taking her place in the unit until the inmates had been moved out. Plaintiff stated that they did not make any plan, however, for Wurzelbacher to accompany or relieve her while she made her normal rounds through the unit every 20 to 25 minutes.

{¶16} Plaintiff testified that the dayroom time for inmates on the second-floor range began at 7:30 a.m., so at that time she went upstairs and unlocked the doors to those inmates' cells, including Perry's. According to plaintiff, she did not have the authority to leave Perry locked in his cell and deny him access to dayroom time. Plaintiff acknowledged, though, that she could have contacted a lieutenant that morning to follow up and ask about having Perry removed from the unit, as lieutenants had authority to move inmates immediately. Plaintiff testified that she was under the supervision of and had a good working relationship with the lieutenant who was on duty then, Lieutenant William Lay, but that she has no recollection of speaking with him that morning.

{¶17} Plaintiff recounted that after Perry came out of his cell, she observed that the words "Phat Head," a nickname of his, were shaved out of the hair on the back of his head. Plaintiff testified that this violated inmate grooming standards, so she wrote a Conduct Report citing him for a rules infraction and she wrote an Incident Report as

well, which would have been submitted to a sergeant and to the shift office where Lay worked. Plaintiff stated that sometimes lieutenants would come out to a housing unit to make rounds or address a situation with an inmate, but that she does not remember Lay coming out to the unit that morning. Plaintiff also admitted that she has no personal knowledge to say whether Lay knew anything about her encounter with Perry the day before.

{¶18} As plaintiff related, Perry's attack occurred near the end of the dayroom time for the inmates who lived on the second-floor range, around 10:30 a.m., while she was making rounds through the unit. Plaintiff stated that when she began making rounds along the first-floor range, she was talking on a handheld portable phone, but she cannot remember to whom she was speaking. Plaintiff stated that she then went upstairs and made rounds along the second-floor range. According to plaintiff, she then started to descend the stairs back to the first-floor range, at which time Perry started to ascend the stairs. As plaintiff described, this was something that Perry would deliberately do to her on a regular basis as an intimidation tactic. Plaintiff, who stated that she was still on the phone, testified that she cannot remember if she was in imminent fear when she saw Perry coming up the steps. Plaintiff stated that if she backed up and tried to avoid Perry, it would have looked cowardly and cost her respect within the institution. Plaintiff acknowledged that she had the authority to order Perry not to walk up the steps at that time or to order him to use the other set of stairs. Plaintiff also acknowledged that she had on her utility belt a canister of pepper spray as well as a "man down" alarm that she could activate with the push of a button to summon other officers to the scene if she felt threatened, but she explained that she did not feel activating the alarm was warranted simply by Perry walking up the stairs, and once the attack suddenly commenced she was immediately incapacitated and could not activate the alarm. Plaintiff testified that the next thing she can remember is waking up severely injured in an intensive care unit at a local hospital. Plaintiff authenticated a video

recording of the housing unit, which ends immediately before the attack. (Defendant's Exhibit D.)

{¶19} Corrections Officer Robert Wurzelbacher testified that he has been employed with defendant at ToCI since 2000. Wurzelbacher related that at the time of the incident, he was a relief officer who worked at various posts around ToCI, and that his assignment that day was to serve in a support role in housing block C, assisting the officers posted in the housing units within the block, such as helping to facilitate the movement of inmates in and out of the units.

{¶20} Wurzelbacher testified that on the morning of the attack, plaintiff told him that Perry had said something to her the day before along the lines of "you know what time it is," and that she perceived it as a threat. Wurzelbacher also testified that Sergeant Klavinger told him that morning to keep an eye on plaintiff, and from what plaintiff told him it was apparent that Perry's conduct was the reason for this. Following the institutional count, Wurzelbacher stated, it came to his attention that Perry had the words Phat Head shaved into the hair on the back of his head, which was a violation of prison rules. Although Wurzelbacher testified that he did not have a lot of experience working in this unit and thus was not very familiar with Perry, to him this flagrant rules infraction was an indication of Perry's state of mind that gave credibility to the threat he reportedly made. In addition, Wurzelbacher stated that he sensed tension among the inmates in the unit.

{¶21} Wurzelbacher stated that he had a good working relationship with plaintiff and that when they talked about the situation they concluded the most likely time for something to happen would be during the recreation movement, so they came up with a plan for plaintiff to temporarily go to the control room at that time while he would remain in the unit. Wurzelbacher also stated that he kept an eye on plaintiff all morning.

{¶22} According to Wurzelbacher, Lieutenant Lay made rounds through housing block C sometime that morning and he had a conversation with Lay. Wurzelbacher

stated that he cannot remember exactly what he told Lay, but that he basically recalled telling Lay about the exchange between Perry and plaintiff the day before, about the words shaved on Perry's head, about the tension that he felt in the unit, and that he felt something was going to happen. Wurzelbacher stated that he also believes he told Lay that, in his opinion, Perry should be removed from the unit. Wurzelbacher testified that he could not have been certain that something would happen, but had a hunch or feeling that there would be an attack that day and he was concerned for plaintiff's safety. According to Wurzelbacher, Lay's response was that if there was a problem, Wurzelbacher should activate his man down alarm and summon assistance. As Wurzelbacher explained, Lay was the immediate supervisor during that shift of all the corrections officers. As a corrections officer, Wurzelbacher stated, he lacked authority himself to move Perry.

{¶23} Wurzelbacher testified that he temporarily had to leave the unit at one point to escort some inmates to the library, and while he was out of sight of plaintiff, he heard a scream. Wurzelbacher stated that he activated his alarm and ran into the unit, where he observed plaintiff in the fetal position on the stairs being battered by Perry. Wurzelbacher recounted that when he got to the stairs, Perry retreated to the second-floor range. Wurzelbacher stated that he held onto plaintiff until other staff arrived at the scene.

{¶24} Sergeant Marshal Klavinger testified that he has been employed with defendant at ToCI since 2000. Klavinger described his duties as a sergeant, which generally pertain toward oversight of inmates, and he explained that he has no supervisory control over corrections officers, who are instead supervised by lieutenants. Klavinger stated that he was assigned to the same housing unit as plaintiff, with whom he had a good working relationship.

{¶25} Klavinger testified that he was familiar with Perry, whom he described as a nuisance inmate and a "problem child," and that Perry's misbehavior had been

escalating in the time leading up to the attack and resulting in more Conduct Reports. Klavinger stated, though, that as far as he knew, Perry's behavior was not necessarily aggressive, rather, it was more in the category of nuisance behavior, such as accumulating prohibited red items in connection with his membership in the Bloods gang. Klavinger testified that in light of Perry's misbehavior, which he admitted to characterizing as getting out of control in his deposition, he had conversations with both Unit Management Chief Meredith Rinna and Warden Edward Sheldon requesting that Perry be permanently moved out of the unit, prior to the incident that occurred between plaintiff and Perry the day before the attack, but nothing had come of those discussions yet. Klavinger also testified that he did not have authority himself to place an inmate under temporary cell isolation, either in the inmate's own cell or in a disciplinary housing unit. Klavinger stated that he needed permission from a shift supervisor, either a captain or lieutenant, to do so, and he cannot recall if he made any such request or recommendation for Perry before the attack.

{¶26} Klavinger testified about the role sergeants play in the disciplinary process and how Conduct Reports are submitted to them. Regarding the Conduct Report that he received from plaintiff on the day before the attack, Klavinger stated that he discussed it with her near the end of her shift that day. Klavinger testified that it is standard for corrections officers to document threats against them by issuing Conduct Reports. Klavinger also testified, though, that if an inmate puffed himself up in an aggressive manner and had to be restrained by another inmate, it should be included in the Conduct Report because it demonstrates some action rather than mere words. Nevertheless, Klavinger acknowledged that plaintiff did charge Perry in the Conduct Report with threatening bodily harm to her.

{¶27} By his way of thinking, Klavinger stated, when he spoke with plaintiff he did not feel that Perry needed to be removed from the unit at that moment because plaintiff was getting ready to leave for the day. Looking ahead beyond that day, Klavinger

stated, he advised plaintiff that she should remove herself from the unit so long as Perry remained there. Klavinger could not recall whether he talked with plaintiff about actually trying to get Perry moved out of the unit, but he also explained that he had at least three business days to consider the Conduct Report and issue his decision and any recommendation on discipline. Klavinger recalled that when he advised plaintiff to secure a work assignment elsewhere in the institution for the time being, plaintiff said she thought it would harm her credibility if she avoided Perry that way, and he testified that he understood where she was coming from and agreed that it might have that effect.

{¶28} Klavinger testified that the following morning he was primarily occupied with a charity 5K fundraiser being held in the ToCI gymnasium, so he was not in his office or otherwise in the unit other than to drop off his coat and lunch. Klavinger stated that he does not remember having a conversation with Corrections Officer Wurzelbacher that morning and telling him to keep an eye on plaintiff, but he allowed that it may have happened. When the attack occurred, Klavinger stated, he heard the "signal three" alarm called out and he ran to the housing unit, where he saw plaintiff in an injured state.

{¶29} Lieutenant William Lay testified that he is employed with defendant at ToCI and was working first shift on the day of the attack. Lay stated that he was in the shift office that morning when he received a call from plaintiff, whom he described as a by-the-book type of officer when it came to enforcing rules, notifying him that the words Phat Head were shaved into Perry's hair, so he told her he would come out to the unit and address the situation. According to Lay, when he arrived there he saw plaintiff sitting at the desk, he asked her where Perry was, and she pointed him out. Lay stated that after plaintiff showed him where Perry was standing on the second-floor range, he went upstairs and looked at Perry's hair, saw the engraving, and ordered Perry to get it removed by the end of the day. By Lay's account, plaintiff did not mention anything

about feeling threatened that Perry might attack her. Lay also had no recollection of Corrections Officer Wurzelbacher telling him anything to that effect. Indeed, Lay testified that it was long after the attack, during the ensuing criminal prosecution of Perry, when he learned about what Perry had said to plaintiff the day before, and about the corresponding Incident Report.

{¶30} Lay testified that if a corrections officer feels threatened, his expectation is that the officer will not only write a report, but also call the shift office, where he works. Lay testified that he was a direct supervisor of plaintiff, whereas a sergeant was not. Lay also testified that an officer could raise the issue during roll call before beginning her shift. Lay stated that if a credible physical threat against an officer is reported to him, that would be grounds to move the inmate or put the inmate in segregation, both of which he has the authority to do; but, he stated that he expects an officer to determine when a threat is credible and in that event it is incumbent on the officer to report it and suggest that the inmate be moved or put in segregation. As an example of what he would consider to be a credible physical threat, Lay described an inmate coming up to an officer, clenching his fists or flexing, and saying he would kick the officer's ass. Regarding the statement that plaintiff attributed to Perry in her Conduct Report, Lay testified that he does not know what to make of that statement and could not place much significance on it without more information.

{¶31} Lay testified that corrections officers at ToCI are also equipped with pepper spray that they can use to defend themselves, and they can also summon assistance from other staff when in danger by making a phone call, triggering an alarm by leaving a phone off the hook for several seconds, or activating the man down alarm that they all wear on their person. Additionally, Lay stated that some housing units were equipped with a cordless phone in addition to the standard corded phone to allow for telephonic communication no matter where the officer was located. According to Lay, at the times when corrections officers are supposed to unlock the doors to inmates' cells, an officer

is permitted to leave an inmate locked in the cell if justified by a threat to the officer, but the officer would need to then call a supervisor and explain the situation.

{¶32} Reviewing the video of the incident, Lay testified that corrections officers should not use a phone for as long as plaintiff did unless there is a serious issue because it distracts them from their job, although he admittedly did not know whom plaintiff was speaking with nor what was being discussed. (Defendant's Exhibit D.) Lay also testified that a corrections officer is in a more vulnerable position on a staircase and that the officer has the authority to order an inmate not to come up the stairs until the officer has made it down. Looking at the video, Lay stated that plaintiff's vulnerability on the stairs was exacerbated by the fact that she was holding the phone in one hand.

{¶33} Under Ohio law, employer intentional torts are governed by R.C. 2745.01, which states the following:

{¶34} "(A) In an action brought against an employer by an employee, or by the dependent survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.

{¶35} "(B) As used in this section, 'substantially certain' means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.

{¶36} "(C) Deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result.

{¶37} "(D) This section does not apply to claims arising during the course of employment involving discrimination, civil rights, retaliation, harassment in violation of

Chapter 4112. of the Revised Code, intentional infliction of emotional distress not compensable under Chapters 4121. and 4123. of the Revised Code, contract, promissory estoppel, or defamation."

{¶38} In enacting R.C. 2745.01, "the General Assembly intended to limit claims for employer intentional torts to situations in which an employer acts with the 'specific intent' to cause an injury to another." *Houdek v. Thyssenkrupp Materials N.A.*, 134 Ohio St.3d 491, 2012-Ohio-5685, ¶ 24. "R.C. 2745.01 thereby restricts recovery for employer intentional torts to cases where the worker proves that the employer deliberately intended to harm the worker." *Johnson v. Internatl. Masonry, Inc.*, 10th Dist. Franklin No. 12AP-966, 2013-Ohio-2749, ¶ 13. "This standard is difficult to meet because an intentional-tort claim is intended to be a narrow exception to the workers' compensation system's prohibition against an employee's ability to sue his or her employer for a workplace injury." *Pastroumas v. UCL, Inc.*, 1st Dist. Hamilton No. C-150352, 2016-Ohio-4674, ¶ 26.

{¶39} "It is not enough to show that the employer was merely negligent, or even reckless." *Weimerskirch v. Coakley*, 10th Dist. Franklin No. 07AP-952, 2008-Ohio-1681, ¶ 8. "An intentional tort does not encompass '"accidental injuries caused by the gross, wanton, willful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer short of a conscious and deliberate intent directed to the purpose of inflicting an injury."'" *Boyd v. Archdiocese of Cincinnati*, 2nd Dist. Montgomery No. 25950, 2015-Ohio-1394, ¶ 55, quoting *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, ¶ 99-100, quoting 6 Larson, *Workers' Compensation Law*, Section 103.03 (2008).

{¶40} Even if the employer's conduct "includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering employees to perform an extremely dangerous job, wilfully failing to furnish a safe place to work, wilfully violating a safety statute, failing to protect employees from crime, refusing to

respond to an employee's medical needs and restrictions, or withholding information about worksite hazards, the conduct still falls short of actual intention to injure that robs the injury of accidental character.'" *Kaminski* at ¶ 100, fn. 16, quoting 6 Larson, *Workers' Compensation Law*, Section 103-01 (2008).

{¶41} It is noted that plaintiff advances the definition of intent set forth in *Cantu v. Irondale Indus. Contrs., Inc.*, 6th Dist. Fulton No. F-11-018, 2012-Ohio-6057. Other courts have specifically rejected that portion of *Cantu*, however, as conflicting with Supreme Court of Ohio case law interpreting R.C. 2745.01. *Pastroumas* at ¶ 31; *Ball v. MPW Indus. Servs., Inc.*, 5th Dist. Licking No. 15-CA-89, 2016-Ohio-5744, ¶ 38; *Lucio v. Levy Environmental Servs. Co.*, 173 F.Supp.3d 558, 568 (N.D.Ohio 2016); *Spangler v. Sensory Effects Powder Sys.*, N.D.Ohio No. 3:15 CV 75, 2015 U.S. Dist. LEXIS 70427 (June 1, 2015). The magistrate declines to follow *Cantu* in this matter.

{¶42} Upon review of the evidence presented at trial, the magistrate finds as follows. Plaintiff began employment with defendant on December 2, 2012. Although plaintiff was on the job for less than one year before the attack occurred, she received extensive training from defendant and was familiar with defendant's policies and procedures. After attending defendant's training academy and receiving on-the-job training at ToCI, plaintiff requested and received a first-shift post in Housing Unit C West, which housed inmates classified at the next-to-highest security level in the prison system. In March or April 2013, inmate Perry moved into the unit. In the months leading up to the attack, Perry increasingly engaged in nuisance-type behavior, but his behavior at least toward the staff during that time was not violent or particularly aggressive. The emphasis that plaintiff places on Perry's behavior during that time is belied by the fact that the evidence shows plaintiff never ticketed him for any rules infraction until November 21, 2013, even though plaintiff strictly enforced the rules. Although not long before this incident Sergeant Klavinger had some communication with prison management about his desire to have Perry moved elsewhere, Klavinger's

concerns centered upon behavior that was a nuisance for staff to manage, not a direct threat to the safety of staff.

{¶43} On November 21, 2013, just after noon, plaintiff observed Perry remove three packaged soups from another inmate's cell. Plaintiff ordered Perry to return the soups, and when Perry balked, plaintiff informed Perry that she was going to prepare a Conduct Report, ticketing him for violating prison rules. As described by plaintiff in the Conduct Report and Incident Report that she consequently prepared, Perry eventually returned the soups but informed her "that 'I know what time it's about to be…' or something to that effect." Plaintiff perceived this as a threatening statement. In her Conduct Report, plaintiff ticketed Perry for stealing the soups and disobeying her orders to return them, as well as disrespecting her and threatening bodily harm.

{¶44} Plaintiff submitted her Incident Report and Conduct Report, the latter of which was submitted to Klavinger. Near the end of her shift that was over at 2:00 p.m., plaintiff also contacted Klavinger and spoke to him about the matter. Klavinger was not plaintiff's supervisor, he had several days before he would be required to make any decision on the Conduct Report, and he lacked authority to move or isolate an inmate himself. Klavinger advised plaintiff to select a work assignment at another post at ToCI until such time as Perry was moved out of the unit. Plaintiff had the ability to do so, but chose not to.

{¶45} Plaintiff did not contact Lieutenant Lay that day, even though he was her supervisor, he had authority to move inmates, and he expected his employees to call into the shift office where he worked when faced with a credible physical threat. Plaintiff distributed a copy of her Incident Report to the shift office, but there was little or no meaningful evidence presented at trial as to the process and timing by which such reports were submitted and reviewed in that office. It was not shown that anyone in the shift office actually saw the Incident Report, and indeed Lay never saw it before the attack. Although there is a time stamp on the Incident Report apparently showing that it

was received somewhere at ToCI at 8:54 a.m. on the day of the attack, it was not shown where or by whom it was received or that any supervisory staff saw it.

{¶46} When plaintiff reported for roll call the next morning at 5:30 a.m. on the day of the attack, she did not raise any issue relating to Perry. Sometime after plaintiff began her shift at 6:00 a.m. there was an institutional count of inmates, and when plaintiff saw that Perry was still present in the housing unit she spoke with Corrections Officer Wurzelbacher about the events from the day before, and they consequently came up with a plan for Wurzelbacher to relieve her temporarily during the recreation movement later that morning. Klavinger had also told Wurzelbacher earlier that morning to keep an eye on plaintiff. To the extent that plaintiff was confused or surprised to see Perry still in the unit, it is not clear why, as it was apparent that her phone call to Klavinger was not going to result in Perry being immediately moved, and, even if plaintiff was truly surprised and in fear for her safety, she had the ability to call the shift office and discuss the situation but did not do so. Rather, plaintiff had only submitted her reports near the end of her previous shift and had only told two staff members of her concerns, Klavinger and Wurzelbacher, neither of whom was her supervisor nor had authority to move Perry.

{¶47} At 7:00 a.m., plaintiff let Perry out of his cell for dayroom time, along with the other inmates on the second-floor range. Plaintiff was not required by defendant to do this if faced with a credible physical threat, so long as she involved a supervisor. Perry later exited his cell and plaintiff observed that the words Phat Head were shaved into the back of his head. Plaintiff wrote a Conduct Report to ticket Perry for violating grooming standards and she phoned Lay in the shift office, but she notified him only of this issue, not the events of the day before. Upon being notified of the problem with Perry's hair, Lay promptly came out to the housing unit to address that issue, stopping at the desk for plaintiff to point out Perry. Lay ordered Perry to get a haircut by the end of the day. It is more likely than not that before Lay left the unit, Wurzelbacher did

speak with Lay and share some concern about Perry's interaction with plaintiff the day before, and that Wurzelbacher sensed that something might be afoot. Lay, having not seen any Incident Report or Conduct Report about any problems the day before, and having just spoken with plaintiff that morning and hearing nothing at all from her about any concern on her part, essentially told Wurzelbacher to send an emergency alert if anything should happen and that he would be there immediately. All that Lay heard about the prior day's events was through Wurzelbacher's secondhand account, the details of which were not sufficiently established at trial. Lay had a good working relationship with plaintiff and was responsive when she brought issues to his attention, as shown by the timely way that he responded to the issue with Perry's hair.

{¶48} At 10:22 a.m., plaintiff commenced to make her periodic rounds through the housing unit. Perry and several other inmates who lived on the second-floor range were still in the dayroom, which was available to them until 10:30 a.m. Although Wurzelbacher had been watching plaintiff that morning, he was temporarily outside the housing unit at this time, escorting inmates to the library. Plaintiff walked along the perimeter of the first-floor range, then went upstairs and walked along the second-floor range. When plaintiff made it to the end of the second-floor range, she began to descend the stairs. At that time, plaintiff was talking on a phone that she had been holding in one hand for at least as long as it took her to make rounds, and there is no credible evidence to establish with whom plaintiff was speaking. Perry was plainly visible at the bottom of the stairs when plaintiff began to descend. Plaintiff had the authority to order Perry away from the stairs while she descended, but did not do so. Perry started up the stairs, and as they passed, he attacked her and inflicted serious injuries. Plaintiff was equipped with a man down alarm that could have been used to request assistance or backup in the event that she feared for her safety, and if she was speaking on the phone with someone at the prison she could have requested assistance that way as well, but she did not do so and was caught so off guard by the

attack that she was unable to alert anyone before being incapacitated. Wurzelbacher returned to the housing unit shortly thereafter, while the attack was still in progress. Wurzelbacher immediately ran toward the stairs, stopped the attack, and secured the scene until other staff arrived in response to his call for help.

{¶49} While the magistrate sympathizes with the serious physical and emotional harm that plaintiff suffered as a result of Perry's criminal attack, the evidence fails to establish that defendant deliberately intended for any harm to be done to plaintiff.

{¶50} Perry was one of many inmates at ToCI serving time for violent crimes, and all the inmates in his unit had the same security classification and privilege level that he did. Perry's increasing nuisance-type behavior while living in the unit, which was brought to the attention of prison authorities, made him a difficult inmate to manage but from the evidence presented about Perry at trial his misbehavior was not shown to be violent nor specifically directed toward plaintiff, and it plainly did not provide a basis for defendant to believe Perry was substantially certain to harm plaintiff, nor did Perry's gang affiliation.

{¶51} Defendant provided protections to corrections officers who were faced with credible physical threats, but it was incumbent upon plaintiff to promptly report any such threat to a supervisor—who had authority to move the inmate or take other preventive measures, or, in the event of imminent danger, to summon emergency response from other officers by the man down alarm, the radio, or the phone. Despite the tense encounter that plaintiff testified she had with Perry on November 21, 2013, being serious enough that she feared Perry might attack her at that very moment, she did not summon an emergency response at that time, nor did she contact a supervisor, and the Conduct Report and Incident Report that she subsequently prepared do not portray the encounter as being nearly as dangerous as she described at trial, even though she was supposed to provide all pertinent details in those reports. The description that plaintiff wrote in the Conduct Report and Incident Report is primarily devoted to Perry's theft of

some soup and his initial disobedience of her orders to return the soup. While plaintiff wrote that Perry said "I know what time it's about to be…" and that she took this to be a threatening statement, the reports lacked key details that she related at trial, including that Perry approached her, flexed his muscles and displayed other aggressive body language, and had to be restrained by another inmate. The omission of such important information from plaintiff's otherwise thorough reports about the incident calls into question the accuracy of that information, but, regardless, plaintiff did not report such information and prison officials were not aware of it. The quote that plaintiff did attribute to Perry in her reports is subject to interpretation, and, even though plaintiff wrote that she took it as a threat, it is difficult to differentiate from the type of idle threats that officers are commonly faced with and cannot be given the significance that she seeks to place upon it without more contextual details. The description that she wrote did not describe circumstances under which it was substantially certain that Perry would harm her if preventive action was not taken.

{¶52} Although plaintiff contacted Klavinger when she submitted the Conduct Report to him, it was not shown that Klavinger learned any more details than what plaintiff wrote in the Conduct Report, and even if he did, he was not plaintiff's supervisor and did not have authority to move Perry. Rather than acting in a way that would deliberately enable Perry to harm plaintiff, Klavinger advised plaintiff to temporarily work at another post as a preventive measure, and even after plaintiff declined to follow his recommendation he advised Wurzelbacher the next morning to keep an eye on plaintiff. Although plaintiff asserts that she expected Perry to be moved after reporting the encounter, she could not have reasonably expected Klavinger to have effected that result, based upon his response to her during their conversation and his lack of authority. The two employees with whom plaintiff spoke about her encounter with Perry—Klavinger and Wurzelbacher—each responded in ways that were meant to prevent harm, not intend harm. Their actions, as well as the prompt action by Lay when

plaintiff notified him about the problem with Perry's hair, are consistent with the fact that plaintiff got along well with everyone at ToCI, that her co-workers were attentive to her concerns and wanted to help her, and that there was no animosity or ill-will toward her, much less a deliberate intent to see her injured.

{¶53} It was not shown that Lay or any other prison officials who actually had the authority to move or segregate Perry knew at all of his encounter with plaintiff prior to the attack, other than whatever secondhand information Wurzelbacher may have shared with Lay when Lay visited the housing unit on the morning of the attack to address the problem with Perry's hair. At best, Lay was apprised by Wurzelbacher that Perry might pose some risk to plaintiff, but there is a difference between a mere foreseeability that harm might occur and substantial certainty of harm occurring, and the evidence simply does not support a finding that it was substantially certain to Lay, or any other employee for that matter, that plaintiff would be harmed, let alone that there was a deliberate decision to enable such harm. Even Wurzelbacher admitted that he could not have been certain about what would happen. Whatever Lay learned from Wurzelbacher had to be weighed against the fact that plaintiff had not mentioned anything at all to Lay along those lines, even though she had just spoken to him, which would suggest that she was not especially concerned, thus weighing against the likelihood of an attack.

{¶54} Plaintiff suggests that Lay or other supervisory staff somehow violated Ohio Adm.Code 5120-9-11, but the version of that rule in effect in 2013 speaks in relevant part about circumstances when an inmate "may" be placed in security control and this rule cannot be construed to have mandated Perry's placement in security control. Even if it had been established that a rule or policy was violated, this would not, standing alone, demonstrate an intent to injure.

{¶55} Plaintiff was also not required by defendant to let Perry out of his cell if she determined that he posed a credible physical threat to her. In that event, defendant

permitted her to keep Perry locked in his cell so long as she got a supervisor involved, but plaintiff did not avail herself of this safeguard. If Perry's attack was as certain to happen as plaintiff claims, it is difficult to understand why she let him out of his cell without ever hearing from or communicating with a supervisor that morning about her concern. Defendant also conferred plaintiff with authority to order an inmate away from the stairs while she used the stairs. Insofar as plaintiff did not exercise that authority and allowed Perry to come up the stairs while she descended, and also insofar as plaintiff was on the phone and did not have her hands free at that time, these factors made her more vulnerable to Perry, but they were not directed by defendant. More broadly, plaintiff was not required by defendant to work in this particular housing unit that day, for as she explained, the policies governing her employment with defendant permitted her to select another work location. Even after Klavinger, who was far more experienced than plaintiff, recommended to her that she work another post for the time being, she decided on her own to remain.

{¶56} Considering that plaintiff gave a significantly less concerning account of the November 21, 2013 encounter with Perry in her Conduct Report and Incident Report than what she described at trial, that plaintiff elected not to contact her supervisor about the encounter even though she did use her discretion to contact him over the issue with Perry's hair, that plaintiff elected not to follow Klavinger's advice and select another post, that plaintiff did not raise any issue about Perry at roll call on the morning of the attack, that plaintiff let Perry out of his cell that morning without consulting a supervisor, that plaintiff did not mention any concern for her safety when her supervisor was in the unit that morning to respond to the issue with Perry's hair, that plaintiff allowed Perry to come up the stairs while she descended, and that plaintiff was seemingly caught off guard by the attack, taken as a whole the evidence tends to show that in plaintiff's mind the attack was not so certain to occur as what she now claims. If it were not

substantially certain to plaintiff, it is difficult to see how it could have been substantially certain to defendant.

{¶57} Accordingly, plaintiff failed to prove her claim of employer intentional tort under R.C. 2745.01. Given that plaintiff cannot prevail on her claim, the derivative claim for loss of consortium asserted by her husband must fail also. *Gordon v. Ohio State Univ.*, 10th Dist. Franklin No. 10AP-1058, 2011-Ohio-5057, ¶ 80, citing *Bowen v. Kil-Kare, Inc.*, 63 Ohio St.3d 84, 93 (1992).

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

{¶59} *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).*

ROBERT VAN SCHOYCK
Magistrate

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