

[Cite as *Person v. Ohio Dept. of Rehab. & Corr.*, 2022-Ohio-2734.]

ANDRE PERSON  Plaintiff  v.  OHIO DEPARTMENT OF REHABILITATION AND CORRECTION  Defendant	Case No. 2021-00181JD  Magistrate Gary Peterson  <u>DECISION OF THE MAGISTRATE</u>
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{¶1} Plaintiff, an inmate in the custody and control of defendant, brings this action for negligence arising out of an incident in which a PR-24 fell from the upper range of the housing unit and struck plaintiff in the head. At the outset of the trial, the magistrate DENIED plaintiff's April 11, 2022 "motion of discovery." The issues of liability and damages were not bifurcated, and the case proceeded to trial before the undersigned magistrate.

#### Findings of Fact

{¶2} On July 2, 2019, corrections officers B. Dillon, K. Ritchie, and K. Alexander responded to the A-Block at Lebanon Correctional Institution (LECI) to break up a fight between two inmates on the upper range of the housing unit. Defendant's Exhibit B. The corrections officers successfully terminated the altercation and escorted the inmates involved in the fight to the medical department. *Id.*

{¶3} Plaintiff was sitting in the common area, also known as the dayroom, at a table playing chess at the same time. The dayroom is located on the lower floor of the housing unit, below the upper range where the fight occurred. Plaintiff heard an altercation when he felt something hit him on the side of the head.

{¶4} Plaintiff reported that he was knocked unconscious and that when he regained consciousness, he was lying on the floor, confused. Plaintiff stated that another inmate said he got hit. Plaintiff informed a staff member that he was unable to move; he was

subsequently transported to the medical department by means of a wheelchair. Plaintiff stated that a “thick” officer informed him that he was hit by a PR-24, a 24-inch, 24-ounce baton issued to corrections staff. On cross-examination, however, plaintiff asserted that when he regained consciousness he saw the PR-24 on the ground next to him.

{¶5} Plaintiff stated that he had a lump on the side of his head and that he felt dizzy and nauseous. Plaintiff reported that he received ice, ibuprofen, and water while recovering in the infirmary. According to plaintiff, at some point while he was in the medical department, Ritchie apologized to him for losing control of his PR-24. Plaintiff was later able to return to his cell with the aid of another inmate and a rollator walker. Plaintiff stated that he later made a sick call appointment to see the doctor because his head hurt so much that he was unable to sleep. Plaintiff’s swelling receded three days after this incident.

{¶6} At the trial, plaintiff reported that he continues to suffer from headaches, sensitivity to bright lights, nausea, trouble sleeping, dizzy spells, and “head spins.” Plaintiff testified that the headaches and dizziness occur frequently. To counter these effects, plaintiff purchases ibuprofen. Plaintiff acknowledged that prior to this incident he suffered from head injuries and migraine headaches, but he asserted that his migraine headaches now last longer and are more intense.

{¶7} On July 3, 2019, the day after the incident, plaintiff wrote a grievance about “strong fumes” causing nausea and migraine headaches. Defendant’s Exhibit E. The grievance does not mention plaintiff being hit by a PR-24 or any injuries associated with that incident. *Id.*

{¶8} On July 22, 2019, plaintiff submitted a grievance wherein he reported that he was hit on the head by a PR-24 that fell from the third range. Defendant’s Exhibit D. The grievance does not mention that Ritchie apologized for losing control of his baton nor does the grievance mention the injuries plaintiff claims to have suffered other than to state that plaintiff suffered a head injury. *Id.*

{¶9} Nicholas Kujel, a lieutenant at LECI, oversees the daily operations of the prison, including collecting the documentation following a use of force. Defendant's Exhibit B. Kujel was unable to recall an incident where a staff member lost control of a PR-24, and added that if something like that had happened, it would more than likely be reported in the use of force report. Kujel clarified that if an inmate had been knocked unconscious by a PR-24, it would have been noted in an incident report. Kujel confirmed that video of the corrections officers breaking up the fight between the inmates was preserved. Defendant's Exhibit A.

{¶10} Video of the incident shows two inmates engaging in a physical altercation on the third floor of the dormitory. Defendant's Exhibit A. The altercation occurs on the walkway with a railing separating the walkway from an area that is open down to the dayroom below. *Id.* Both the dayroom and the walkway are crowded with a number of inmates. *Id.* As the altercation continues, many of the inmates in the dayroom turn their attention upward to the third range where the fight is underway. *Id.* Several corrections officers respond, including Ritchie. *Id.* Ritchie appears to be dragging a radio along the floor as he enters the area. *Id.* The object is attached to what appears to be a retractable cord and as Ritchie continues down the walkway to the fight, the object bounces along the walkway, but it does not fall to the dayroom below. *Id.* Ritchie does have a PR-24 as he responded to the fight. *Id.* The corrections officers gain control of the situation, and the inmates are escorted away from the area. *Id.* The video does not show a PR-24 falling to the lower range, although the viewpoint of the camera, which is not in close proximity to where the fight occurred, and the number of inmates and officers in the area largely obscures Ritchie. *Id.* After the fight is over, the inmates in the dayroom return to their tables. *Id.* There are three corrections officers in the dayroom on the lower range and they do not appear to be attending to or responding to any injured inmate in the dayroom. *Id.* Several corrections officers, including Ritchie, lean over the railing and look

down to the dayroom below. *Id.* Ritchie's left side, where his PR-24 was located when he responded to the fight, is not visible as he leaves the area. *Id.*

{¶11} Michael Marinich, a major at LECI, is the chief of security at LECI and is responsible for designing security measures at the prison. Marinich explained that all corrections officers carry PR-24s and receive initial training and annual retraining. Marinich maintained that attaching a retractable cord to a PR-24 would inhibit a corrections officer's ability to quickly draw and use that PR-24 in addition to introducing a choking hazard into the prison. Marinich also stated that adding netting between the ranges would introduce objects into the prison that could be used as weapons and would decrease the visibility between ranges. Marinich was unaware of an incident where a PR-24 fell from the third range and struck an inmate in the head.

{¶12} Jody Sparks, the institutional inspector at LECI, is responsible for investigating policy violations and ensuring that policy is followed. Sparks would be made aware if a PR-24 fell from an upper range and hit an inmate. Sparks searched for incident reports regarding a PR-24 falling from the third range and could not locate any incident reports on or around the date of this alleged incident. Sparks could not recall any incident where a PR-24 fell from the upper range in a dormitory, was not aware of any incidents of debris falling from the upper range of a dormitory, and was not aware of an officer dropping a PR-24 from an upper range.

{¶13} Hannah Kroggelh a quality improvement coordinator for defendant and registered nurse reviewed plaintiff's medical records in this case. Plaintiff sought medical treatment on July 2, 2019, and reported that "I was in the day room and I was sitting there all of a sudden a PR hit me in the head it fell off the top range." Defendant's Exhibit F. Plaintiff was alert and oriented, his speech was clear and appropriate, and "slight swelling" was noted. *Id.* A nurse sick call appointment was made. *Id.* Plaintiff is noted to have a history of malingering and the head injury noted in the medical record is a prior injury. Defendant's Exhibit G. Following nurse sick call, plaintiff was given ice and ibuprofen. *Id.*

{¶14} Kroggelh also reviewed a health services record from April 2019, which predates the incident that gives rise to this case. Defendant's Exhibit I. In the health services record, plaintiff complains of migraine headaches, photosensitivity, and dizziness that have been occurring since March. *Id.* Regarding plaintiff's sick call appointment to see a doctor concerning his ongoing headaches, Kroggelh stated that the sick call appointments were about plaintiff's ongoing hunger strike and not because of any injuries associated with head trauma. Plaintiff's Exhibits 2A, 3, and 4.

#### Conclusions of Law and Discussion

{¶15} To prevail on a claim for negligence, plaintiff must prove by a preponderance of the evidence that "(1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, and (3) the breach of the duty proximately caused the plaintiff's injury." *Jenkins v. Ohio Dept. of Rehab & Corr.*, 10th Dist. Franklin No. 12AP-787, 2013-Ohio-5106, ¶ 6. "While the state is not an insurer of the safety of inmates, the state generally owes a duty of reasonable care and protection from harm to inmates under its custody." *Price v. Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 14AP-11, 2014-Ohio-3522, ¶ 9. "Reasonable care is that degree of caution and foresight an ordinarily prudent person would employ in similar circumstances, and includes the duty to exercise reasonable care to prevent an inmate from being injured by a dangerous condition about which the state knows or should know." *McElfresh v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 04AP-177, 2004-Ohio-5545, ¶ 16. A duty arises when a risk is reasonably foreseeable. *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77 (1984).

{¶16} Plaintiff proved by a preponderance of the evidence that a PR-24 fell from the upper range of the dormitory and struck him on the side of his head. Plaintiff was sitting at a table playing chess at the time while corrections officers, including Ritchie, broke up a fight between two inmates on the upper range. Immediately after the corrections officers broke up the fight, Ritchie, along with several other officers, leaned over the railing and looked down at the lower range. After plaintiff was struck in the head,

a staff member transported plaintiff to the medical department where plaintiff reported to the medical staff that he was hit in the head by a PR-24. The medical records contain a number of subjective injuries that plaintiff reported to medical staff, but the medical records also contain the objective finding of slight swelling that was observed by the medical staff. This all leads the magistrate to believe that more likely than not, plaintiff was hit in the head by a PR-24 that fell from the upper range of the dormitory. Furthermore, plaintiff was hit in the head by the PR-24 because Ritchie lost control of his PR-24. Ritchie acknowledged as much by apologizing to plaintiff for losing control of his PR-24.

{¶17} The magistrate acknowledges that defendant does not have documentation, such as an incident report, relating that a PR-24 fell from the upper range of the dormitory. However, the lack of documentation does not mean that it did not happen. Additionally, the video of the fight between the two inmates does not show a PR-24 falling from the range; however, the video is taken from afar, the viewpoint does not fully capture the fight or clearly show the dayroom below, and there are a number of individuals, corrections officers and inmates, obstructing a clear view of Ritchie. Accordingly, plaintiff established that defendant breached a duty that it owed to him when Ritchie lost control of his PR-24 and that such a breach proximately caused him harm when the PR-24 fell from the upper range and hit him in the head.

{¶18} Generally, “the appropriate measure of damages in a tort action is the amount which will compensate and make the plaintiff whole.” *N. Coast Premier Soccer, LLC v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 12AP-589, 2013-Ohio-1677, ¶ 17. As an inmate, plaintiff was not required to pay for the medical treatment defendant’s employees rendered. Further, plaintiff does not allege that he lost wages because of his injuries. Consequently, plaintiff is entitled to compensation for the pain and suffering his injuries caused him.

{¶19} There is “no specific yardstick, or mathematical rule [that] exists for determining pain and suffering.” *Hohn v. Ohio Dept. of Mental Retardation & Developmental Disabilities*, 10th Dist. Franklin No. 93AP-106, 1993 Ohio App. LEXIS 6023, 10-11 (Dec. 14, 1993). “Rather, the finder of fact makes a ‘human evaluation’ of all the facts and circumstances involved.” *McCombs v. Ohio Dept. of Dev. Disabilities*, 10th Dist. Franklin No. 21AP-280, 2022-Ohio-1035, ¶ 29 quoting *Kelly v. Northeastern Ohio Univ. College*, 10th Dist. Franklin No. 07AP-975, 2008-Ohio-4893, ¶ 8. When determining the appropriate amount of damages for pain and suffering, a court may consider awards given in comparable cases as a point of reference, but ultimately must evaluate each case in light of its own particular facts. *Id.* In a similar case, a plaintiff fell backwards while in a wheelchair and struck his head. *Williams v. Ohio Dept. of Rehab. & Corr.*, Ct. of Cl. No. 2019-00884JD, 2021-Ohio-1898. The plaintiff suffered a minor head injury and was treated with ice and Tylenol. *Id.* The injuries were temporary and resolved quickly. *Id.* The plaintiff was awarded \$1,000. *Id.*

{¶20} Plaintiff claims to have suffered significant head injuries. However, the magistrate finds that plaintiff lacks credibility concerning correctly describing the symptoms that he suffered because of this incident. It was established that plaintiff has a history of malingering regarding his injuries. As noted in plaintiff’s medical records, plaintiff has a documented history of malingering, thus undermining plaintiff’s credibility regarding the subjective injuries that he claims to have suffered. Furthermore, while plaintiff asserted at trial that he was knocked unconscious, he did not report that to the medical department as shown by the medical records. As a result, the magistrate does not believe plaintiff was knocked unconscious as he claimed, but rather, the magistrate believes that plaintiff was hit in the head by the PR-24 causing minor injuries as noted in the medical records.

{¶21} Additionally, many of the symptoms that plaintiff ascribes to being hit in the head by a PR-24, are the same symptoms plaintiff attributes to other incidents for which

he either sought treatment or filed grievances. Indeed, the day after plaintiff was hit in the head, plaintiff complained that he was suffering nausea and migraines due to a noxious odor emanating from a drain. Furthermore, plaintiff did not seek additional medical treatment for his claimed head injuries. Rather, plaintiff saw a medical provider for a hunger strike shortly after he was hit in the head. Moreover, plaintiff conceded that prior to this incident, he suffered from migraine headaches. Plaintiff's medical records that predate this incident further document symptoms, such as migraines, photosensitivity, and dizziness, that he now assigns to being hit in the head by a PR-24. It was also established that plaintiff suffered a head injury prior to this incident. Accordingly, plaintiff's credibility is negatively impacted given his history regarding these symptoms.

{¶22} Finally, plaintiff claims long-term head injuries such as migraine headaches, dizziness, and nausea; however, the symptoms of which plaintiff complains fall into the category of complicated internal medical issues that are difficult for a layperson to understand in the absence of supporting testimony from a medical expert. See *Corwin v. St. Anthony Med. Ctr.*, 80 Ohio App.3d 836, 840-841, 610 N.E.2d 1155 (10th Dist.1992) ("Where the permanency of an injury is obvious, such as the loss of an arm, leg or other member, the jury may draw its own conclusions as to the measure of damages; however, where an injury is not obvious, there must be expert evidence as to the damage sustained, the probability of future pain and suffering or the permanency of the injury."). Plaintiff did not present any expert testimony to establish that his present injuries were a result of being hit in the head as opposed to the other events documented in his medical records and grievances.

{¶23} As a result, the magistrate finds that plaintiff suffered minor injuries such as a headache, minor swelling, and discomfort after being hit in the head by a PR-24. Indeed, plaintiff was treated for such minor injuries with ice, water, and ibuprofen and discharged from the medical department. While plaintiff later purchased additional ibuprofen, it is just

as likely that he purchased it as a consequence of unrelated symptoms, and it is thus not recoverable. The only objective medical finding noted was minor swelling, which resolved in a matter of days. As a result, plaintiff is entitled \$1,250 for temporary pain and discomfort that he experienced.

{¶24} Based upon the foregoing, the magistrate recommends that the court enter judgment in favor of plaintiff in the amount of \$1,275, which includes that \$25 filing fee paid by plaintiff.

{¶25} *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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GARY PETERSON  
Magistrate