

the ground before placing him in handcuffs. Plaintiff was taken to the local patrol post where he was interviewed before being transported to the Auglaize County jail by Sergeant Anspach.

{¶ 4} When his handcuffs were removed, plaintiff complained of pain in his right shoulder. Anspach took plaintiff to a local hospital for an evaluation and x-ray of the shoulder. The medical staff did not detect any broken bones, and plaintiff was returned to the jail and incarcerated. He was charged with two counts of felony drug trafficking and subsequently pleaded guilty to one count.

{¶ 5} In his complaint, plaintiff alleges that defendant's employees used excessive force during his arrest and that the arresting officers' negligence caused an injury to his right shoulder. Specifically, plaintiff alleges that Peterson injured plaintiff's right shoulder by pulling his right arm over his head while placing him in handcuffs.

{¶ 6} As a preliminary matter, the court notes that plaintiff has relied on *Graham v. Connor* (1989), 490 U.S. 386 as the controlling authority for his claim of excessive force. However, the decision in *Graham* is distinguishable in that it analyzed a claim of "excessive force" under Fourth Amendment jurisprudence in a Section 1983, Title 42, U.S.Code action. To the extent that plaintiff alleges claims for relief premised upon violations of either the Ohio or United States Constitution, this court is without jurisdiction to consider those claims. It has been consistently held that actions against the state cannot be brought under Section 1983, Title 42, U.S.Code, because the state is not a "person" within the meaning of Section 1983. See, e.g., *Jett v. Dallas Indep. School Dist.* (1989), 491 U.S. 701; *Burkey v. Southern*

Ohio Correctional Facility (1988), 38 Ohio App.3d 170; *White v. Chillicothe Correctional Institution* (Dec. 29, 1992), Franklin App. No. 92AP-1230. Accordingly, plaintiff's claim alleging violations of his constitutional rights cannot be addressed in this forum.

{¶ 7} Plaintiff also asserts that the evidence satisfies the requirements for application of the doctrine of *res ipsa loquitur* to permit an inference of negligence. "To warrant application of the rule a plaintiff must adduce evidence in support of two conclusions: (1) That the instrumentality causing the injury was, at the time of the injury, or at the time of the creation of the condition causing the injury, under the exclusive management and control of the defendant; and (2) that the injury occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed." *Hake v. Wiedemann Brewing Co.* (1970), 23 Ohio St.2d 65, 66-67.

{¶ 8} "The doctrine of *res ipsa loquitur* is founded on an absence of specific proof of acts or omissions constituting negligence, and the particular justice of the doctrine rests upon the foundation that the true cause of the occurrence, whether innocent or culpable, is within the knowledge or access of the defendant and not within the plaintiff's knowledge or accessible to him." *Shields v. King* (1973) 40 Ohio App.2d 77. It is inappropriate to apply the doctrine where the cause of plaintiff's injury is either unknown or could possibly be within plaintiff's knowledge and control. *Fidelity & Guaranty Ins. v. Spires* (May 26, 1983), Athens App. No. 1123. In this case, there is a dispute regarding the "instrumentality" that caused plaintiff's injury.

{¶ 9} Unlike the inanimate instrumentalities usually associated with the application of *res ipsa loquitur*, the "instrumentality"

that allegedly caused plaintiff's injury was the amount of force that was used by defendant's employee during a lawful arrest. At least one Ohio court has found that the doctrine was inapplicable to allegations that police officers used excessive force during an arrest. See *Ringel v. Adrine*, (Nov. 2, 1995), Cuyahoga App. No. 68737. Plaintiff has not presented any authority to support his assertion that *res ipsa loquitur* should be applied under the circumstances of this case. The court finds that the evidence adduced at trial does not warrant application of the doctrine of *res ipsa loquitur*.

{¶ 10} In order for plaintiff to prevail upon his claim of negligence, he must prove by a preponderance of the evidence that defendant owed him a duty, that it breached that duty, and that the breach proximately caused his injuries. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285.

{¶ 11} At the time of the incident, Peterson had been with the Highway Patrol for approximately 15 years, where he served as a member of defendant's Special Response Team, a unit that was specially trained to control uncooperative suspects and serve high risk warrants. Peterson's testimony was that on December 5, 2002, he was assigned to assist Leach with a drug trafficking investigation. After he witnessed the drug transaction, he identified himself as a member of the Highway Patrol whereupon he followed Leach as they moved towards plaintiff. He then ordered plaintiff to exit the truck, observing that the truck's engine was running. When he reached for plaintiff's arm to remove him from the truck, plaintiff moved away from him and reached inside the vehicle, at which point Peterson grabbed plaintiff's jacket and pulled him from the truck. Peterson directed plaintiff to the

ground and plaintiff complied when he was ordered to put his hands out to his side before being handcuffed.

{¶ 12} Peterson testified that the handcuffing process "went very smooth," that he used no more force than was necessary, and that he was certain that he did not pull plaintiff's arm back from above plaintiff's head. According to Peterson, plaintiff did not scream, groan or otherwise indicate that he was in pain at any time either during or after the handcuffing procedure. Peterson testified that it is "somewhat common" for individuals who are handcuffed to feel some discomfort and that he would have adjusted plaintiff's handcuffs and documented any complaints of pain if he had received such a complaint.

{¶ 13} Sergeant Deana Anverse testified that she had been assigned to the investigation team and that she observed the procedure used to arrest plaintiff. Anverse corroborated Peterson's testimony concerning both the arrest procedure and plaintiff's conduct at the time of his arrest. Anverse testified that both Leach and Peterson identified themselves and ordered plaintiff to get his hands up as they approached plaintiff to make the arrest. Anverse characterized the incident as a "standard" arrest involving felony charges and she testified that nothing "out of the ordinary" occurred and that plaintiff did not appear injured.

{¶ 14} Plaintiff's testimony regarding his arrest conflicted with the testimony of defendant's employees. Plaintiff did not recall the officers either identifying themselves or directing him to show his hands. Plaintiff testified that he initially believed that he was being robbed because he saw two individuals with weapons who ordered him to get out of his vehicle and give them his

money. Plaintiff explained that he threw the money and then began to reach into the truck to call for help on his radio. Plaintiff further testified that he was ready to step out of the truck when Peterson grabbed him and pulled him from the vehicle. Plaintiff maintained that he did not know Leach and Peterson were law enforcement officers until he was being handcuffed. Plaintiff testified that he put his arms straight above his head when he was lying face down on the ground and that he did not feel any pain until Peterson pulled his right arm straight back over his head. Plaintiff claimed that the pain caused him to yell and that he repeatedly asked Peterson to release the handcuffs.

{¶ 15} There is no dispute that plaintiff complained of pain in his right shoulder when he was taken to jail. The issue, however, is whether the force used by Peterson was excessive under the circumstances.

{¶ 16} Plaintiff's credibility regarding his version of the arrest was undermined by the testimony of defendant's employees and his own testimony regarding when he became aware of his injury. Although plaintiff maintained that he felt severe pain and yelled while he was being handcuffed, both Sergeant Anverse and Trooper Peterson testified that plaintiff did not yell or exclaim that he was in pain during the arrest. Plaintiff explained that he did not realize the extent of his injury until he was able to move his right arm when the handcuffs were removed at the jail; however, Anverse testified that plaintiff's right arm was released from the handcuffs and free to move while he was being interviewed at the patrol post. The testimony and evidence showed that plaintiff was interviewed at the patrol post for approximately 20 minutes and

that he did not give any indication that he had been injured until he arrived at the jail.

{¶ 17} The court finds the testimony of Anverse and Peterson to be credible. Furthermore, the tape recording of the surveillance video that was admitted into evidence does not support plaintiff's version of the events. Although plaintiff testified that he threw the money he had received from Ware and did not immediately exit the truck because he thought he was being robbed, the videotape supports the testimony of Anverse and Peterson that the officers did not order plaintiff to give them the money during the arrest and that plaintiff retained the money until after he was in custody. The tape also shows that Trooper Peterson wore his badge on a chain around his neck and that Sergeant Anverse wore a black "raid jacket" with large yellow letters that read "STATE PATROL." The court finds plaintiff's assertion that he believed he was being robbed is not credible.

{¶ 18} Based upon the testimony and evidence, the court finds that defendant's employees had a duty to arrest plaintiff and that they did not use excessive force when they performed that duty. The court concludes that plaintiff has failed to prove that defendant's employees acted negligently in their efforts to place plaintiff into custody.

{¶ 19} For the foregoing reasons, the court finds that plaintiff has failed to prove, by a preponderance of the evidence, that defendant breached any duty owed to him and accordingly, judgment is recommended in favor of defendant.

{¶ 20} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision. A party shall not assign as error on appeal the court's adoption of any*

finding or conclusion of law contained in the magistrate's decision unless the party timely and specifically objects to that finding or conclusion as required by Civ.R. 53(E)(3).

ANDERSON M. RENICK
Magistrate

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