

[Cite as *Booth v. Ohio Dept. of Rehab. & Corr.*, 2005-Ohio-7018.]

IN THE COURT OF CLAIMS OF OHIO
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DANIEL BOOTH :

Plaintiff : CASE NO. 2004-01419
Judge Joseph T. Clark
v. : Magistrate Steven A. Larson

OHIO DEPARTMENT OF : MAGISTRATE DECISION
REHABILITATION AND CORRECTION :
Defendant :

: : : : : : : : : : : : : : :

{¶ 1} Plaintiff brought this action against defendant alleging that he sustained personal injury as a result of the conduct of defendant's employee, Guy Adams. The issues of liability and damages were bifurcated and the case proceeded to trial before a magistrate on the issue of liability and the civil immunity of defendant's employee.¹

{¶ 2} At all times relevant to this action, plaintiff was an inmate in the custody and control of defendant's Southeastern Correctional Institution (SCI) pursuant to R.C. 5120.16. Plaintiff alleges that Adams, a food service coordinator at SCI, used unnecessary force against him during an incident that occurred on January 28, 2003, when plaintiff was completing his assigned kitchen duties in Adams' area.

{¶ 3} On the date of the incident, plaintiff was working the first shift and had just completed serving breakfast to the general

¹At the conclusion of the trial, the court agreed to allow the record to remain open for presentation of additional evidence and testimony. The proceedings were reconvened and concluded at a later date.

inmate population. Plaintiff contends that a conflict began when he attempted to get his own breakfast, but Adams was unwilling to serve him. The testimony at trial established that kitchen workers were routinely served their meals after the general population had eaten and the workers had completed their duties. The evidence also establishes that, in this instance, Adams refused to serve plaintiff because he thought that plaintiff had already eaten. Plaintiff protested, and Adams did allow him to take a tray of food. However, plaintiff contends that when he reached into a nearby cooler to obtain some juice, Adams shut the door on his hand.

{¶ 4} As a result of being refused the juice, plaintiff sought intervention by a corrections officer on duty, but was told that the matter had to be resolved with Adams. Plaintiff testified that he was walking away from that conversation, with his breakfast tray in hand, when he observed Adams coming toward him. Plaintiff stated that Adams' head was turned and that he was looking over his right shoulder talking to another inmate. Plaintiff contends that he tried to avoid Adams but that he nevertheless collided with him, causing food to spill on Adams' clothing. Plaintiff further maintains that he began to step backward, away from Adams, but that Adams continued to move toward him. Plaintiff testified that he apologized to Adams, but that Adams raised two long metal serving ladles that he had in his hand and struck plaintiff with them in the left side of the face, causing injury to his ear, neck, and jaw. (Plaintiff's Exhibits 2, 3, 4, 5.)

{¶ 5} In order to prevail upon a claim of negligence, plaintiff 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. *Armstrong v. Best Buy Company, Inc.*, 99 Ohio St.3d 79, 81, 2003-Ohio-2573, citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77. Ohio law imposes a duty of reasonable care upon the state to provide for its prisoners' health, care and well-being. *Clemets v. Heston* (1985), 20 Ohio App.3d 132, 136.

{¶ 6} In this case, the duty owed is that which is set forth under the Ohio Administrative Code with respect to the circumstances under which defendant's employees are authorized to use force against an inmate. Specifically, former Ohio Adm.Code 5120-9-01 provides in pertinent part:

{¶ 7} "(A) As the legal custodians of a large number of inmates, some of whom are dangerous, prison officials and employees are confronted with situations in which it is necessary to use force to control inmates. This rule identifies the circumstances when force may be used lawfully.

{¶ 8} "(B) ***

{¶ 9} "(C) There are six general situations in which a staff member may legally use force against an inmate:

{¶ 10} "(D) ***

{¶ 11} "(1) Self-defense from an assault by an inmate;

{¶ 12} "****

{¶ 13} "(E) The superintendent, administrator, or staff member of a correctional institution is authorized to use force, other than deadly force, when and to the extent he reasonably believes that such force is necessary to enforce the lawful rules and regulations of the institution and to control violent behavior."

{¶ 14} This court has previously noted that "corrections officers have a privilege to use force upon inmates under certain

conditions. *** However, such force must be used in the performance of official duties and cannot exceed the amount of force which is reasonably necessary under the circumstances. *** Force may be used to control or subdue an inmate in order to enforce the institution's rules and regulations. *** Obviously, 'the use of force is a reality of prison life' and the precise degree of force required to respond to a given situation requires an exercise of discretion by the corrections officer." *Mason v. Ohio Dept. of Rehab. & Corr.* (1990), 62 Ohio Misc.2d 96, 101-102.

{¶ 15} (Internal citations omitted.)

{¶ 16} In this case, a tape of the incident, taken by a security camera on the premises, was presented as part of plaintiff's evidence. (Plaintiff's Exhibit 7.) The tape clearly shows that Adams struck plaintiff with the metal ladles. However, in order for the use of force to be justified, there must be some evidence that plaintiff instigated physical contact with Adams. The tape does not resolve that question and the testimony of inmates and corrections officers who witnessed the incident is conflicting as to whether plaintiff intentionally or accidentally collided with Adams prior to his being struck. Thus, the gravamen of the case turns on witness credibility. In that regard, the court found the testimony of defendant's investigator, Dave French, to be the most reliable and persuasive.

{¶ 17} Based upon the totality of evidence, the court is persuaded that plaintiff did not collide with Adams accidentally. The two had been swearing at one another; Adams had begrudgingly served plaintiff breakfast; he had denied plaintiff any juice to drink; and he had closed the cooler door on plaintiff's fingers. Plaintiff's assertion that he attempted to avoid Adams but that

Adams walked directly into him lacks credibility. Rather, the weight of evidence compels the conclusion that plaintiff intended to collide with Adams and to spill food on him. For the same reasons, the court is persuaded that Adams reasonably believed that plaintiff intended to escalate the earlier conflict to a physical altercation.

{¶ 18} Thus, pursuant to former Ohio Adm.Code 5120-9-01, Adams was lawfully entitled to use force against plaintiff either as a means of self defense under subsection (D)(1) or to control plaintiff's violent behavior under subsection (E).

{¶ 19} However, the court is persuaded that Adams violated the code provisions in his response to plaintiff's conduct. Specifically, the videotape of the incident shows that plaintiff was backing away from Adams after the two collided and was attempting to avoid further contact. It is also clear from the tape that Adams continued advancing toward plaintiff and reached out with the ladles to strike plaintiff. Adams then turned away from plaintiff and walked back toward the kitchen. The act of pursuing and striking plaintiff exceeded the amount of force that was reasonably necessary under the circumstances, or that was necessary in order to enforce the institution's rules and regulations.

{¶ 20} For the foregoing reasons, the court concludes that plaintiff proved his negligence claim by a preponderance of the evidence. Accordingly, judgment is recommended in favor of plaintiff.

{¶ 21} Regarding the issue of civil immunity, R.C. 2743.02(F)

{¶ 22} provides, in part:

{¶ 23} "A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of his employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action. ***"

{¶ 24} R.C. 9.86 provides, in part:

{¶ 25} "*** no officer or employee [of the state] shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were *manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.* ***" (Emphasis added.)

{¶ 26} In *Thomson v. University of Cincinnati College of Medicine* (Oct. 17, 1996), Franklin App. No. 96API02-260, at p. 13, the Tenth District Court of Appeals stated:

{¶ 27} "Under R.C. 9.86, an employee who acts in the performance of his duties is immune from liability. However, if the state employee acts manifestly outside the scope of his or her employment or acts with malicious purpose, in bad faith, or in a wanton or reckless manner, the employee will be liable in a court of general jurisdiction. 'It is only where the acts of state employees are motivated by actual malice or other such reasons

giving rise to punitive damages that their conduct may be outside the scope of their state employment.' *James H. v. Dept. of Mental Health & Mental Retardation* (1980), 1 Ohio App.3d 60,61. Even if an employee acts wrongfully, it does not automatically take the act outside the scope of the employee's employment even if the act is unnecessary, unjustified, excessive, or improper. *Thomas v. Ohio Dept. of Rehab. & Corr.* (1988), 48 Ohio App.3d 86. The act must be so divergent that its very character severs the relationship of employer and employee. *Wiebold Studio, Inc. v. Old World Restorations, Inc.* (1985), 19 Ohio App.3d 246."

{¶ 28} In this case, having found that Adams was lawfully entitled to use reasonable force against plaintiff, but that he was negligent in his attempt to do so, the court cannot find that Adams acted manifestly outside the scope of his employment or that his conduct was so divergent that it severed the employer-employee relationship. Additionally, while the evidence shows that Adams acted unreasonably in response to plaintiff's conduct, the court does not find that Adams acted with malicious purpose, in bad faith or in a wanton or reckless manner toward plaintiff. It is therefore recommended that in addition to rendering judgment in favor of plaintiff, the court issue a determination that Adams is entitled to civil immunity pursuant to R.C. 2743.02(F) and 9.86 and that the courts of common pleas do not have jurisdiction over any civil actions that may be filed against him based upon the allegations in this case.

{¶ 29} 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).

STEVEN A. LARSON
Magistrate

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Filed December 12, 2005
To S.C. reporter December 29, 2005