[Cite as *Lucero v. Ohio Dept. of Rehab. & Corr.*, 2011-Ohio-6388.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Arturo Lucero,	:	
Plaintiff-Appellant,	:	
v.	:	No. 11AP-288 (C.C. No. 2008-08019)
Ohio Department of Rehabilitation and Correction et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on December 13, 2011

Swope and Swope, and *Richard F. Swope*, for appellant.

Michael DeWine, Attorney General, and *Eric A. Walker*, for appellees.

APPEAL from the Court of Claims of Ohio.

SADLER, J.

{¶1} Plaintiff-appellant, Arturo Lucero, appeals from a judgment of the Court of Claims of Ohio entered in favor of defendants-appellees, Ohio Department of Rehabilitation and Correction ("ODRC") and Chillicothe Correctional Institution ("CCI"). For the following reasons, we affirm.

{¶2} Appellant filed an action in the Court of Claims seeking damages against appellees for negligence. Specifically, the complaint alleged that appellees negligently failed to protect appellant from another inmate named Richard Caldwell and, as a result, proximately caused appellant's injuries. The matter was referred to a magistrate, who conducted a bench trial on March 23 and September 2, 2010. Therein, the following evidence was presented.

{¶3} On August 29, 2007, appellant was serving a sentence at CCI for drug trafficking. He resided on the second floor of "F-2," a two-story dormitory that contained approximately 280 inmates (100 to 125 inmates on the first floor and 150 to 170 on the second floor). That afternoon, appellant and Caldwell fought over the trading of food. The two exchanged punches before appellant walked back to his bunk. Approximately two minutes later, Caldwell approached appellant and cut him in the face with a canned-food lid. Appellant reported the attack to Corrections Officer Nathan Pettit at the first-floor inmate desk at 3:41 p.m.

{¶4} Pettit testified that, on the day of the incident, he was assigned to work with Corrections Officer Dale Jones in F-2 from 2:00 p.m. to 10:00 p.m. One of their duties was to periodically conduct "rounds" on both floors of F-2. During each set of rounds, the officers would monitor potential conflicts between inmates. According to the log book from that day, Pettit testified that he and Jones conducted rounds at 2:14 p.m., 2:39 p.m., 3:07 p.m., and 3:31 p.m., the last set of rounds occurring ten minutes before appellant reported the attack at the inmate desk. Pettit stated that neither he nor Jones were informed during any of the rounds that appellant was in danger.

{¶5} Appellant testified that he had argued with Caldwell before and that he had notified prison officials of the potential for a fight between the two. He claimed to have sent an inmate "kite" (a form of inmate communication) to the supervisor of F-2, Sergeant Fearl Christman, on August 17, 2007, asking to be transferred because he and Caldwell "almost got into a fight." Appellant offered a photocopy of the kite into evidence as Plaintiff's Exhibit 1. The copy purported to bear Christman's signature on the back side.

{¶6} To verify the validity of Christman's signature on the kite, appellant presented expert testimony from Ray Fraley, a retired question document examiner for the Columbus Division of Police. Fraley compared the signature on the photocopied kite with several exemplars of Christman's actual signature. He found ten points of similarity between the example signatures and the signature contained on the kite, leading him to conclude that the signature on Plaintiff's Exhibit 1 belonged to Christman. Fraley could not, however, discount the possibility that Christman's signature was copied and pasted onto the kite. Fraley acknowledged that technology allows forgers to copy a signature onto a document as if the signature appeared as if it were part of the document. On redirect-examination, Fraley testified that there was no evidence that Christman's signature had been forged; however, on recross-examination, he admitted that such evidence may be difficult to detect. (Tr. Vol. II, 62.)

{¶7} Although the kite appeared to contain his signature, Christman testified that he neither received nor signed the kite presented by appellant. According to Christman, for a kite to be processed by CCI, the inmate must provide identifying information on the front side of the document, e.g., name, inmate number, and location.

On the back side, which is blank, the inmate can then present their question or concern. Once the kite is filled out, however, the inmate must obtain a signature from a staff member. The signature must be located in the "Issued By (Staff Member Signature)" box on the front of the kite. Additionally, valid kites are date-stamped "received F unit" by a staff member before they are placed in staff mailboxes. Christman pointed out that the kite presented by appellant did not contain a signature on the front of the document and was not date-stamped by a staff official. Because the kite lacked the features required for a kite to be processed by prison officials, Christman concluded that the kite was not authentic.

{¶8} After the presentation of the evidence, the magistrate rendered a decision finding that appellees were not liable for appellant's injuries. Appellant objected to the magistrate's decision, and, on March 1, 2011, the trial court overruled the objections, adopted the magistrate's decision, and entered judgment in favor of appellees.

{¶9} In a timely appeal, appellant presents five assignments of error for our consideration:

> ASSIGNMENT OF ERROR NO. 1:
>
> THE TRIAL COURT AND MAGISTRATE ERRED IN ALLOWING RAY FRALEY TO BE QUESTIONED WHETHER THE SIGNATURE COULD BE A FORGERY, CUTTING OFF HIS RESPONSE AND DISCOUNTING FRALEY'S OPINION WITHOUT CONTRADICTORY EVIDENCE.
>
> ASSIGNMENT OF ERROR NO. 2:
>
> THE TRIAL COURT AND MAGISTRATE ERRED IN SIMPLY ACCEPTING CHRISTMAN'S DENIAL OF HIS SIGNATURE ON EXHIBIT 1 BASED SOLELY ON HIS

> TESTIMONY AND IN THE FACE OF EXHIBITS 6, 7 AND 8, WHICH CORROBORATE FRALEY'S TESTIMONY.
>
> ASSIGNMENT OF ERROR NO. 3:
>
> THE TRIAL COURT AND MAGISTRATE ERRED WHEN THEY FAILED TO FAIRLY ADDRESS THE CLAIM OF NEGLIGENT SUPERVISION WHEN IT IS CLEAR THERE WAS NO SUPERVISION IN F-2, SECOND FLOOR, AND THAT THE FIRST INCIDENT WOULD HAVE PLACED BOTH INMATES IN SEGREGATION.
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> ASSIGNMENT OF ERROR NO. 4:
>
> THE TRIAL COURT AND MAGISTRATE ERRED IN FAILING TO FIND LUCERO'S KITE AS ADEQUATE NOTICE OR LACK OF SUPERVISION AS CONSTRUCTIVE NOTICE OF AN IMPENDING ASSAULT.
>
> ASSIGNMENT OF ERROR NO. 5:
>
> THE TRIAL COURT AND MAGISTRATE'S DECISIONS ARE CONTRARY TO LAW AND ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶10} Appellant's first assignment of error challenges testimony elicited during the second recross-examination of Fraley. We will not disturb a trial court's decision to admit or exclude evidence, including expert testimony, absent a clear showing that the trial court abused its discretion in a manner causing material prejudice. *Krischbaum v. Dillon* (1991), 58 Ohio St.3d 58, 66. " '[A]buse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying an abuse-of-discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169.

{¶11} Appellant argues that the trial court erred in allowing Fraley to be "questioned" about whether the signature on the kite could be a forgery. To support this argument, appellant quotes the following from Fraley's second recross-examination:

> Q. When you say there is no doubt in your mind, there is - - it could be that that signature was not Sergeant Christman's, but if it were an expert forgerer, an expert forgerer could have signed that name, Sergeant Christman's name, right?
>
> MR. SWOPE: I object. Could have doesn't do it. Everything is possible in this world.
>
> THE COURT: Overruled, Mr. Swope. You can answer the question.
>
> A. Now, do it again.
>
> Q. Yes. In terms of the signature that appears on the kite, you indicated that there are expert forgerers who are good at this, and they know how to forge signatures. Right?
>
> A. Some of them do, and some of them are very stupid.
>
> Q. Okay. But as far as you know, you cannot say that there was not an expert forgerer who forged Mr. Christman's signature. True?
>
> MR. SWOPE: I'm going to object for the record and continuing objection to this line of questioning.
>
> THE COURT: Your objection is noted, and overruled. He is making a suggestion. You don't have any evidence, do you, Mr. Walker, that there was a forgery?
>
> MR. WALKER: Well, he - -
>
> THE COURT: I understand you are asking if it is a possibility, but I don't see any foundation for that question.
>
> MR. WALKER: Well, I'm asking him in terms of he's making - - may I have a little more opportunity?
>
> THE COURT: Yes.

BY MR. WALKER:

Q. I'm just saying to you, Mr. Fraley, you don't know - - isn't it true that you do not know if an expert forgerer signed Mr. Christman's name. Isn't that true?

MR. SWOPE: I'm going to object again for the record.

THE COURT: Overruled.

A. I have no knowledge of that.

Q. That's all I'm asking you.

A. Yeah. We can suppose anything.

Q. No, I just asked you whether - - so you have no knowledge of it, right?

A. No.

Q. Because you weren't there when that signature was signed obviously. Correct?

A. That's correct. But there is no evidence of any deviation from the original - -

Q. I don't need you to explain. I just asked you a question.

THE COURT: Strike the rest of that. Mr. Fraley, you need to answer the question that's asked by Mr. Walker. It is a yes or no question.

MR. WALKER: Nothing further.

THE COURT: Thank you.

(Tr. Vol. II, 64-66.)

{¶12} Appellant claims that the above questioning required Fraley to improperly speculate that it was possible for the signature to be a forgery. We disagree. First, Fraley did not respond in terms of "possibility" during the above exchange. After

several objections, appellees' counsel asked Fraley if he could determine whether the signature was a forgery, to which Fraley responded, "I have no knowledge of that." While Fraley later volunteered, "[w]e can suppose anything," the trial court appeared to strike this testimony as unresponsive.

{¶13} Nevertheless, even if the testimony elicited during Fraley's second recross-examination amounted to error, we find no material prejudice given that Fraley had already testified about the possibility of a forgery, without objection, several times before. During his first cross-examination, Fraley testified that modern technology allows forgers to copy and paste a signature onto a document so as to make the signature appear as if it were part of the original. (Tr. Vol. II, 46.) The possibility of a forgery was then raised again—this time by *appellant's* counsel—during the first redirect-examination:

> Q. One other question I have, Mr. Walker has been talking about whether or not this *could be* a cut and paste signature. Take a look at Exhibit Number 1, which is the actual copy that was introduced into the record. Do you see any evidence that anybody pasted or attached that signature by any other means than signing it?
>
> A. There is no evidence at all.

(Tr. Vol. II, 59; emphasis added.) Appellees' counsel revisited the issue again, without objection, during Fraley's second cross-examination:

> Q. Now, also in terms of you said you saw no evidence of copying or pasting - - or, excuse me, cutting and copying or pasting the signature on to the kite, but you would agree there is a way in which that could be done where there is no trace of any evidence of it being copied, right?
>
> A. Well, how would you know if it hasn't been detected?

MR. WALKER: Precisely. Okay. No further questions.

(Tr. Vol. II, 62.)

{¶14} Thus, any error in the admission of Fraley's testimony during the second recross-examination was harmless because the same testimony was introduced earlier without objection. See, e.g., *Havenec v. Havanec*, 10th Dist. No. 08AP-465, 2008-Ohio-6966, ¶18 (finding error in the admission of testimony harmless where the same testimony had already been introduced). Accordingly, appellant's first assignment of error is overruled.

{¶15} For ease of discussion, we will address appellant's remaining assignments of error out of order. In his second, fourth, and fifth assignments of error, appellant argues that appellees had notice of an impending attack from Caldwell based on the kite that purported to bear the signature of Christman. Appellant contends that Fraley's testimony established Christman's receipt of the kite and, consequently, notice of an impending assault. Because these assignments of error challenge the weight of the evidence, we will address them together.

{¶16} "It is well-settled law that '[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.' " *Sharp v. Norfolk & W. Ry. Co.* (1995), 72 Ohio St.3d 307, 313, quoting *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. In an appeal from a bench trial, a reviewing court must presume that the factual findings of the trial judge are correct because the trial judge had an opportunity "to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the

credibility of the proffered testimony." *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. If the evidence is susceptible to more than one interpretation, we must construe it consistently with the trial court's judgment. *Cent. Motors Corp. v. Pepper Pike* (1995), 73 Ohio St.3d 581, 584.

{¶17} The elements of negligence are a duty, a breach of that duty, and injury resulting proximately therefrom. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282. In the context of the custodial relationship between the state and its prisoners, the state owes a common-law duty of reasonable care and protection from unreasonable risks. *McCoy v. Engle* (1987), 42 Ohio App.3d 204, paragraph two of the syllabus. This duty does not, however, render the ODRC an insurer of inmate safety. *Mitchell v. Ohio Dept. of Rehab. & Corr.* (1995), 107 Ohio App.3d 231, 235.

{¶18} Where one inmate attacks another inmate, actionable negligence arises only when there was adequate notice of an impending attack. *Hughes v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 09AP-1052, 2010-Ohio-4736, ¶13, citing *Mitchell* at 235. Notice may be actual or constructive, the distinction being the manner in which the notice is obtained rather than the amount of information obtained. *Hughes* at ¶14. While actual notice exists where the information was personally communicated to or received by the party, "[c]onstructive notice is that notice which the law regards as sufficient to give notice and is regarded as a substitute for actual notice." Id., citing *In re Estate of Fahle* (1950), 90 Ohio App. 195, 197.

{¶19} Here, although Fraley testified that the signature on the kite matched the signature belonging to Christman, appellees presented evidence that the kite was never signed or received by Christman. Christman testified that the kite lacked authenticity

because it was not processed through the normal channels at CCI. Unlike legitimate kites, the kite presented by appellant lacked a signature in the "Issued By (Staff Member Signature)" box on the front of the form, and it was never date-stamped "received F unit" by a staff member. According to Christman, a kite cannot be processed by CCI without these features. Christman further testified that the signature on the back of the kite did not belong to him because of the way the "t" in "Christman" was crossed on the kite.

{¶20} To the extent Christman's testimony was in conflict with the handwriting comparison described by Fraley, the trial court was in the best position to resolve any such inconsistency. See *Seasons Coal Co.* at 80. Moreover, it is unclear whether Fraley actually contradicted Christman's testimony about the kite's authenticity. The kite examined by Fraley was photocopied, and Fraley admitted being unable to determine whether Christman's signature had been copied and pasted onto the document. (Tr. Vol. II, 43-44.) Accordingly, competent, credible evidence supported the trial court's finding that appellees did not have notice that Caldwell would attack appellant. Appellant's second, fourth, and fifth assignments of error are overruled.

{¶21} We now turn to appellant's third assignment of error, which argues that the trial court "failed to fairly address" his claim that appellees were negligent in their supervision of the second floor of F-2. We disagree. The trial court found that the supervision of F-2 did not fall below the standard of care based on the testimony of Corrections Officers Pettit and Jones, who had conducted rounds only ten minutes before the attack was reported. At least one of the two checked the second floor of F-2 during the rounds conducted at 2:14 p.m., 2:39 p.m., 3:07 p.m., and 3:31 p.m. At no

point during that time did either corrections officer observe an indication that appellant was in danger. Pettit specifically testified that he and Jones supervised F-2 in accordance with the policies and procedures of CCI.

{¶22} Appellant failed to present evidence establishing that this level of supervision fell below the standard of care. Nothing in the record indicates that more corrections officers should have been on duty on the day of the attack or that CCI should have maintained uninterrupted surveillance of every inmate in F-2. As this court has stated in rejecting a similar argument, "[m]ere statements that the prison was overpopulated and understaffed do not establish negligence as to the incident at issue." *Millette v. Ohio Dept. of Rehab. & Corr.* (1997), 10th Dist. No. 97API03-302. Thus, because appellant failed to present evidence that appellees fell below the standard of care, the trial court's judgment was not against the manifest weight of the evidence.

{¶23} Accordingly, appellant's third assignment of error is overruled.

{¶24} Having overruled appellant's assignments of error, we affirm the judgment of the Court of Claims of Ohio.

Judgment affirmed.

BRYANT, P.J., and KLATT, J., concur.

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