[Cite as *Keys v. Ohio Dept. of Rehab. & Corr.*, 2004-Ohio-2751.]

IN THE COURT OF CLAIMS OF OHIO

JOHN R. KEYS :

Plaintiff : CASE NO. 2002-01594
Judge J. Warren Bettis

v. :

DECISION

DEPARTMENT OF REHABILITATION AND CORRECTION :

:

Defendant

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

{¶1} Plaintiff brought this action against defendant alleging a single claim of negligence. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} At all times relevant hereto plaintiff was an inmate at Richland Correctional Institution (RiCI), in the custody and control of defendant pursuant to R.C. 5120.16. This case arises as a result of an incident that occurred on March 15, 2000, when plaintiff was assaulted by a fellow inmate, Jeffrey Whalen. At the time, plaintiff and Whalen were working as porters, cleaning the restroom/shower area in their assigned unit. It was approximately 12:20 a.m., and all other inmates were in their bunks, "locked down"[1] for the night. Plaintiff and Whalen were alone and locked

[1] RiCI is a dormitory-style, medium-security prison. In that setting, the term "lock down" means that inmates were required to be in their bunks and not moving about the premises.

down[2] in the restroom. Each had been issued a deck broom which consisted of a rectangular brush attached to a long handle.

{¶3} Corrections Officer (CO) Casey Ladd observed part of the assault through an observation window between the restroom and the CO area. He testified that he was returning from a security round when he looked through the window, saw plaintiff stumble out of the shower area and lean over a sink; that he then observed Whalen come out of the shower area, grab the back of plaintiff's shirt and proceed to strike plaintiff about the head and neck. CO Ladd also saw plaintiff fall to the floor. He called for assistance and, when another CO arrived, the two entered the restroom and secured Whalen with handcuffs. Medical help arrived for plaintiff within a matter of minutes.

{¶4} Other than plaintiff, Whalen, and CO Ladd, there were no other witnesses to the assault. As stated, CO Ladd did not observe the entire incident. Inmate Whalen did not testify at trial. Plaintiff was unable to attend the trial because the injuries he sustained rendered him permanently quadriplegic. Consequently, plaintiff's trial testimony was presented by way of deposition.

{¶5} The incident was initially treated as an inmate altercation and both plaintiff and Whalen were charged with infractions of institution rules for participating in a fight. Several days after the occurrence, the Ohio State Highway Patrol (OSHP) was called in to investigate. Ultimately, the charge against plaintiff was not pursued. Whalen was indicted for one count of felonious assault and later pled guilty to that offense.

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[2] Here, the term is used to indicate that no other inmates could enter the restroom while plaintiff and Whalen were working.

{¶6} Plaintiff contends that defendant was negligent in supervising the inmates and in placing the two together. There is some dispute as to how many COs were on duty at the time of the assault. In any event, plaintiff maintains that RiCI was seriously overcrowded, that it was understaffed, and that it was inappropriately classified as a medium-security prison. Whalen, who was incarcerated for committing violent crimes (felonious assault, intimating a victim/witness, and aggravated burglary), was inappropriately classified as a medium-security risk. Plaintiff also argued that, by issuing Whalen a deck broom, defendant essentially gave him a dangerous "weapon" and then locked him in the restroom with plaintiff. Finally, plaintiff maintains that defendant should be held strictly liable for plaintiff's injuries.

{¶7} In order to prevail on a claim of negligence, a plaintiff must show the existence of a duty on the part of the defendant, a breach of that duty, and injury proximately resulting therefrom. *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77. Ohio law generally imposes upon the state a duty of reasonable care and protection of its prisoners. *Clemets v. Heston* (1985), 20 Ohio App.3d 132, 136. However, in cases involving an intentional attack of one inmate by another inmate, actionable negligence arises only where the state had adequate notice, either actual or constructive, of an impending attack. *Baker v. State* (1986), 28 Ohio App.3d 99.

{¶8} Here, plaintiff has raised the issue of strict liability. That concept, if applied, would preclude presentation of any legal defense or excuse, such as lack of notice. See *Sikora v. Wenzel*, 88 Ohio St.3d 493, 2000-Ohio-406, citing, 57A American Jurisprudence 2d (1989) 76-77,

Negligence, Section 19. Thus, the court will begin by addressing that argument.

{¶9} Plaintiff's strict liability theory is premised upon certain language contained in the RiCI Post Orders. Specifically, Post Order Section VI(A)(10) states that COs are responsible to "[e]nsure inmates do not act in a manner, which would jeopardize the orderly operation of the area or the institution or threaten the safety and well-being of staff, other inmates or visitors." (Plaintiff's Exhibit 9.) Plaintiff argues that the Post Orders are "the law"; that use of the word "ensure" is strict liability terminology; and that use of such language sets the standard to which defendant should be held accountable. This court disagrees.

{¶10} The Post Orders were issued in accordance with R.C. 5120.38 and Ohio Adm.Code 5120. Those code provisions delegate to defendant the authority to manage and direct all inmates and personnel and to set forth policies, procedures, and guidelines for safe and secure operation of its institutions. As such, the provisions make clear a basic principle that courts have consistently adhered to: that prison officials are the acknowledged experts in the placement and management of their prisoners. See, e.g., *Mitchell v. Ohio Dept. of Rehab. & Corr.* (1995), 107 Ohio App.3d 231. "Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgement are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish* (1979), 441 U.S. 520, 547. Accordingly, the Post Orders promulgated by RiCI do not represent the "law" of the state of Ohio in the sense asserted by plaintiff, but rather, are the policies and procedures it has adopted for its own internal regulation. This court does not interfere with decisions made in accordance with such regulations, much less will

it impose strict liability for their violation. See *Williams v. Ohio Dept. of Rehab. & Corr.* (1993), 67 Ohio Misc.2d 1; *Reynolds v. State* (1984), 14 Ohio St.3d 68.

{¶11} This court has also consistently recognized that prisons are inherently dangerous places and that, "[t]o hold the state liable for every attack upon an inmate without sufficient notice would render the state an insurer of inmates safety." *Millette v. Ohio Dept. of Rehab. & Corr.* (1996), 83 Ohio Misc.2d 44, 49. Thus, notwithstanding the language of the Post Orders, the common law of Ohio is that the state cannot insure inmates' safety. Having so found, the question becomes whether defendant had adequate notice of an impending assault upon plaintiff.

{¶12} The legal concept of notice is comprised of two distinguishable types, actual and constructive. See *In re Estate of Fahle* (1950), 90 Ohio App. 195, 197. The distinction between the two is in the manner in which notice is obtained, or assumed to have been obtained, rather than in the amount of information conveyed. Generally, information that was personally communicated to or received by a party, constitutes actual notice. Constructive notice is that which the law regards as sufficient to give notice and is regarded as a substitute for actual notice or knowledge. Id. The evidence presented in this case fails to establish adequate notice as to either variety.

{¶13} Plaintiff's own testimony reveals that he and Whalen had worked together before the night of the assault; that there had never been any problems between the two; that plaintiff had never expressed a fear of Whalen or requested protective custody to keep him separate from Whalen; and that plaintiff simply had no idea why Whalen had attacked him. The testimony of COs Ladd and Jason

Williams, who was also on duty on the night of the assault, corroborates that of plaintiff. Both COs stated they had no knowledge of any prior problems or physical altercations between plaintiff and Whalen. CO Williams also stated that no other CO had ever communicated any such problems to him regarding these two inmates. Thus, actual notice was clearly lacking.

{¶14} With respect to constructive notice, plaintiff maintains that defendant knew or should have known that conditions at RiCI were such that this incident was reasonably certain to occur. For example, plaintiff argues that the cumulative effect of overcrowding, understaffing, misclassification of Whalen's security status, and misclassification of the institution itself were enough to constitute constructive notice. Both parties presented expert testimony on these matters.

{¶15} Plaintiff presented the expert testimony of Gordan Kampa, a criminal justice consultant with more than 30 years of experience. Defendant's expert, James Ricketts, Ph.D., was a correctional consultant with experience in both medium and maximum-security facilities, as well as service as an auditor determining whether such facilities met accreditation standards. Upon review of the testimony of these witnesses, and to the extent that such evidence

{¶16} was either relevant or probative under the facts of this case, the court finds that plaintiff's expert was not persuasive.

{¶17} Mr. Kampa opined that RiCI was fashioned in the manner of a minimum-security facility. According to Kampa, "[t]he designation of medium security use for a minimum security, dormitory setting is usually a direct response to population

pressures (prison overcrowding)." In his opinion, RiCI was seriously overcrowded. He further testified that contributing factors to the incident were the lack of audio and/or video surveillance equipment that would have allowed the assigned COs to see and hear inmate activity while the COs were accomplishing other tasks. In addition, he noted that fans that were in use in the CO area would have further inhibited the ability to hear what was occurring in the dormitories or restroom. Mr. Kampa was also sharply critical of the fact that neither CO on duty had been closely observing the activity in the restroom on the night of the assault and neither heard or observed the initial outbreak of violence.

{¶18} Despite Mr. Kampa's opinions on these matters, he admitted on cross-examination that physical altercations can, and do, occur between inmates even in uncrowded, well-run, celled facilities, that are equipped with audio and visual systems. He admitted altercations can begin so quickly that they cannot be prevented regardless of what conditions existed. Mr. Kampa also acknowledged that he was not aware of any statutory provision, administrative, departmental or Post-Order rule, or any accreditation standard, that was violated with respect to any of the conditions he criticized. He also was unable to testify as to whether the fans he referred to were in use on the date of the assault. In short, none of this testimony outweighed the testimony of defendant's expert, all of which was to the contrary.

{¶19} With respect to the argument that notice should be implied because of Whalen's criminal history, the court has previously addressed that issue in connection with the strict liability arguments. Nevertheless, the court will reiterate that

classification of prisoners and their placement within an institution are administrative decisions that are due great deference. *Bell v. Wolfish*, supra. The court finds nothing in the evidence here to suggest that Whalen's history was such that defendant's decision regarding his placement was an abuse of its discretion. Therefore, plaintiff has failed to demonstrate constructive notice.

{¶20} For these reasons, the court concludes that defendant did not have adequate notice that the assault would occur and, accordingly, it did not breach its duty of care to protect plaintiff. As such, plaintiff has failed to prove his claims by a preponderance of the evidence and judgment shall be rendered in favor of defendant.

{¶21} On another matter, plaintiff filed a motion shortly before the date of trial seeking reconsideration of this court's entry granting defendant's second motion for leave to amend its answer. At issue was the fact that defendant's first two answers stated that there was only one guard on duty, in charge of 240 inmates, on the night of the assault. Both plaintiff's and defendant's experts agreed that such ratio of COs to inmates would not meet accepted institutional practices. However, the testimony and documentary evidence made it abundantly clear that there were always two COs on duty and that a simple error had been made in identifying the location of the officers. Thus, the court is not persuaded that such information came as a surprise to plaintiff's counsel. Moreover, in light of the instant decision, it is the court's opinion that lack of the information was not prejudicial to plaintiff's case. Thus, the court concludes that its ruling was not in error. The motion for reconsideration is, therefore,

DENIED. Additionally, plaintiff's motion in opposition to a change in situs is hereby DENIED as moot

{¶22} This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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J. WARREN BETTIS
Judge

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