

{¶3} Inmates were escorted to the physician in full restraints. The restraints were removed during the physician's examination. Afterward, CMC officers put handcuffs on the inmates. Upon returning to the holding cell, inmates were to be placed back in full restraints by the transport officers from the parent institution prior to their return trip. Several officers testified that this usually occurred when they were "not busy."

{¶4} Prior to the assault, Swank had been brought to CMC in full restraints, examined, and was awaiting transfer back to his parent institution. He was placed in handcuffs, and then returned to the holding cell, but he had not yet been placed back in full restraints by the transport officers. After the decedent was placed in the holding cell, Swank attacked. On that day, there were 90 inmates at CMC and approximately 50 to 60 corrections officers (COs). CO Peggy Stapleton was the first to discover the assault in progress, at which point she called for help and pulled the "man down" alarm. Soon thereafter, CO Dale Rouff responded; approximately five other officers arrived within seconds. Swank was immediately restrained by the officers and then removed to a maximum security holding cell. The decedent was taken to receive medical attention.

{¶5} In order for plaintiff to prevail on a claim of negligence, she must prove by a preponderance of the evidence that defendant owed a duty to the decedent, that it breached that duty, and that the breach proximately caused the decedent's injuries. *Strother v. Hutchinson* (1991), 67 Ohio St.2d 282, 285. 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, at 136. However, the state is not an insurer of inmate safety. See *Williams v. Ohio Dept. of Rehab. & Corr* (1991), 61 Ohio Misc.2d 699, at 702. Accordingly, the issue before the court is whether defendant breached its duty of reasonable care under the circumstances of this case.

{¶6} The law is well-settled in Ohio that the state is not liable for the intentional attack on one inmate by another unless there is actual or constructive notice of an impending assault. See *Baker v. State* (1986), 28 Ohio App.3d 99; *Williams v. S. Ohio Corr. Facility* (1990), 67 Ohio App.3d 517; *Belcher v. Ohio Dept. of Rehab. & Corr.* (1991), 61 Ohio Misc.2d 696.

{¶7} “The distinction between actual and constructive notice has long been recognized. The distinction is in the manner in which notice is obtained or assumed to have been obtained rather than in the amount of information obtained. Wherever, from competent evidence, either direct or circumstantial, the trier of the facts is entitled to hold as a conclusion of fact and not as a presumption of law that the information was personally communicated to or received by the party, the notice is actual. On the other hand, constructive notice is that which the law regards as sufficient to give notice and is regarded as a substitute for actual notice or knowledge.” *In re Estate of Fahle* (1950), 90 Ohio App. 195, 197.

{¶8} None of the officers who were called as witnesses in this case testified that they were aware of any problem between the two inmates. There was no testimony or evidence introduced that would have required that Swank be placed in the maximum security holding cell instead of the minimum/medium security holding cell. While some testimony was offered that showed Swank previously had a few disciplinary issues, there was nothing to indicate that Swank was prone to attacking fellow inmates; that he had a reason to attack the decedent; or that he would do so on the day in question.

{¶9} Plaintiff has not alleged that any specific threats were made against the decedent by Swank. There was no evidence or testimony offered regarding previous encounters between Swank and the decedent prior to the day of the assault.

{¶10} Based upon the totality of the evidence, the court concludes that plaintiff failed to prove by a preponderance of the evidence that defendant had actual or constructive notice of an impending assault by another inmate on the decedent.

{¶11} Plaintiff also contends that defendant was negligent in failing to place Swank back in full restraints prior to returning him to the holding cell. At the time of the incident, Swank was classified as a medium security inmate. Policy at the time of the assault was that inmates could be in the holding cell without full restraints. Plaintiff has offered no evidence that this policy was unreasonable. In fact, CO Ernest Jones, a CO with 22½ years of experience, testified that he did not know of any prior incident where an inmate not in full restraints had attacked another inmate in a

holding cell. Notwithstanding the fact that the policy regarding restraints was changed after the incident at issue herein, the court finds that the former policy was reasonable.

{¶12} In short, plaintiff has failed to prove any negligence on the part of defendant. Accordingly, judgment in favor of defendant is recommended.

{¶13} *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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