[Cite as *Hamilton v. Dayton Correctional Inst.*, 2006-Ohio-2543.]

IN THE COURT OF CLAIMS OF OHIO

www.cco.state.oh.us

RICHARD HAMILTON, JR.	:	
Plaintiff	:	CASE NO. 2003-02985 Judge J. Craig Wright
v.	:	DECISION
DAYTON CORRECTIONAL INSTITUTE, et al.	:	
Defendants/Third-Party Plaintiffs	:	
v.	:	
MISSION SYSTEMS, INC.	:	
Third-Party Defendant	:	

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

{¶ 1} Plaintiff brought this action against defendants/third-party plaintiffs alleging a claim of negligence by an employee of Dayton Correctional Institute (DCI). Defendants/third-party plaintiffs subsequently filed a complaint against third-party defendant, Mission Systems, Inc. (MSI), for contribution and indemnification. MSI countersued defendants/third-party plaintiffs for breach of contract. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶ 2} At all times relevant to this action, plaintiff was an inmate in the custody and control of DCI pursuant to R.C. 5120.16. Plaintiff alleges that on March 6, 2001, he was assigned to repair the ice machine located in the maintenance garage at DCI. According to plaintiff he was injured while he was performing the repairs when he was struck in the back by a six-wheeled vehicle called a "gator"

operated by Lawrence Stewart. DCI maintains that Stewart was not its employee, but that he was a temporary employee supplied to DCI by MSI. In addition, DCI alleges that the contract for temporary services with MSI included an indemnification clause whereby MSI agreed to indemnify DCI for any damages or injuries caused by MSI's employees.

{¶ 3} The crux of MSI's position is that the contract also required DCI to provide automobile insurance coverage for any temporary worker who would be operating a vehicle while on the job, that DCI failed to provide an endorsement for Stewart in its policy, and that DCI breached the contract by failing to do so. At trial, MSI argued that DCI failed to properly instruct Stewart on how to operate a gator. MSI also argued, conversely, that Stewart was an employee of DCI.

{¶ 4} Plaintiff filed this case on March 4, 2003. During discovery, plaintiff learned that DCI alleged that Stewart was a temporary employee supplied by MSI. Plaintiff then filed suit against MSI in Montgomery County; however, plaintiff's case was dismissed by the court because the complaint was filed outside the applicable statute of limitations. No appeal was taken from that judgment.

{¶ 5} It is undisputed that on March 6, 2001, plaintiff was assigned to repair the ice machine located in the maintenance garage at DCI. While plaintiff was making the repairs, he was being supervised by Nicholson Parchment, an employee of DCI responsible for maintenance and repair of heating and ventilation systems. Parchment testified that, although he was nearby, he did not see the accident and that he responded to the scene only after he heard a commotion. Plaintiff testified that the gator was stored in the maintenance building, that the gator was driven in and out of the

building all day long, and that he did not see or hear the gator approach as he worked on the ice machine. Plaintiff explained that in order to reach the internal components, he had to kneel facing the ice machine and reach both of his arms up into the machine. According to plaintiff, Stewart drove the gator into his mid-back area "really hard," such that he was pinned between the gator and the machine for several seconds. Plaintiff testified that he yelled at Stewart but that Stewart responded by laughing at him. Although he decided initially against going to the infirmary, plaintiff recalled that the pain in his back intensified over the next hour and he decided to seek medical treatment.

{¶ 6} This court has ruled that "inmates working in the correctional institution in which they are incarcerated are not employees of the state of Ohio. *** This, however, merely means that plaintiff is not entitled to some of the protections and benefits pronounced in the Ohio Revised Code, such as workers' compensation. *** Nevertheless, inmates who are injured while working in a prison shop or industry may have a cause of action in negligence." *Watkins v. Department of Rehab. and Corr.*(1988), 61 Ohio Misc.2d 295, 298. (Internal citations omitted.) Specifically, this court has held that "[a]n injured prisoner seeking damages must prove that the negligence of responsible officials, or agents, of the state of Ohio is the proximate cause of his injury." *Fondern v. Dept. of Rehab. & Corr.* (1977), 51 Ohio App.2d 180, 183 citing *Watson v. Dept. of Rehab. & Corr.* (Mar. 16, 1976), Court of Claims No. 75-0204.

{¶ 7} 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. *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. "Where an inmate also performs labor for the state, the state's duty must be defined in the context of those additional factors which characterize the particular work performed." *McElfresh v. Ohio Dep't of Rehab. & Corr.*, Franklin App. No. 04AP-177, 2004-Ohio-5545, citing *McCoy v. Engle* (1987), 42 Ohio App.3d 204, 208. Further, the Tenth District Court of Appeals noted that the state may "be liable for damages when safe and adequate means are not provided to an inmate to carry out a direct order." *Keil v. Dept. of Rehab. & Corr.* (1989), 57 Ohio Misc.2d 40.

{¶ 8} DCI argues, and this court agrees, that Stewart was not an employee of DCI at the time of the accident. According to the testimony of Mohindar Rajmohan, president and owner of MSI, the purpose of the contract between DCI and MSI was to enlist the services of an agency in order that such agency would supply temporary personnel to DCI. The contract specifically defined the term "Qualified Temporary Personnel" as "those individuals *employed by the contractor* who meet the minimum specifications" described in the contract. (DCI's Exhibit 1.) (Emphasis added.) According to testimony elicited at trial, DCI communicated to MSI its need for a laborer and MSI sent Stewart. The contract lists the minimum qualifications for a laborer as one who has the ability to use simple mathematics, to write legibly, to lift or move up to 100 pounds, and to have knowledge of safety requirements and procedures. The tasks include such general labor as shoveling snow, mowing grass, and hauling trash. Rajmohan admitted that MSI hired Stewart, paid him wages, remitted social security and workers' compensation payments on his behalf, and withheld requisite federal, state, and local payroll taxes. The evidence also established that Stewart was

not entitled to participate in any state employee union, retirement system or benefits program. Thus, the court finds that pursuant to the contract, Stewart qualifies as an employee of MSI and not DCI.

{¶ 9} In addition, the court finds that Stewart does not meet the statutory definition of a state employee. Pursuant to R.C. 2743.02 if plaintiff can prove that "an officer or employee, as defined in section 109.36 of the Revised Code, would have personal liability for his acts or omissions but for the fact that the officer or employee has personal immunity under section 9.86 of the Revised Code, the state shall be held liable in the court of claims in any action that is timely filed."

{¶ 10} R.C. 109.36 states as follows: "'Officer or employee' means any person who, at the time a cause of action against the person arises, is serving in an elected or appointed office or position with the state or is employed by the state or any person that, at the time a cause of action against the person, partnership, or corporation arises, is rendering medical, nursing, dental, podiatric, optometric, physical therapeutic, psychiatric, or psychological services pursuant to a personal services contract or purchased service contract with a department, agency, or institution of the state."

{¶ 11} Stewart did not have a personal services contract with the state. He performed his duties pursuant to a contract between his employer and DCI. Although Stewart performed pursuant to a purchased services contract, he was not rendering medical care and thus he does not qualify under the statute as a state employee. Since Stewart does not qualify as a state employee, this court finds that DCI is not liable to plaintiff for Stewart's negligent acts under a theory of respondeat superior. See *Ballengee v. Ohio Dept. of Rehab & Corr.* (1996), 79 Ohio Misc.2d 69, *Hughes v. Ohio Dept. of*

Rehab. & Corr., 2005-Ohio-4462, Court of Claims No. 2004-08120, (liability will not be imposed upon the department of rehabilitation and corrections for any negligence on the part of its contractor's employees).

{¶ 12} The court further finds that there was insufficient evidence produced at trial to show that defendant's employee, Nicholson Parchment, negligently supervised plaintiff or that he failed to provide a safe working environment for plaintiff. Plaintiff testified that he was provided access to tools and materials that were needed to effect repairs. Moreover, plaintiff stated that he was qualified to perform such repairs, that he had done so numerous times in the past, and that he had never found it necessary to arrange safety cones or warning signs around the area. Plaintiff referenced an employment history pre-incarceration which spanned approximately ten years in the heating and cooling industry. The court finds that plaintiff was provided with safe working conditions and that DCI did not create an unreasonable risk of harm to plaintiff while he was performing the repairs assigned to him.

{¶ 13} Rather, the court finds that the sole cause of plaintiff's injury was the negligent operation of the gator by Stewart. The photographs of the area around the ice machine depict ample room to maneuver a vehicle such as a gator within the confines of the maintenance garage without encroaching on the area directly in front of the ice machine. (Plaintiff's Exhibits 4, 5, 6, and 8.) The court notes that plaintiff was working in a location that was not in the direct path of pedestrian or motorized traffic. Upon review, the court finds that DCI is not liable to plaintiff for the injuries he suffered on the basis of any alleged negligent supervision by defendant.

{¶ 14} At trial, Rajmohan asserted that DCI was negligent for allowing Stewart to operate a gator. "Liability for negligent entrustment arises 'from the act of entrustment of the motor vehicle, with permission to operate the same, to one whose incompetency, inexperience or recklessness is known or should have been known by the owner.'" *Dowe v. Dawkins* (Dec. 23, 1993), Franklin App. No. 93AP-860, citing *Williamson v. Eclipse Motor Lines, Inc.* (1945), 145 Ohio St. 467, paragraph two of the syllabus.

The court finds that neither MSI nor plaintiff presented any evidence that Stewart was incompetent or inexperienced, or that DCI knew or should have known that Stewart was not qualified to drive a gator. Indeed, a maintenance repair worker employed by DCI, Wendell Williams, testified that he had worked with Stewart for approximately six months prior to the incident, that he had seen Stewart operate a gator, and that he had never before seen an accident involving the operation of a gator. Parchment also testified that he had observed Stewart operate the gator on prior occasions without incident. Rajmohan maintained that DCI did not notify MSI that Stewart would be operating a motorized vehicle while working at DCI. However, the court notes that the contract lists tasks to be performed by a laborer which include hauling trash and operating lift trucks. In addition, the contract states that laborers are expected to be proficient in using equipment such as lift trucks and mowers. Upon review, the court finds that MSI presented insufficient evidence for the court to find that DCI was negligent in allowing Stewart to drive the gator.

{¶ 15} Having found that DCI is not liable to plaintiff for his injuries, the court need not address DCI's claims for indemnity and contribution against MSI and those claims shall be dismissed.

{¶ 16} MSI has asserted a claim for breach of contract against DCI. MSI argues that DCI was required, by contract, to have Stewart added to its automobile insurance policy for coverage in the event of an accident while he operated a motor vehicle. DCI argued, conversely, that MSI was required to obtain liability insurance to cover any negligent acts of its employees and that MSI was required to hold DCI harmless from any and all claims. In this case, the court has reviewed the contract in its entirety and accordingly concludes that neither party's performance is predicated on the completion of the other promise. Indeed, promises in a bilateral contract should be construed as concurrent and mutually dependent, "rather than one promise as a condition precedent to the other." *Kaufman v. Byers,* 159 Ohio App.3d 238, 2004-Ohio-6346. Moreover, the court finds that the contract contains language — under the heading, Special Instructions to Bidders — that states MSI's duty to carry public liability insurance supercedes DCI's duty to endorse a temporary service employee to the insurance policy for operators of state-owned vehicles. (DCI's Exhibit 1, Page 32.) For the foregoing reasons, the court finds that although DCI admittedly failed to provide an endorsement for Stewart under its insurance policy, such lapse did not constitute a failure of a condition precedent.

{¶ 17} The court concludes that MSI has incurred no compensable damages as a result of the alleged breach of contract, inasmuch as DCI is not liable to plaintiff for his injuries and plaintiff's complaint against MSI was dismissed. In addition, Rajmohan testified that MSI had not incurred any attorney fees to defend the action filed against MSI. Accordingly, judgment shall be rendered in favor of DCI on MSI's counterclaim.

IN THE COURT OF CLAIMS OF OHIO
www.cco.state.oh.us

RICHARD HAMILTON, JR.	:	
Plaintiff	:	CASE NO. 2003-02985 Judge J. Craig Wright
v.	:	
		JUDGMENT ENTRY
DAYTON CORRECTIONAL INSTITUTE, et al.	:	
	:	
Defendants/Third-Party Plaintiffs	:	
v.	:	
MISSION SYSTEMS, INC.	:	
Third-Party Defendant	:	

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

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 defendants/third-party plaintiffs as to plaintiff's complaint and accordingly, defendants/third-party plaintiffs' third-party complaint for indemnification and contribution is DISMISSED. Judgment is rendered in favor of defendants/third-party plaintiffs as to MSI's counterclaim for breach of contract. 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.

_____
J. CRAIG WRIGHT
Judge

Entry cc:

James R. Geisenfeld 440 South Main Street P.O. Box 40 Englewood, Ohio 45322	Attorneys for Plaintiff
R. Casey Daganhardt 3946 Kettering Blvd. Dayton, Ohio 45439	
Peter E. DeMarco Assistant Attorney General 150 East Gay Street, 23rd Floor Columbus, Ohio 43215-3130	Attorney for Defendants/ Third-Party Plaintiffs
Steven F. Stofel 130 West Second Street Suite 1850 Dayton, Ohio 45402-1502	Attorney for Third-Party Defendant

SJM/cmd
Filed April 17, 2006
To S.C. reporter May 23, 2006