[Cite as *Stubbs v. Dept. of Rehab. & Corr.*, 2019-Ohio-3694.]

JASON L. STUBBS Plaintiff v. DEPARTMENT OF REHABILITATION AND CORRECTION Defendant	Case No. 2018-01237JD Judge Patrick M. McGrath Magistrate Gary Peterson ENTRY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

{¶1} On June 14, 2019, defendant filed a motion pursuant to Civ.R. 56(B) for summary judgment. On July 10, 2019, plaintiff filed miscellaneous documents with the court that may or may not be related to the pending motion for summary judgment. Nevertheless, there is no certificate of service indicating that it was served upon opposing counsel as required by Civ.R. 5. "Documents filed with the court shall not be considered until proof of service is endorsed thereon or separately filed." Civ.R. 5(B)(4). Plaintiff's documents will not be considered. The motion is now before the court for a non-oral hearing pursuant to L.C.C.R. 4(D).

{¶2} Civ.R. 56(C) states, in part, as follows:

{¶3} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." *See also*

Gilbert v. Summit Cty., 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc*., 50 Ohio St.2d 317 (1977).

{¶4} According to the complaint, plaintiff is an inmate in the custody and control of defendant. Plaintiff alleges that on or about March 19 or 20, 2018, he was sexually assaulted while in defendant's custody in the segregation unit at the Warren Correctional Institution (WCI). Plaintiff does not identify the assailant, but it is presumably an inmate. Plaintiff claims that defendant failed to protect him from harm.

{¶5} "To prevail on a negligence claim, a plaintiff must establish the existence of a duty, a breach of the duty, and an injury resulting proximately therefrom." *Fraley v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 18AP-731, 2019-Ohio-2804, ¶ 11. "In the context of a custodial relationship between the state and its prisoners, the state owes a common-law duty of reasonable care and protection from unreasonable risks." *Jenkins v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 12AP-787, 2013-Ohio-5106, ¶ 8. "The state's duty of reasonable care, however, does not render it an insurer of inmate safety." *Pate v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 18AP-142, 2019-Ohio-949, ¶ 11. "'Reasonable care is that degree of caution and foresight an ordinarily prudent person would employ in similar circumstances.'" *Literal v. Dept. of Rehab. & Corr.*, 2016-Ohio-8536, 79 N.E.3d 1267, ¶ 15 (10th Dist.), quoting *McElfresh v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 04AP-177, 2004-Ohio-5545, ¶ 16.

{¶6} "'The law is well-settled in Ohio that ODRC is not liable for the intentional attack of one inmate by another, unless ODRC has adequate notice of an impending assault.'" *Williams v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 18AP-720, 2019-Ohio-2194, ¶ 18, quoting *Watson v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 11AP-606, 2012-Ohio-1017, ¶ 9; *Literal* at ¶ 16; *Pate* at ¶ 12. "Notice may be actual or constructive, the distinction being the manner in which the notice is obtained rather than the amount of information obtained." *Lucero v. Ohio Dept. of*

Rehab. & Corr., 10th Dist. Franklin No. 11AP-288, 2011-Ohio-6388, ¶ 18. "Whenever the trier of fact is entitled to find from competent evidence that information was personally communicated to or received by the party, the notice is actual. Constructive notice is that notice which the law regards as sufficient to give notice and is regarded as a substitute for actual notice." *Hughes v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 09AP-1052, 2010-Ohio-4736, ¶ 14.

{¶7} Defendant argues in its motion that it had no actual or constructive notice of an impending attack upon plaintiff. In support of its motion, defendant submitted the affidavits of David Agee and Anita Eulenburg. Agee, the interim institutional inspector at WCI, avers that on March 23, 2018, plaintiff was transferred to the Southern Ohio Correctional Facility (SOCF), and that upon his arrival, he reported to staff members that he had been sexually assaulted by his former cellmate Faudree on March 19 and 20, 2018, while he was incarcerated at WCI. Agee states that he has access to inmates' records, including kite logs and grievances, and that after reviewing plaintiff's file, he concluded that plaintiff did not alert anyone at WCI of an impending sexual assault by inmate Faudree. Agee adds that there is no separation order on the two inmates and that the first time anyone learned about the attack was on March 23, 2018. Finally, Agee states that after reviewing Faudree's inmate disciplinary history, he concluded that Faudree has never been written up or found guilty of sexual assault of another inmate.

{¶8} Eulenburg, the Prison Rape Elimination Act (PREA) coordinator at WCI, avers that she ensures that WCI educates inmates on the several ways to report that they feel susceptible to sexual assault or have been raped. Eulenburg states that during institutional orientation, she informs inmates about the numerous ways they can notify staff members if they feel susceptible to a sexual assault or rape. Inmates can submit a kite; call a toll-free number, which is listed in every unit; verbally tell a staff member; have a person from outside of the prison contact defendant; or write a letter to

the Chief Inspector's Office. Eulenburg adds that plaintiff has previously used the PREA hotline to report an unrelated matter thus demonstrating his awareness of the various reporting channels. Eulenburg provides that once it is brought to defendant's attention, the inmates are immediately separated and the matter is investigated. Eulenburg reviewed her records and concluded that plaintiff did not use any available channel to alert defendant of an impending sexual assault by inmate Faudree.

{¶9} As stated previously, while plaintiff filed documents after defendant's motion for summary judgment was filed, he did not serve those documents on defendant and thus they cannot be considered. Civ.R. 5(B)(4). Nevertheless, even if the court waived the service requirements, the documents are unauthenticated and are not of the type identified in Civ.R. 56(C). Furthermore, the documents do not support any conclusion that defendant had actual or constructive notice of an impending attack. As a result, the evidence submitted by defendant is unrebutted. Civ.R. 56(E) provides: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party."

{¶10} Upon review, it can only be concluded that defendant did not have any notice, actual or constructive, of an impending sexual assault on plaintiff. Indeed, there is no dispute that plaintiff first reported the sexual assault after he was transferred to SOCF on March 23, 2018. Plaintiff did not use any of the methods established by defendant to notify staff of an impending sexual assault. It is clear that plaintiff was aware of the several ways in which he could report an impending attack inasmuch as he previously used the PREA hotline to report an unrelated matter. Nevertheless, there is no dispute that he first reported the attack three days after it occurred. Furthermore, there is nothing in the assailant's inmate history to suggest that defendant should have

known of an impending attack and there is no history of incidents between the two inmates. In short, there is no dispute that defendant did not have actual or constructive notice of an impending attack.

{¶11} Based upon the foregoing, the court concludes that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law. Defendant's motion for summary judgment is GRANTED and judgment is hereby rendered in favor of defendant. All previously scheduled events are VACATED. 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.

PATRICK M. MCGRATH
Judge

Filed August 21, 2019
Sent to S.C. Reporter 9/13/19