

[Cite as *Fhiaras v. Ohio Dept. of Rehab. & Corr.*, 2021-Ohio-1527.]

GEORGE FHIARAS

Plaintiff

v.

OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION

Defendant

Case No. 2019-00823JD

Magistrate Scott Sheets

DECISION OF THE MAGISTRATE

{¶1} Plaintiff is an inmate in defendant's custody who, during the time relevant to this complaint, resided at defendant's Warren Correctional Institution (WCI) in Lebanon, Ohio. Plaintiff seeks money damages for unspecified injuries he alleges were sustained when another inmate attacked him in the WCI dayroom on July 5, 2019. The case proceeded to trial via Zoom videoconference. Plaintiff testified on his own behalf and counsel for defendant cross examined plaintiff. Plaintiff offered no other evidence in support of his claims. At the close of plaintiff's testimony, counsel for defendant moved for dismissal pursuant to Civ.R. 41(B)(2). Defendant's motion was taken under advisement. The magistrate finds that, based upon the facts and the law, plaintiff failed to demonstrate a right to relief. Accordingly, for the reasons discussed below the magistrate recommends that defendant's motion for dismissal pursuant to Civ.R. 41(B)(2) be granted.

Findings of Fact

{¶2} Plaintiff testified that, in June of 2019, he began sharing a cell with another inmate who he believed was a member of the Heartless Felons gang. According to plaintiff, he felt that defendant housed him with this inmate in retaliation for him having filed previous lawsuits. Plaintiff did not recall his cellmate's name and only revealed that the inmate smoked unknown drugs in the cell, which plaintiff did not like. Plaintiff testified that he would cover his face and would keep the window open to avoid inhaling

the drugs. At an unspecified time, plaintiff requested that he be moved based upon his cellmate's drug use and plaintiff's belief that there would be a problem between the two of them, but his request was denied. Thereafter, in July of 2019, plaintiff was in the dayroom when he was attacked from behind by another unknown inmate. According to plaintiff, he believed this inmate was hired by his cellmate to ensure plaintiff was removed from the cell. However, plaintiff did not know his attacker and had no previous history with this inmate. Defendant had no notice that plaintiff would be assaulted. Plaintiff suffered no injuries as a result of the attack.

{¶3} Plaintiff did not testify to any of his injuries and presented no evidence other than his own testimony regarding the incident. He presented no corroborating evidence in support of his opinion that his cell mate was responsible for the attack by a different inmate. Plaintiff also never testified that he, at any point, notified defendant's staff that he feared an attack upon his person by his cellmate or the unknown inmate in the dayroom. In addition to his failure to identify both his cellmate and his attacker, plaintiff did not testify that either threatened him. In fact, he testified he did not know the inmate who attacked him.

{¶4} To meet his burden at trial, plaintiff needed to prove his claims by a preponderance of the evidence. As stated in *Brothers v. Morrone-O'Keefe Dev. Co., LLC*, 10th Dist. No. 06AP-713, 2007 Ohio 1942, 2007 Ohio App. Lexis 1762, ¶ 49: "[a] preponderance of the evidence is 'the greater weight of the evidence * * * [it] means evidence that is more probable, more persuasive, or of greater probative value.'"

{¶5} "To establish negligence, a plaintiff must show the existence of a duty, a breach of that duty, and injury resulting proximately therefrom." *Taylor v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 11AP-1156, 2012-Ohio-4792, ¶ 15. "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, however, is not an insurer of inmate safety and owes the duty of ordinary care only to inmates who are foreseeably at risk.” *Franks v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 12AP-442, 2013-Ohio-1519, ¶ 17. “Reasonable care is that degree of caution and foresight an ordinarily prudent person would employ in similar circumstances, and includes the duty to exercise reasonable care to prevent an inmate from being injured by a dangerous condition about which the state knows or should know.” *McElfresh v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 04AP-177, 2004-Ohio-5545, ¶ 16.

{¶6} “When one inmate attacks another inmate, ‘actionable negligence arises only where prison officials had adequate notice of an impending attack.’” *Skorvanek v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 17AP-222, 2018-Ohio-3870, ¶ 29, citing *Metcalf v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 01AP-292, 2002-Ohio-5082, ¶ 11. “Whether ODRC had or did not have notice is a question that depends on all the factual circumstances involved.” *Pate v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 18AP-142, 2019-Ohio-949, ¶ 12, quoting *Frash v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 14AP-932, 2016-Ohio-3134, ¶ 11.

{¶7} “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.

{¶8} Civ.R. 41(B)(2) provides:

After the plaintiff, in an action tried by the court without a jury, has completed the presentation of the plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Civ.R. 52 if requested to do so by any party.

Furthermore, as stated in *Jarupan v. Hanna*,

Civ.R. 41(B)(2) allows a trial court to determine the facts by weighing the evidence and resolving any conflicts therein. If, after evaluating the evidence, a trial court finds that the plaintiff has failed to meet her burden of proof, then the trial court may enter judgment in the defendant's favor. Therefore, even if the plaintiff has presented evidence on each element of her claims, a trial court may still order a dismissal if it finds that the plaintiff's evidence is not persuasive or credible enough to satisfy her burden of proof. An appellate court will not overturn a Civ.R. 41(B)(2) involuntary dismissal unless it is contrary to law or against the manifest weight of the evidence.

Jarupan v. Hanna, 173 Ohio App.3d 284, 2007-Ohio-5081, 878 N.E.2d 66, ¶ 9 (10th Dist.).

{¶9} The evidence presented by plaintiff at trial established that he was housed with an unknown inmate that he believed was a member of the Heartless Felons gang organization. It was plaintiff's opinion that defendant housed him with this inmate in retaliation, but plaintiff provided no corroborating evidence to support his contention. At

some point, plaintiff was attacked by another unnamed inmate in the day room. It was plaintiff's opinion that this unnamed inmate was hired by his cellmate to ensure plaintiff was removed from the cell. However, plaintiff provided no evidence other than his own uncorroborated statements that this unnamed attacker was in any way connected with plaintiff's cellmate. Furthermore, plaintiff presented no evidence that he notified any of defendant's employees that he was in fear of an impending attack from his cellmate or the unidentified inmate who attacked him. *See Watson v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 11AP-606, 2012-Ohio-1017, ¶ 9 ("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."). Plaintiff also never testified that his cellmate ever threatened him or that his cellmate indicated to him that he solicited or would solicit another inmate to attack him. Likewise, plaintiff offered no evidence regarding any previous history with the inmate who did attack him.

{¶10} The magistrate finds that plaintiff's theory that his cellmate hired and or encouraged his attacker to assault him is not credible as plaintiff provided no corroborating evidentiary support for this theory and failed to provide sufficient detail for the magistrate to conclude otherwise. In addition, plaintiff presented no evidence at all establishing that defendant had notice regarding the eventual assault, regardless of the motivation behind it. Finally, plaintiff offered no evidence establishing injuries.

{¶11} Based upon the foregoing, the magistrate finds that plaintiff failed to satisfy his burden of proof to establish that defendant had notice of an impending assault and/or that defendant breached its duty of reasonable care. Therefore, the magistrate recommends that defendant's motion to dismiss pursuant to Civ.R. 41(B)(2) be granted, and judgment is recommended in favor of defendant.

{¶12} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files*

objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).

SCOTT SHEETS
Magistrate

Filed March 15, 2021
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