[Cite as *Hairston v. Ohio Dept. of Rehab. & Corr.*, 2022-Ohio-3381.]

RICO ISAIH HAIRSTON Plaintiff v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION Defendant	Case No. 2021-00567JD Judge Patrick E. Sheeran Magistrate Gary Peterson ENTRY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

{¶1} On June 7 and 8, 2022, defendant filed two motions for summary judgment pursuant to Civ.R. 56(B).[1] On June 13, 2022, plaintiff filed a combined memorandum in opposition and cross-motion for partial summary judgment pursuant to Civ.R. 56(A). Neither party filed any additional memoranda. The motions for summary judgment are now before the court for a non-oral hearing pursuant to Civ.R. 56 and L.C.C.R. 4(D). For the reasons that follow, defendant's motions for summary judgment are granted and plaintiff's motion for summary judgment is denied.

{¶2} Motions for summary judgment are reviewed under the standard set forth in Civ.R. 56(C), which states, in part:

> 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 summary 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

[1] It appears that the motions and attachments thereto are nearly identical with the exception of labels on the exhibits.

> 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.

"[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of material fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). To meet this initial burden, the moving party must be able to point to evidentiary materials of the type listed in Civ.R. 56(C). *Id*. at 292-293.

{¶3} According to the complaint, at all times relevant, plaintiff was an inmate in the custody and control of defendant at the Ohio State Penitentiary (OSP). Complaint, ¶ 2. On or about October 4, 2021, plaintiff requested that his family search for the ingredients of "coolaid," which is a drink packet provided to the inmates on a daily basis. *Id*. at ¶ 7. Plaintiff began suffering seizures, "body locks," and other uncontrollable shaking after consuming the drink. *Id*. at ¶ 5. Plaintiff had never before suffered such symptoms. *Id*. at ¶ 6. Plaintiff thereafter discontinued consuming the "coolaid" and reported the symptoms to the medical department. *Id*. at ¶ 8. Plaintiff believes defendant should be liable for his seizures and other symptoms because defendant did not disclose the "known detrimental side effects associated with the spring house brand; phenylketonurics * * *." *Id*. at ¶ 9. Although the complaint does not identify the cause of action, it appears that plaintiff seeks to hold defendant liable for negligently providing a drink mixture that subsequently allegedly caused the symptoms/injuries listed above.

{¶4} Defendant moves for summary judgment arguing that it did not breach any duty owed to plaintiff and is therefore not liable for negligence. In support of that position, defendant submitted the affidavits of Michelle Tatman and Bertha Goodman. Plaintiff responded with his own motion for summary judgment arguing that the drink packet was

not labeled. Plaintiff also submitted unauthenticated exhibits including a disposition of grievance, handwritten notes, a motion that he previously filed in this case, and an order from a magistrate.

{¶5} There is no dispute that the beverage plaintiff believes caused his symptoms is the fortified drink option accessible to the incarcerated population at no cost during specified meal periods. Defendant's Exhibit A, ¶ 7. The fortified drink is a sugar-free beverage supplied by the Sunshine Brand and has nutrients added that do not naturally occur in traditional drinks; the drink also contains the artificial sweetener aspartame. *Id*. at ¶ 8. The fortified drink is intended to improve inmate nutrition and exceeds the applicable nutritional and health safety standards, defendant's policies, and regulations. *Id*. at ¶ 9-10.

{¶6} For security purposes, meals at OSP, where plaintiff was housed at all relevant times, are brought to inmates on a tray and served to them on their meal trays; the fortified drink is served to OSP inmates via a single packet of mix placed on their meal trays to be mixed with water. *Id*. ¶ 12-14. Aspartame is FDA approved for use as a nutritive sweetener and is one of the most studied substances in the food supply with more than 100 studies supporting its safety; however, people with a rare hereditary disease known as phenylketonuria (PKU) have a difficult time metabolizing phenylalanine, a component of aspartame, and should control their intake of phenylalanine from all sources. *Id*. at ¶ 16. Phenylalanine is an essential amino acid and is found in all proteins as well as in some artificial sweeteners like aspartame. *Id*. at ¶ 17.

{¶7} Michelle Tatman, defendant's Health Care Administrator, reviewed plaintiff's medical records, noted that plaintiff does not have PKU, and concluded that the warning label on the fortified drink mix does not pertain to plaintiff. *Id*. at ¶ 18. Tatman added that plaintiff's medical history does not reflect any allergy, diagnosis, or health condition that requires dietary restriction or menu substitutions. *Id*. at ¶ 19.

{¶8} Plaintiff has never made a request for a dietary accommodation or menu substitution based on illness, injury, or medical need while in defendant's custody. *Id*. at ¶ 20-21. Defendant prepared and served all meals to plaintiff in accordance with the applicable standards, policies, and regulations; plaintiff was not forced to consume the fortified drink or any other beverage and his consumption was voluntary. *Id*. at ¶ 23-25. Plaintiff was not in any immediate danger or susceptible to any harm as a result of the fortified beverage served to the inmates. *Id*. at ¶ 26.

{¶9} On October 5, 2021, Christopher Lombard-RN examined plaintiff, who reported that he had been "having issues the past 2 weeks for my body locking up for 20-30 minutes." Defendant's Exhibit B, ¶ 3-4. Plaintiff also reported that he believed the drink mix had phenylketonurics in it causing him to lock up. *Id*. at ¶ 5. Plaintiff was not in acute distress, had a steady gait, and had no concerning vital signs. *Id*. at ¶ 6. Lombard advised plaintiff to notify the medical department if his symptoms continue to appear and to stop drinking the drink mix if he thinks he is having a reaction; Lombard also advised plaintiff to increase his water intake. *Id*. at ¶ 7.

{¶10} On October 13, 2021, Lombard examined plaintiff a second time; plaintiff reported that he continued to experience episodes where his body would lockup even though he was no longer consuming the drink mix. *Id*. at ¶ 8-10. Lombard noted no neuromuscular deficits or other concerning medical signs or symptoms; Lombard advised plaintiff to exercise and follow-up if his symptoms did not improve. *Id*. at ¶ 11.

{¶11} Samantha Scardina, a CNP, ordered a comprehensive metabolic panel and a CBC with differential for plaintiff, but the tests were unremarkable. *Id*. at ¶ 12-14. On October 26, 2021, Scardina examined plaintiff for a complaint that after waking up, his muscles tighten and lock up despite not drinking the drink mix for a month. *Id*. at ¶ 15-16. Scardina told plaintiff that his exam and lab results were normal aside from a borderline glucose result; plaintiff was advised to keep track of these alleged episodes and report them to medical if they worsened or changed. *Id*. at ¶ 17-18. Plaintiff was

subsequently transferred to SOCF and was seen by Nathan-Ross CNP; Ross noted that plaintiff's complaints regarding muscles spasms had resolved. *Id*. at ¶ 19-20. Plaintiff's medical records indicate that he has no reported allergies, including any allergies to any of the ingredients in the fortified beverage served to inmates. *Id*. at ¶ 21.

{¶12} Plaintiff responded to defendant's motion for summary judgment by filing a disposition of grievance. Plaintiff's Exhibit A. In the grievance, plaintiff relates his complaint that the fortified drink mix contains phenlyketonurics causing his symptoms. *Id*. The grievance concluded that the packet given to inmates to mix with water does not contain any ingredients listed. *Id*.

{¶13} "To recover on a negligence claim, a plaintiff must prove by a preponderance of the evidence (1) that a defendant owed the plaintiff a duty, (2) that a defendant breached that duty, and (3) that the breach of the duty proximately caused a plaintiff's injury." *Ford v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 05AP-357, 2006-Ohio-2531, ¶ 10. "Ohio law imposes a duty of reasonable care upon the state to provide for its prisoners' health, care, and well-being." *Ensman v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 06AP-592, 2006-Ohio-6788, ¶ 5. "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.

{¶14} The relationship between a correctional institution and an inmate "does not expand or heighten the duty of ordinary reasonable care." *Franks v. Ohio Dept. of Rehab. & Corr.*, 195 Ohio App.3d 114, 2011-Ohio-2048, 958 N.E.2d 1253, ¶ 12, quoting *Woods v. Ohio Dept. of Rehab. & Corr.*, 130 Ohio App.3d 742, 745, 721 N.E.2d 143 (10th Dist.1998). (Internal quotations omitted.) A duty arises when a risk is reasonably foreseeable. *Menifee v. Ohio Welding Prods., Inc*., 15 Ohio St.3d 75, 77 (1984). "The state's duty of reasonable care does not render it an insurer of inmate safety." *Allen v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 14AP-619, 2015-Ohio-383, ¶ 17;

Forester v. Ohio Dept. of Rehab. & Corr., 10th Dist. Franklin No. 11AP-366, 2011-Ohio-6296, ¶ 8 (the state is not an insurer of inmate safety, but must take reasonable care to prevent injury to the inmate once it becomes aware of a dangerous condition). "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.

{¶15} "Notice may be actual or constructive, the distinction being the manner in which the notice is obtained rather than the amount of information obtained." *Watson v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 11AP-606, 2012-Ohio-1017, ¶ 9. "Actual notice is notice obtained by actual communication to a party." *Barnett v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 09AP-1186, 2010-Ohio-4737, ¶ 23. "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.

{¶16} As noted above, there is no dispute that plaintiff drank the fortified drink offered to him at OSP and subsequently reported "body locks" and other symptoms to the medical department. Plaintiff was free to drink or not drink the fortified drink option. The drink contained aspartame and people with a rare hereditary disease known as PKU have a difficult time metabolizing phenylalanine, a component of aspartame. Aspartame is otherwise safe for consumption by the general population. Defendant's medical staff evaluated plaintiff and preformed a variety of tests, the results of which were unremarkable. At no point has plaintiff ever been diagnosed with PKU. Additionally, plaintiff's medical history does not reflect any allergy, diagnosis, or health condition that requires dietary restriction or menu substitutions. Plaintiff has never made a request for a dietary accommodation or menu substitution based on illness, injury, or medical need

while in defendant's custody. In short, there is nothing in the record to suggest that defendant had actual or constructive notice, i.e., that it was foreseeable that the fortified drink may have posed a risk of harm to plaintiff. Accordingly, there is no genuine issue of material fact that defendant did not have notice of a dangerous condition that posed a risk of harm to plaintiff. Therefore, defendant did not breach any duty owed to plaintiff.

{¶17} While plaintiff argues that the drink packet was not labeled, labeling the packet does not establish notice that plaintiff could be harmed by the fortified drink option. In other words, plaintiff's argument does not address the issue of notice and foreseeability of harm. Plaintiff's other arguments likewise do not address these issues. Because defendant properly supported its motion for summary judgment with evidence that would entitle it to judgment in its favor, plaintiff was required to present evidence to contradict that put forth by defendant to create a genuine issue of material fact and did not. Civ.R. 56(E) provide, in relevant part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the 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.

{¶18} Furthermore, plaintiff failed to support his motion for summary judgment with evidence showing there is no genuine issue of material fact and that he is entitled to judgment in his favor.

{¶19} Based upon the foregoing, defendant's motions for summary judgment are GRANTED and plaintiff's motion for summary judgment is DENIED. 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.

PATRICK E. SHEERAN
Judge

Filed August 8, 2022
Sent to S.C. Reporter 9/26/22