

[Cite as *Whitfield v. S. Ohio Corr. Facility*, 1992-Ohio-280.]

IN THE COURT OF CLAIMS OF OHIO

WILLIE WHITFIELD, #183-056	:	
Plaintiff	:	CASE NO. 91-07691
v.	:	<u>REFEREE REPORT</u>
SOUTHERN OHIO CORRECTIONAL FACILITY	:	Fred D. Gartin, Referee
Defendant	:	

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

Willie Whitfield, #183-056  
Pro se

Lee A. Fisher, Attorney General  
and Larry Y. Chan, Esq.  
For Defendant

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Plaintiff filed a complaint on July 8, 1991, alleging that defendant was negligent in failing to maintain the shower stalls in the K5 cell block at the Southern Ohio Correctional Facility (SOCF).

Throughout the trial, plaintiff asserted that he could not prevail because he did not have counsel. There are no statutes or rules authorizing the court to appoint counsel. *Perroti v. Department of Rehabilitation and Correction* (Feb. 23, 1989), Franklin App. No. 88 AP-560, et al., unreported, at page 7. Furthermore, plaintiff presented his arguments well despite his assertion.

Plaintiff alleges that on May 26, 1991, he was taking a shower in the K5 cell block when a portion of tile began falling from the ceiling, hitting him on the head and causing him personal injury.

Plaintiff's complaint is construed to set forth a single cognizable action, which is one sounding in negligence. In a claim predicated on negligence, the plaintiff bears the burden of proving by a preponderance of the evidence that defendant breached a duty owed to plaintiff and this breach proximately caused injury. *Strother v. Hutchinson* (1981), 67 Ohio At. 2d 282. Defendant owed to plaintiff the common law duty of reasonable care. *Justice v. Rose* (1975), 102 Ohio App. 482. Reasonable care is that which would be utilized by an ordinary prudent person under similar circumstances. *Smith v. United Properties, Inc.* (1965), 2 Ohio St. 2d 310.

While cognizant of a "special relation" between an inmate and his custodian, no higher standard of care is derived from his relationship. *Scebbi v. Dept. of Rehab. and Corr.* (March 21, 1989), Court of Claims No. 87-09439, unreported. Although the state is not an insurer of the safety of its prisoners, once it becomes aware of a dangerous condition in the prison, it is required to take the reasonable care necessary to make certain that the prisoner is not injured. *Clements v. Heston* (1985), 20 Ohio App. 3d 132. Consequently, plaintiff bears the burden of proof to demonstrate that defendant was on notice or aware of a dangerous condition in the shower stall. *Presley v. Norwood* (1973), 36 Ohio St. 2d 29.

The legal concept of notice is of two distinguishable types; actual and constructive.

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The distinction between actual and constructive notice 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 the trier of the facts is entitled to hold as a conclusion of fact and not as a presumption of law that information was personally communicated to or received by a party, the notice is actual. Constructive notice is that which the law regards as sufficient to give notice and is regarded as a substitute for actual notice.

*In Re Fahle's Estate* (1950), 90 Ohio App. 195, paragraph two of the syllabus.

In the case at bar, plaintiff has failed to prove that defendant had actual or constructive notice of dangerous conditions in the shower stall. Plaintiff asserted that work orders had been requested for the shower stall at issue. However, a review of the testimony and exhibits indicate that the work orders were for water pressure and paint.

Additionally, plaintiff asserted that the photographs contained in his exhibit number 3 demonstrate that the shower had been negligently repaired causing the tiles to loosen. The referee disagrees. The photos demonstrate that work had been done on the shower stall; however, there is nothing to indicate that the soldering was faulty or contributed to the tiles falling.

Moreover, nothing on these photos would have given defendant notice that the shower stall was in such a dangerous condition to warrant its being closed. Therefore, defendant was not aware of a potentially dangerous condition and is not liable for continuing to allow inmates to utilize the shower stall at issue.

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Based upon the above, plaintiff has failed to show based upon the facts and law that he has a right to relief. Therefore, the referee recommends defendant's motion for a dismissal pursuant to Civ. R. 41(B) be granted.

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FRED D. GARTIN  
Referee

Entry cc:

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