

[Cite as *King v. Ross Correctional Inst.*, 2006-Ohio-1112.]

IN THE COURT OF CLAIMS OF OHIO
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ALFRED S. KING :
 :
 Plaintiff : Case No. 99-01322
 : Judge J. Craig Wright
 v. : Magistrate Steven A. Larson
 :
 ROSS CORRECTIONAL INSTITUTION : MAGISTRATE DECISION
 :
 Defendant :

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{¶ 1} On February 5, 2002, this court issued a judgment entry in favor of defendant. On December 31, 2002, the Court of Appeals reversed the judgment of this court and remanded the case for further proceedings, stating in relevant part:

{¶ 2} "*** plaintiff argues that the trial court failed to rule on his claims that defendant was negligent in hiring, supervising and disciplining CO's Warth and Barnett and Lt. Simmons and in failing to protect him from their abusive and demeaning treatment, including the alleged assault. We agree. As noted previously, the trial court characterized plaintiff's entire cause of action as one for civil conspiracy and found, as a matter of law, that plaintiff could not prevail on such claim because he could not establish the element of malice. The court did not make any findings or even discuss plaintiff's negligence claims. As plaintiff's complaint clearly set forth claims of negligence against defendant, the trial court erred in failing to address those claims, and the case must be remanded for that purpose. ***" *King v. Ross Corr. Inst.*, Franklin App. No. 02AP-256, 2002-Ohio-7360, ¶27.

{¶ 3} Upon remand from the Court of Appeals, the issues of liability and damages were bifurcated and the case proceeded to a new trial on the issue of liability before a magistrate of the court.¹

{¶ 4} At all times relevant to this action, plaintiff was an inmate in the custody and control of defendant pursuant to R.C. 5120.16. Plaintiff testified to the following version of events: On December 21, 1998, plaintiff was housed in unit 6B at Ross Correctional Institution (RCI). Building 6 consisted of two units, 6A and 6B, separated by an officers' area, known as "C-section." Plaintiff alleged that Warth had allowed inmates Boyle and Smith to sort through the mail before it was distributed and that some of plaintiff's mail was missing. Plaintiff drafted an informal complaint about his allegations (Plaintiff's Exhibit 2) and took it to Sergeant (Sgt.) Younkers, the mail room supervisor, who told him to take it to Administrative Captain Mikey Baines. At some point thereafter, Warth told plaintiff in the presence of two other inmates that if anyone filed a complaint about him that they had better move out of the "pod" because he would "get them."

{¶ 5} On December 24, 1998, Boyle told Warth that plaintiff had filed a complaint. Barnett then ordered plaintiff to accompany her to C-section, at which time Warth, Barnett, and Boyle all began to question plaintiff as to why he had not talked to them before filing a complaint. Barnett called plaintiff foul names, including a "bitch-ass snitch." Shortly thereafter, Barnett called plaintiff

¹On September 21, 1999, this court issued an entry finding that Lieutenant (Lt.) Simmons and Corrections Officers (COs) Deborah Barnett and Robert Warth were entitled to personal immunity. On November 15, 1999, plaintiff's appeal of the court's immunity determination was dismissed by the Court of Appeals due to plaintiff's failure to pay the required filing fee. See *King v. Ross Correctional Inst.* (Nov. 15, 1999), Franklin App. No. 99AP-1188.

foul names in the 6B day room in the presence of a number of other inmates who were waiting for their mail.

{¶ 6} Later that day, inmate Gary "Wink" Cantrell, who was housed in unit 7A, came to plaintiff's cell and told plaintiff that he would "deal with" Barnett. Cantrell returned a short time later with Barnett and Barnett sat on plaintiff's bed and apologized to him for her conduct. Barnett told plaintiff that she would "take care" of a citation that Warth had written against plaintiff for disrespect toward an officer if plaintiff agreed to drop his complaint about the mail room.

{¶ 7} On December 25, 1998, Barnett returned to plaintiff's cell with an inmate Blackshear, and told plaintiff that the citation had been taken care of.

{¶ 8} On December 26, 1998, at approximately 10:30 p.m., plaintiff heard someone outside of his cell "messaging" with his door. When he looked out, he saw Warth and Boyle at the end of the range. On December 27, 1998, at approximately noon, plaintiff's cell mate, Alfred Williams, discovered that something had been placed in the lock of their cell. Plaintiff and Williams contacted Sgt. Yates, who found that part of a ballpoint pen had been jammed into the lock. Yates filed an incident report that day. (Defendant's Exhibit A.)

{¶ 9} On December 30, 1998, plaintiff went into his cell to get a cup of coffee and did not shut the door behind him. Plaintiff turned around and Cantrell was in his cell. Cantrell stated, "I heard you gave my name to the police" and then assaulted plaintiff. Plaintiff reported the assault and the case was referred to the state highway patrol.

{¶ 10} Plaintiff asserts claims of negligent hiring and supervision with respect to Barnett and Warth and he also alleges that Barnett violated institutional policies by leaving her post in 6A to go to his cell in 6B. Plaintiff also asserts that defendant was negligent in failing to protect him from the assault by Cantrell.

{¶ 11} Robert Warth testified that he had been employed as a CO for ten years; that he had received academy training in courses such as report writing, rules of conduct, and unarmed self-defense; that he received annual training updates; and that he was working as a unit officer in 6B in December 1998. Warth denied that he allowed any inmates to look through the mail before it was distributed, denied ever threatening plaintiff or having anything to do with the assault by Cantrell, and denied tampering with the lock on plaintiff's cell door. Warth also testified that he was not on duty at the time of the assault.

{¶ 12} Sgt. Sharon Perry testified that she had worked for the state highway patrol for 15 years and that she conducted investigations at RCI from 1997-1999. Plaintiff's Exhibit 12 was the investigation report that she wrote regarding this incident after taking statements from plaintiff and other inmates. (Plaintiff's Exhibits 15-21.) Perry interviewed CO Warth but found him to be uncooperative. (Plaintiff's Exhibit 22.) Barnett refused to speak to her and then shortly thereafter resigned her position. Perry's interview with Cantrell yielded a different version as to why the assault took place.

{¶ 13} Steven Michael Garrett, a former inmate, testified that he and some other inmates were present when Barnett yelled at

plaintiff but that he never heard Barnett threaten to have plaintiff assaulted.

{¶ 14} Elmore Jordan testified² that he was a former cell mate of plaintiff; that he saw Cantrell walk up the stairs to plaintiff's cell, and that he saw that plaintiff had been assaulted shortly thereafter.

{¶ 15} Wayne Ashbrook testified that he resided in Unit 6B and that he was present when Barnett yelled at plaintiff about filing a complaint. Ashbrook also testified that he saw plaintiff after he had been assaulted.

{¶ 16} David Baker, investigator for RCI, testified that after plaintiff told him that he had been assaulted and alleged that a CO allowed it to happen, he interviewed plaintiff about a possible criminal assault. Baker further testified that although both plaintiff and Cantrell had been issued citations for fighting, Baker recommended that plaintiff's ticket be dismissed because he believed that Cantrell intentionally went to plaintiff's cell and assaulted him. Baker further stated that it was not his understanding that Cantrell assaulted plaintiff at Barnett or Warth's request, and that he did not find any evidence to support plaintiff's allegation that either Barnett or Warth had organized the assault.

²At trial, plaintiff's counsel made an oral motion to admit the testimony of former inmates Elmore Jordan and Wayne Ashbrook from the previous trial on March 6, 2002, (beginning at pages 83 and 100 of the transcript, respectively) on the basis that these individuals had been paroled and plaintiff's counsel could not locate them. Defendant opposed the motion. In the interests of justice, and pursuant to Evid.R. 804 and the holding in *Banks v. D'Andrea* (Sept. 23, 1997), Franklin App. No. 97APG03-321, (it is within the trial court's discretion to make an Evid.R. 804(A)(5) finding of unavailability based on unsworn statements of counsel) plaintiff's request to admit the testimony of Jordan and Ashbrook is GRANTED.

{¶ 17} Regarding the duties of COs, Baker testified that there are times when COs assigned to one unit are allowed to walk to the adjoining unit and return, but that COs do not have unlimited authority to leave their assigned post. Baker further testified that Barnett resigned because she was under investigation for having an inappropriate relationship with an inmate at Dayton Correctional Institution.

{¶ 18} Lt. Gary Simmons testified that he had worked for RCI for 17 years. Simmons stated that his usual practice when a fight occurred between inmates was to issue a citation to both inmates and then send the matter to the Rules Infraction Board (RIB) for further investigation. Simmons further testified that Plaintiff's Exhibit 6 was a "ticket" that he wrote about the assault and that he did not witness it.

{¶ 19} Sgt. Paul Yates testified that he had worked at RCI since 1987 and that he prepared an incident report on December 27, 1998, regarding the lock on plaintiff's cell. Although Yates found that part of an ink pen had been jammed into the lock to prevent it from being secured, he was not able to determine who had tampered with the lock.

{¶ 20} Warden Patrick Hurley testified that when COs are first employed they are trained on a number of topics, including security, safety, sanitation, and appropriate supervision of inmates; that COs are required to have 40 hours of in-service training every year; that Barnett and Warth were subject to those requirements and that he was not aware of any required training that they did not receive. Hurley further testified that when an inmate assault occurs, both the accuser and the accused are placed in isolation; that the supervisor writes an incident report and

sends it to the warden's office; that the investigator's office receives a report; and that the report is forwarded to the state highway patrol.

{¶ 21} Hurley also testified that if an investigation resulted in a finding that a CO had participated in a plan to organize an assault of an inmate, a pre-disciplinary hearing of that employee would take place in accordance with defendant's employee standards of conduct. Hurley also stated that there may be various reasons for a CO to walk from one adjoining unit to another during a shift.

{¶ 22} 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. Ohio law imposes a duty of reasonable care upon the state to provide for its prisoners' health, care, and well-being. *Clemets v. Heston* (1985), 20 Ohio App.3d 132, 136. However, the state is not an insurer of inmate safety and owes the duty of ordinary care only to inmates who are foreseeably at risk. *McAfee v. Overberg* (1977), 51 Ohio Misc. 86.

{¶ 23} When one inmate intentionally attacks another inmate, actionable negligence may arise only where there was adequate notice of an impending attack. *Baker v. State* (1986), 28 Ohio App.3d 99. The magistrate finds that plaintiff has provided no credible evidence to show that defendant had notice, constructive or actual, that Cantrell was going to assault him. Plaintiff did not report that he felt threatened by Cantrell or request to be placed in protective custody before the assault. Therefore, the

magistrate finds that plaintiff has failed to prove that defendant was negligent in failing to protect plaintiff or in failing to prevent the assault.

{¶ 24} In order to prove a claim of negligent hiring and supervision of Barnett and Warth, plaintiff must show: 1) the existence of an employment relationship; 2) that Barnett and Warth were incompetent; 3) that defendant had actual or constructive knowledge of their incompetence; 4) that Barnett and Warth's acts or omissions caused plaintiff's injuries; 5) and that defendant's negligence in hiring or retaining Barnett and Warth was a proximate cause of plaintiff's injuries. *Evans v. Ohio State Univ.* (1996), 112 Ohio App.3d 724, 739.

{¶ 25} The magistrate finds that plaintiff has failed to prove that either Barnett or Warth were incompetent. Defendant supplied the court with evidence that both Barnett and Warth had received adequate training for their positions. Although, in the final analysis, it is questionable whether Barnett was competent, plaintiff has provided no evidence to prove that defendant had either actual or constructive notice of her incompetence until after she had resigned. Furthermore, the magistrate finds that plaintiff has failed to prove by a preponderance of the evidence any causal connection between any action or inaction of Barnett or Warth and the assault by Cantrell.

{¶ 26} For the foregoing reasons, the magistrate finds that plaintiff has failed to prove any of his claims by a preponderance of the evidence and accordingly, judgment is recommended in favor of defendant.

{¶ 27} A party may file written objections to the magistrate's decision within 14 days of the filing of the decision. A party

shall not assign as error on appeal the court's adoption of any finding or conclusion of law contained in the magistrate's decision unless the party timely and specifically objects to that finding or conclusion as required by Civ.R. 53(E)(3).

STEVEN A. LARSON
Magistrate

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HTS/cmd
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