

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Jack Barnett,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 09AP-1186
v.	:	(C.C. No. 2002-09382)
	:	
Ohio Department of Rehabilitation and	:	(REGULAR CALENDAR)
Correction,	:	
	:	
Defendant-Appellee.	:	
	:	

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D E C I S I O N

Rendered on September 30, 2010

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*Swope and Swope*, and *Richard F. Swope*, for appellant.

*Richard Cordray*, Attorney General, *Peter E. DeMarco* and *Stephanie D. Pestello-Sharf*, for appellee.

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APPEAL from the Court of Claims of Ohio.

McGRATH, J.

{¶1} Plaintiff-appellant, Jack Barnett ("appellant"), appeals from the judgment of the Court of Claims of Ohio in favor of defendant-appellee, Ohio Department of Rehabilitation and Correction ("ODRC"), on appellant's negligence claim arising from injuries sustained by appellant while working in the kitchen at Madison Correctional Institution ("MCI"). Because the judgment of the Court of Claims is supported by competent, credible evidence, we affirm.

{¶2} At all times relevant to this action, appellant was incarcerated at MCI, and appellant's claims arise out of two separate incidents that occurred when he was employed there as a kitchen worker. The first incident is alleged to have occurred during the week of November 20-28, 2001, when appellant was assigned to clean a tilt skillet with a cleaner called "Hot Shot." According to appellant, he was not properly trained in the use of Hot Shot, nor was he provided with any protective gear, and as a result of the product making contact with his body, he suffered burns to his hands, arms, and leg. The second incident is alleged to have occurred on June 7, 2002, when appellant received a severe electrical shock from a device in the kitchen known as a hot box.<sup>1</sup> According to appellant, when he opened the door of the hot box to insert a tray of oatmeal, he was severely shocked.

{¶3} Appellant filed this complaint in the Court of Claims on October 17, 2002, alleging ODRC was negligent in failing to train inmates on the use of Hot Shot and in failing to provide protective clothing and goggles. Regarding the hot box, appellant alleged ODRC was negligent in failing to secure electrical outlets and in failing to warn inmates of potential electrical faults in the equipment. The trial court bifurcated the issues of liability and damages. The evidence presented at the bench trial held on June 28, 2004 is as follows.

{¶4} Appellant testified as to both incidents. According to appellant, after cooking, he was instructed to "detail the tilt grills" and was given Hot Shot in an unmarked plastic spray bottle. (Tr. 74.) Appellant testified that he sprayed Hot Shot on the grill, let it soak, and then began scrubbing the grill. As Hot Shot got onto his hands, appellant

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<sup>1</sup> The hot box was described as a warmer to keep hot foods at a certain temperature prior to serving.

stated he began noticing the appearance of small blisters. Back in his dorm, as appellant was changing clothes, he noticed his leg was burning in the area where his pants had become soaked with Hot Shot. Appellant then went to the infirmary where he was given ointment and gauze. With respect to the hot box, appellant testified he opened the door to insert a tray of oatmeal and received a severe electrical shock.

{¶5} Appellant also testified that he had been working in the kitchen for approximately two years prior to the incidents. Appellant admitted to signing forms entitled "Acknowledgement of Safety Practices" ("acknowledgement form"), acknowledging that he was instructed on safety practices. Additionally, the acknowledgment form states that he had been instructed on how to operate machinery, utilize safety equipment, and that if hazardous chemicals were utilized, he would use all protective equipment supplied. Despite admitting that he signed the acknowledgment form, appellant testified "there was no training at all." (Tr. 70.) Though he testified he was told only that the spray bottle contained "oven cleaner," appellant understood, even prior to his incarceration, that oven cleaner was a chemical that needed to be used with caution. Appellant testified that at no time did he receive any information or warnings with respect to Hot Shot, nor was he given gloves or told at any time that day that he should have been wearing protective gear. Appellant stated that he was wearing an apron, but no gloves or safety goggles, even though he knew where the protective clothing was kept and that to access the protective gear, he would have had to notify the coordinator.

{¶6} Warren Gebhart, safety and health coordinator at MCI, testified that he was never made aware, prior to appellant's incidents, of any problem with the operation of the hot box or injuries sustained from the use of Hot Shot. Carmen Jones worked as a

supervisor in MCI's food service area at the time of the incident with Hot Shot. According to Ms. Jones, inmates are trained on everything stated on the acknowledgement form, including the use of chemical cleaners, and that she herself would be subject to disciplinary action if she just had the inmates sign the acknowledgement form without actually providing them with training. Ms. Jones also recalled that all of the inmates working with Hot Shot that day were wearing rubber gloves. William Rickens, food service coordinator at MCI, testified that when inmates use Hot Shot they get eye protection, a mask, gloves, and an apron from the locked area.

{¶7} Norma Martin, also a food service coordinator at MCI, testified she had no knowledge of anyone being shocked by a hot box prior to the incident involving appellant. Ms. Martin explained that after appellant was shocked, the hot box was removed for repairs and returned approximately 24 hours later. Another food service coordinator at MCI, Uche Kenechukwu, also testified that she had no knowledge of anyone being shocked prior to appellant's incident.

{¶8} Inmates Tyrone Wise and Dale Davis both testified that, despite signing the acknowledgment forms, they received no training on the various things contained on the acknowledgement form, nor any training regarding the use of chemical cleaning agents. Both testified they were not given any sort of protective gear when using Hot Shot, though Wise did recall seeing inmates use gloves and aprons. Additionally, on cross-examination, Wise testified he was told Hot Shot was an oven-cleaning substance and that he should wear gloves and an apron when using it.

{¶9} Following the bench trial, the magistrate issued a decision on March 16, 2009, finding appellant failed to prove either of his claims by a preponderance of the

evidence. Appellant filed objections to the magistrate's decision, and on November 17, 2009, the trial court issued a decision overruling appellant's objections and adopting the decision of the magistrate. This appeal followed, and appellant brings the following eight assignments of error for our review:

ASSIGNMENT OF ERROR NO. 1:

THE TRIAL COURT AND MAGISTRATE ERRED IN APPLYING AND INTERPRETING THE LAW IN MCCOY V. ENGLE (1987), 42 OHIO APP.3D 204, AND IN FONDERN V. DEPT. OF REHAB. & CORR. (1977), 51 OHIO APP.2D 180, IN BOTH CASES, AS TO THE STANDARD OF CARE FOR PRISON WORKERS, AND THE STATE SAFETY LAWS ARE NOW REQUIRED TO BE MET BY DEFENDANT-APPELLEE.

ASSIGNMENT OF ERROR NO. 2:

FAILURE TO APPLY THE SAFE PLACE TO WORK STANDARD TO PRISON EMPLOYEES VIOLATES THE 5TH AND 14TH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 2 OF THE OHIO CONSTITUTION, AS TO BOTH INCIDENTS.

ASSIGNMENT OF ERROR NO. 3:

THE TRIAL COURT AND MAGISTRATE ERRED AND ABUSED THEIR DISCRETION IN RULING THE TRAINING AND SAFETY PRACTICES OF DEFENDANT-APPELLEE OHIO DEPARTMENT OF REHABILITATION AND CORRECTION WAS ADEQUATE TO ENSURE INMATES WERE PROTECTED FROM KNOWN DANGERS AND FAILURE TO MEET THEIR OWN ADOPTED PRACTICES WAS NOT THE PROXIMATE CAUSE OF THE TWO INCIDENTS.

ASSIGNMENT OF ERROR NO. 4:

THE TRIAL COURT AND MAGISTRATE ERRED AND ABUSED THEIR DISCRETION IN IGNORING THE CHEMICALS WERE PLACED IN SPRAY BOTTLES, NOT CONTAINING THE WARNING, PLACED IN INMATES' HANDS WITHOUT WARNING, ALL SAFETY

MATERIALS WERE LOCKED AWAY AND ONLY DISBURSED BY DEFENDANTS-APPELLEES, AND DEFENDANTS-APPELLEES' ACKNOWLEDGMENT COORDINATORS AND GUARDS ARE REQUIRED TO ENFORCE USE OF SAFETY GEAR.

ASSIGNMENT OF ERROR NO. 5:

THE TRIAL COURT AND MAGISTRATE ERRED AND ABUSED THEIR DISCRETION IN RULING DEFENDANT-APPELLEE DID NOT HAVE KNOWLEDGE THE HOT BOXES REGULARLY HAD ELECTRICAL PROBLEMS BEFORE BARNETT RECEIVED HIS ELECTRICAL SHOCK AND IN NOT WARNING OF THE PROBLEM WITH THE PLUG, THE PROBLEM BEING KNOWN BEFORE BARNETT WAS SHOCKED.

ASSIGNMENT OF ERROR NO. 6:

THE TRIAL COURT AND MAGISTRATE ERRED AND ABUSED THEIR DISCRETION IN IGNORING THE FACT THAT COORDINATORS AND CORRECTIONAL OFFICERS FAILED TO SUPERVISE AND ENFORCE SAFETY PRACTICES WHICH WAS THE PROXIMATE CAUSE OF BARNETT'S CHEMICAL BURNS.

ASSIGNMENT OF ERROR NO. 7:

THE TRIAL COURT AND MAGISTRATE ERRED AND ABUSED THEIR DISCRETION IN IGNORING NOTICE OF DEFECTS WHICH REGULARLY OCCURRED IN THE HOT BOXES AND RULING PLAINTIFF HAD TO PROVE ACTUAL NOTICE OF A DEFECT IN THE BOX WHICH INJURED BARNETT.

ASSIGNMENT OF ERROR NO. 8:

THE MAGISTRATE'S AND TRIAL COURT'S DECISION IS NOT SUPPORTED BY THE EVIDENCE AND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AND THE CASE SHOULD BE REVERSED AND JUDGMENT ENTERED IN FAVOR OF PLAINTIFF-APPELLANT.

{¶10} In his first assignment of error, appellant contends the trial court erred in applying and interpreting *McCoy v. Engle* (1987), 42 Ohio App.3d 204, and *Fondern v. Dept. of Rehab. & Corr.* (1977), 51 Ohio App.2d 180, and, therefore, was incorrect as to the duty of care owed to inmate workers. It is appellant's position that *McCoy* and *Fondern* represent outdated concepts and standards of care as they have essentially been overruled by state safety laws. According to appellant, instead of utilizing the duty of care established in *McCoy* and *Fondern*, applicable here are various regulations from the Occupational Safety and Health Administration, the Uniform Food Safety Code, and the Division of Safety and Hygiene rules as found in Ohio's Administrative Code.

{¶11} Despite appellant's contention of the outdated nature of *McCoy* and *Fondern*, and the duty of care owed to inmate workers, this court in *McElfresh v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 04AP-177, 2004-Ohio-5545, recently relied upon and reiterated their well-established principle of law. In *McElfresh*, the inmate plaintiff alleged he was injured while helping to dismantle a temporary wall located at the institution in which he was incarcerated. On appeal, the plaintiff argued the trial court erred when it failed to find Ohio Adm.Code 4123:1-3-03(A)(4) required ODRC to provide him a hard hat while performing the assigned duties. This court first noted the regulation under which the plaintiff claimed protection set forth duties imposed on an employer in the context of an employer-employee relationship. We stated:

However, it is well-established that ordinary prison labor performed by an inmate in a state correctional institution facility is not predicated upon an employer-employee relationship and thus does not fall within the scope of worker-protection statutes. *Moore v. Ohio Dept. of Rehab. & Corr.* (1993), 89 Ohio App. 3d 107, 111, jurisdictional motion overruled (1993), 67 Ohio St. 3d 1506. See, also, *Fondern v.*

*Ohio Dept. of Rehab. & Corr.* (1977), 51 Ohio App.2d 180, (R.C. Chapter 4113 inapplicable to injury sustained by inmate working in prison laundry); *Watkins v. Ohio Dept. of Rehab. & Corr.* (1998), 61 Ohio Misc.2d 295, 298, (inmates working in state correctional institutions are not employees of the state of Ohio). Accordingly, the trial court correctly determined that defendant did not violate Ohio Adm.Code 4123:1-3-03(A)(4).

Id. at ¶14.

{¶12} Appellant, like the plaintiff in *McElfresh*, relies on various rules and regulations that enumerate workplace precautionary measures required by employers. Based on the well-established precedent reiterated in *McElfresh*, we find no merit to appellant's argument that the trial court erred in failing to find that he was entitled to such protections. Accordingly, we overrule appellant's first assignment of error.

{¶13} In his second assignment of error, appellant contends the trial court's failure to apply the "safe place to work standard" to inmates violates the Fifth and Fourteenth Amendments of both the United States and Ohio Constitutions. This argument was raised before the trial court in appellant's objections to the magistrate's decision, and the trial court found it did not have jurisdiction to hear such claims. We agree.

{¶14} "Under the Court of Claims Act, individuals can sue the state in the Court of Claims and have liability determined with the same rules of law applicable to suits between private parties." *Deavors v. Ohio Dept. of Rehab. & Corr.* (May 20, 1999), 10th Dist. No. 98AP-1105, citing R.C. 2743.02(A)(1). As a result, "a plaintiff in the Court of Claims is limited to causes of action which he [or she] could pursue if defendant were a private party." *Thompson v. Southern State Community College* (June 15, 1989), 10th Dist. No. 89AP-114. To the extent appellant sought to assert Fifth and Fourteenth Amendment claims, the requirement that he demonstrate an element of state action in the

constitutional violations removes the claim from the Court of Claims' jurisdiction, which is limited to actions against the state as between private parties. *Id.* While such actions commonly are litigated under 42 U.S.C. 1983, see *State ex rel. Carter v. Schotten*, 70 Ohio St.3d 89, 91, 1994-Ohio-37, appellant's asserted argument is nonetheless outside the jurisdiction of the Court of Claims because the state, the only defendant in the Court of Claims, is not a person subject to liability within the meaning of 42 U.S.C. 1983. Thus, to the extent we can construe the arguments asserted in the objections to the magistrate's decision as Section 1983 claims, they may not be maintained in the Ohio Court of Claims, and the trial court correctly determined it was without jurisdiction to hear such claims. *Burkey v. Southern Ohio Corr. Facility* (1988), 38 Ohio App.3d 170, 171.

{¶15} Accordingly, we overrule appellant's second assignment of error.

{¶16} Appellants remaining assignments of error assert the trial court's finding that ODRC was not negligent was in error and against the manifest weight of the evidence. Therefore, they will be addressed together.

{¶17} An inmate who is injured while working in a prison shop or industry may assert a cause of action for negligence. *McElfresh* at ¶15. To establish a claim of negligence, the plaintiff must provide by a preponderance of the evidence that: (1) the defendant owed the plaintiff a duty; (2) the defendant breached that duty; and (3) such breach was the proximate cause of the plaintiff's injuries. *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565, 1998-Ohio-184; *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285.

{¶18} In the context of a custodial relationship between the state and its inmates, the state owes a common-law duty of reasonable care and protection from unreasonable

risks of physical harm. *Woods v. Ohio Dept. of Rehab. & Corr.* (1998), 130 Ohio App.3d 742, 744-45, cause dismissed (1999), 85 Ohio St.3d 1414; *McCoy*, supra. 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. *Woods* at 745; *Moore* at 112. The extent of the state's duty will vary with the circumstances. *Woods*, supra. Where an inmate also performs labor for the state, the state's duty must be defined in the context of those additional factors which characterize the particular work performed. *McCoy* at 208. The state, however, is not an insurer of inmate safety, and the special relationship between the state and the inmate does not expand or heighten the duty of ordinary reasonable care. *Woods*, supra. Applying these legal principles to the facts of this case, we conclude, contrary to appellant's contention, that the magistrate's decision is not against the manifest weight of the evidence.

{¶19} The appropriate standard of review is whether the trial court's decision is contrary to law. *Macklin v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 01AP-293, 2002-Ohio-5069, ¶20. A civil judgment "supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. A reviewing court is obliged to give deference to the factual findings of the trial court. *Zeigler v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 02AP-826, 2003-Ohio-3337, ¶18, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. "The rationale for this presumption is that the trial court is in the best position to

evaluate the evidence by viewing witnesses and observing their demeanor, voice inflection, and gestures." *Id.*

{¶20} We first address appellant's assigned errors with respect to the use of Hot Shot. Appellant asserts his training in the use of Hot Shot was inadequate, ODRC negligently placed the substance in an unmarked spray bottle, and ODRC failed to provide him with protective gear. A review of the record, however, reveals the testimony supports the finding of the trial court that any injury sustained by the use of Hot Shot was not the result of any breach of duty on the part of ODRC.

{¶21} The testimony established that prior to beginning work in the kitchen, inmates receive safety training that includes the use of caustic chemicals and directions for obtaining protective gear. Appellant, like the other inmate workers, signed an acknowledgement form stating that such training was in fact received. Appellant testified he had been employed in the kitchen for two years prior to the incident and that he was aware of not only the caustic nature of oven cleaner, but also the kitchen policies and procedures and availability of protective gear. The evidence showed no known prior complaints of inadequate training or known cases of burn injuries said to be caused by Hot Shot.

{¶22} Appellant, Wise, and Davis did testify that they were not trained as the acknowledgement forms suggest and that they were not provided with any protective clothing. The trial court, however, found their testimony lacked credibility, as is its prerogative to do in judging the credibility of the witnesses. *Seasons Coal Co.*, *supra*. Upon review, we find the trial court's judgment is supported by some competent, credible evidence going to all the essential elements of the case and, therefore, cannot say the

trial court's determination that ODRC was not negligent with respect to appellant's claims regarding Hot Shot is against the manifest weight of the evidence.

{¶23} With respect to the hot box, appellant contends it was error for the trial court to find that ODRC did not have knowledge and/or ignored notice of the hot box's electrical defects. Although the state is not an insurer of the safety of its prisoners, once the state 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. *Macklin* at ¶21; *Briscoe v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 02AP-1109, 2003-Ohio-3533, ¶15. It is appellant's burden to demonstrate that ODRC had notice of the condition of which he complains. *Presley v. Norwood* (1973), 36 Ohio St.2d 29, 31. Notice may be obtained in two ways: actual or constructive. Actual notice is notice obtained by actual communication to a party. *Briscoe* at ¶20. Constructive notice is defined as that which the " 'law regards as sufficient to give notice and is regarded as a substitute for actual notice.' " *Id.*, quoting *Williams v. Ohio Dept. of Rehab. & Corr.* (1991), 61 Ohio Misc.2d 699, 703.

{¶24} As the trial court noted, there was some hearsay evidence that other inmates had been shocked by a hot box; however, each witness testifying stated they had no personal knowledge that a hot box had caused a shock to anyone prior to the incident involving appellant. Appellant testified he had worked with hot boxes almost daily for approximately a year prior to this incident and that he had never been shocked before or heard of any other inmates being shocked. The evidence also established that inspections of the kitchen, including hot boxes, are conducted on a routine basis, and if equipment is not properly working, it is removed from service. Appellant suggests ODRC

had notice of the hot box's potential to cause shock injury because it is known that cords become faulty due to their being pulled from the wall. However, there is *no* evidence ODRC was aware of a cord defect or that a cord defect would lead to an incident such as the one involving appellant. Consequently, we find competent, credible evidence supporting the trial court's finding that ODRC had neither actual nor constructive notice of a problem with the hot box.

{¶25} Finding that the trial court's judgment is not against the manifest weight of the evidence in any respect, we overrule appellant's third, fourth, fifth, sixth, seventh, and eighth assignments of error.

{¶26} Having overruled all eight of appellant's assignments of error, the judgment of the Court of Claims of Ohio is affirmed.

*Judgment affirmed.*

KLATT and FRENCH, JJ., concur.

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