

# Court of Claims of Ohio

The Ohio Judicial Center  
65 South Front Street, Third Floor  
Columbus, OH 43215  
614.387.9800 or 1.800.824.8263  
www.cco.state.oh.us

JERRY MILLER, JR.

Plaintiff

v.

LEBANON CORRECTION INSTITUTION

Defendant

Case No. 2007-08538-AD

Deputy Clerk Daniel R. Borchert

## MEMORANDUM DECISION

{¶ 1} Plaintiff, Jerry Miller, Jr., an inmate formerly incarcerated at defendant, Lebanon Correctional Institution (“LeCI”), stated he suffered personal injury when he was assaulted by his cellmate, Young, on May 16, 2006. Plaintiff contended he informed LeCI personnel on several occasions prior to May 16, 2006 that his cellmate was mentally unstable and prone to physical violence. Plaintiff alleged that LeCI staff had knowledge of the violent propensities of Inmate Young several times during the four-month period preceding May 16, 2006 and did nothing to curtail or inhibit Inmate Young from carrying out violent acts. Plaintiff argued LeCI personnel conspired with Inmate Young urging him to carry out the assault.

{¶ 2} Additionally, plaintiff has alleged his commissary items were stolen from his cell after he was hospitalized for the injuries he received from being assaulted by Inmate Young. Plaintiff filed this complaint seeking to recover \$102.00 for his alleged missing commissary items. Plaintiff also requested an additional damage claim of \$2,398.00 for the personal injuries he suffered on May 16, 2006. Plaintiff listed his

injuries as “damage to left upper side of face and left eye, crown of the back head and left wrist/hand, and blurring eyesight in both eyes.” The court waived payment of the filing fee.

{¶ 3} Defendant denied any LeCI personnel had any prior notice that Inmate Young intended to assault plaintiff. Furthermore, defendant asserted plaintiff failed to offer any evidence to prove an assault was imminent. Additionally, defendant denied plaintiff’s commissary items were stolen as a result of negligence on the part of LeCI staff.

{¶ 4} Defendant acknowledged plaintiff was struck in the head several times by Inmate Young on May 16, 2006. Inmate Young was physically restrained by LeCI employee, Officer Timberlake. Plaintiff was then taken to the LeCI infirmary for examination and treatment and was subsequently transferred to the Middletown Regional Hospital for additional treatment. Defendant did not provide any medical records detailing any injury plaintiff received as a result of being assaulted.

{¶ 5} On June 6, 2006, plaintiff filed an institutional grievance referencing the May 16, 2006 assault by Inmate Young. In this grievance plaintiff alleged LeCI employees, Sergeant Krowialis and Unit Manager Hoffman both were aware that Inmate Young was mentally unstable and consequently prone to physical violence. Plaintiff claimed both Hoffman and Krowialis “knew of the threat of serious assault,” but chose not to take any action to remove Inmate Young from his housing assignment despite Dr. Kelly (identified by plaintiff as Chief of Psychiatric Service) repeatedly recommending Young be moved from his cell assignment. Plaintiff related he informed both Hoffman and Krowialis at sometime prior to May 16, 2006 that Inmate Young “threaten(ed) to kill himself and stab me (responding to a voice).”

{¶ 6} On June 22, 2006, defendant’s Inspector of Institutional Services, responded to plaintiffs’ June 6, 2006 grievance. It was recorded in this response that D. Hoffman (Unit Manager), Sgt. R. Krowialis, Dr. Kelly (Mental Health Supervisor), Inmate Young, and plaintiff were all interviewed. According to information provided in the response both Hoffman and Krowialis denied Dr. Kelly recommended Inmate Young be moved out of the cell he shared with plaintiff. Dr. Kelly apparently stated he did not give any instructions to move Inmate Young from the cell he shared with plaintiff, although Kelly seemingly acknowledged Young expressed he had problems living in the cell with

plaintiff. According to the June 22, 2006 response, Hoffman advised that Inmate Young was scheduled to be moved from the cell on the day he assaulted plaintiff and was told of the scheduled move on that same day. Again, according to the June 22, 2006 response, Inmate Young related he assaulted plaintiff because of an unpaid debt. Supposedly, the assault occurred because plaintiff, who had earlier purchased commissary items to cover the debt he owed Young, had instead given the commissary items away to fellow inmates. Defendant chose not to provide any actual statements from D. Hoffman, Sgt. R. Krowialis, Dr. Kelly, and Inmate Young regarding their recollections of the matters at issue in this claim.

{¶ 7} Defendant denied having any knowledge of animosity between plaintiff and Inmate Young prior to May 16, 2006. Defendant explained plaintiff was interviewed in regard to his cellmate by Unit Manager Hoffman and gave no indication that he felt physically threatened by Inmate Young. Defendant denied plaintiff ever informed LeCI staff about any fears he may have held regarding his housing situation with Inmate Young. Defendant contended no liability can attach for an inmate-on-inmate assault unless plaintiff can offer sufficient proof of prior notice on the part of defendant.

{¶ 8} Defendant denied any commissary items owned by plaintiff were lost or stolen while under the control of LeCI personnel. Defendant asserted plaintiff's cell was secured immediately after plaintiff and Inmate Young were removed from the cell on May 16, 2006. Defendant explained the cell door was locked and plaintiff's property that was left in the cell was subsequently packed by LeCI personnel. The property inventory compiled at the time plaintiff's property was packed lists some articles that were probably purchased at the LeCI commissary. Plaintiff acknowledged the items listed on the May 16, 2006 property inventory as "a complete and accurate inventory" of his personal property.

{¶ 9} Plaintiff filed a response insisting LeCI personnel were on notice of problems between him and Inmate Young prior to the May 16, 2006 assault. Plaintiff stated he tried to get defendant to approve a cell transfer for either him or Inmate Young. Plaintiff also stated Inmate Young, on four separate occasions, checked "himself into (a) mental health unit attempting to compell staff action to abate the risky problem." [sic] Plaintiff did not produce any documentation establishing that he reported any threatening behavior on the part of Inmate Young prior to May 16, 2006.

Furthermore, plaintiff did not offer any evidence to prove he owned \$102.00 worth of commissary items on May 16, 2006 or that any commissary items were stolen from his unlocked cell.

{¶ 10} In order to prevail, plaintiff must prove, by a preponderance of the evidence, that defendant owed him a duty, that defendant breached that duty, and that defendant's breach proximately caused his injuries. *Armstrong v. Best Buy Company, Inc.* 99 Ohio St. 3d 79, 2003-Ohio-2573, 788 N.E. 2d 1088, ¶8 citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St. 3d 75, 77, 15 OBR 179, 472 N.E. 2d 707.

{¶ 11} "Whether a duty is breached and whether the breach proximately caused an injury are normally questions of fact, to be decided by . . . the court . . ." *Pacher v. Invisible Fence of Dayton*, 154 Ohio App. 3d 744, 2003-Ohio-5333, 798 N.E. 2d 1121, ¶41 citing *Miller v. Palson* (1994), 97 Ohio App. 3d 217, 221, 646 N.E. 2d 521; and *Mussivand v. David* (1989), 45 Ohio St. 3d 314, 318, 544 N.E. 2d 265.

{¶ 12} Ohio law imposes a duty of reasonable care upon the state to provide for its prisoner's health, care, and well-being. *Clemets v. Heston* (1984), 20 Ohio App. 3d 132, 136, 20 OBR 166, 485 N.E. 2d 287. Reasonable or ordinary care is that degree of caution and foresight which an ordinarily prudent person would employ in similar circumstances. *Smith v. United Properties, Inc.* (1965), 2 Ohio St. 2d 310, 31 O.O. 2d 573, 209 N.E. 2d 142.

{¶ 13} Defendant, however, is not an insurer of inmate safety. *Mitchell v. Ohio Dept. of Rehab. and Corr.* (1995), 107 Ohio App. 3d 231, 668 N.E. 2d 538. Where one inmate intentionally assaults another inmate, a claim for negligence arises only where there was adequate notice of an impending attack. *Mitchell*, at 235.

{¶ 14} A custodial officer is not obligated to act until he knows, or should know, that the custodial charge is endangered. The legal concept of notice is one of two distinguishable types: actual and constructive.

{¶ 15} "The distinction between actual and constructive notice has long been recognized. The distinction 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, either direct or circumstantial, the trier of fact is entitled to hold as a conclusion of fact and not as a presumption of law that the information was personally communicated to or received by the party, the notice is actual. On the other hand,

constructive notice is that which the law regards as sufficient to give notice and is regarded as a substitute for actual notice or knowledge.” *In re Estate of Fahle* (1950), 90 Ohio App. 195, 197-198, 47 O.O. 231, 105 N.E. 2d 429.

{¶ 16} In *Baker v. State* (1986), 28 Ohio App. 3d 99, 28 OBR 142, 502 N.E. 2d 261, the Tenth District Court of Appeals reviewed a prisoner’s claim for damages under similar allegations. In that case, plaintiff was assaulted by other inmates shortly after plaintiff had made some “vague statements” to prison guards about his need to be relocated. Plaintiff had also been slapped in the face by one of his assailants on the day of the assault. In affirming the trial court’s judgment in favor of defendant, the Court of Appeals held that the prison guards did not have adequate notice of an impending assault and, therefore, were not negligent in failing to prevent the assault. *Baker* at 100. In so holding, the court emphasized the fact that plaintiff had never requested protective custody or directly expressed his fears of an impending assault to any of defendant’s employees. *Baker* at 100. Plaintiff, in the instant claim, has asserted that he did indeed make requests to be removed from his cell, but the requests were ignored. Plaintiff did not present any evidence other than his own assertions that he feared physical violence from the hands of Inmate Young. Plaintiff essentially contended that he offered sufficient evidence to prove defendant received adequate notice of an impending assault upon him because of Inmate Young’s history of unstable mental illness.

{¶ 17} The credibility of witnesses and the weight attributable to their testimony are primarily matters for the trier of fact. *State v. DeHass* (1967), 10 Ohio St. 2d 230, 39 O.O. 2d 366, 227 N.E. 2d 212, paragraph one of the syllabus. The court is free to believe or disbelieve, all or any part of each witness’s testimony *State v. Antill* (1964), 176 Ohio St. 61, 26 O.O. 2d 366, 197 N.E. 2d 548. The court does not find the assertions of plaintiff that he feared an impending assault from Inmate Young or that he notified defendant of that particular apprehension, particularly persuasive.

{¶ 18} In order to prevail, plaintiff must show that the actions causing his injuries were foreseeable. In the case of an inmate upon inmate assault, actionable negligence arises only where defendant’s staff had adequate notice of an *impending attack* (emphasis added). See *Metcalf v. Ohio Dept. of Rehab. & Corr.*, Franklin App. No. 01AP-292, 2002-Ohio-5082; *Kordelewski v. Ohio Dept. of Rehab. & Corr.* (June 21, 2001), Franklin App. No. 00AP-1109, unreported. Plaintiff, in the instant claim, has

failed to establish that defendant either knew or should have known of an impending attack by Inmate Young on plaintiff. No credible evidence was presented to establish that defendant had any notice of any impending attack upon plaintiff. Plaintiff has failed to prove any actionable negligence on the part of defendant.

{¶ 19} Additionally, in regard to his claim for the alleged theft loss of commissary, plaintiff has the burden of proving, by a preponderance of the evidence, that he suffered a loss and that this loss was proximately caused by defendant's negligence. *Barnum v. Ohio State University* (1977), 76-0368-AD. The allegation that a theft may have occurred is insufficient to show defendant's negligence. *Williams v. Southern Ohio Correctional Facility* (1985), 83-07091-AD; *Custom v. Southern Ohio Correctional Facility* (1985), 84-02425. Plaintiff must show defendant breached a duty of ordinary or reasonable care. *Williams*. Defendant is not responsible for thefts committed by inmates unless an agency relationship is shown or it is shown that defendant was negligent. *Walker v. Southern Ohio Correctional Facility* (1978), 78-0217-AD.

{¶ 20} Defendant, when it retains control over whether an inmate's cell door is to be open or closed, owes a duty of reasonable care to inmates who are exclusively forced to store their possessions in the cell while they are absent from the cell. *Smith v. Rehabilitation and Correction* (1978), 77-0440-AD. However, in the instant claim, plaintiff has failed to prove defendant negligently or intentionally failed to lock his cell door, and therefore, no liability shall attach to defendant as a result of any theft based on that contention. *Carrithers v. Southern Ohio Correctional Facility* (2002), 2001-09079-AD. The trier of fact has discretion without constraint to believe or disbelieve all, part, or none of any witness statement presented. See *State v. Long* (1998), 127 Ohio App. 3d 328, 713 N.E. 2d 1. In the instant claim, the trier of fact does not find persuasive the statements plaintiff presented regarding the loss of his items purchased at the LeCl commissary.

{¶ 21} The plaintiff filed a motion to order defendant to supply medical records concerning the injuries he sustained at the time of the assault. The plaintiff asserts these records are necessary to establish his damages. However, since defendant is not liable for the injuries sustained by plaintiff's fellow inmate evidence of damages is irrelevant.

{¶ 22} Plaintiff filed a motion to expedite the proceedings.

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## ENTRY OF ADMINISTRATIVE DETERMINATION

Plaintiffs' motion to compel defendant to supply medical records is DENIED and plaintiff's motion to expedite the proceedings is GRANTED.

Having considered all the evidence in the claim file and, for the reasons set forth in the memorandum decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff.

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DANIEL R. BORCHERT

Deputy Clerk

Entry cc:

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Filed 9/25/08  
Sent to S.C. reporter 12/3/08