

ORIGINAL

IN THE SUPREME COURT OF OHIO

ANTHONY NIX,

: 14-1387

Appellant,

: On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

-vs-

OHIO DEPARTMENT OF REHABILITATION
AND CORRECTION,

: Court of Appeals
Case No. 13AP-547

Appellee.

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT ANTHONY NIX

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Explanation of Why This Case is a Case of Public or Great General Interest and Involves a Substantial Constitutional Question

Immunity for State employees encompasses the spectrum of State government. It is not only correctional officers. It is essential that immunity not be limited by a restrictive view of what is encompassed in employees' action during the course of employment.

Frustration and stress, not only in correction, but in every branch of State government, results in conduct in carrying out the work that to give a restrictive view to course and scope does a disservice to State employees, as well as the citizens of Ohio.

This case is of great interest to all citizens and employees. The Tenth District Court of Appeals in this case, as well as *Jodrey v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin Co. 12AP-477 (Jan. 31, 2013), which was denied for consideration in the Supreme Court of Ohio, in *Jodrey v. Ohio Dept. of Rehab. & Corr.*, S.Ct. Case No. 2013-0631, conflicts with previous Tenth District rulings, as well as this Court's pronouncement in *Amstutz, Admr. v. The Prudential Ins. Co. of America* (1940), 136 Ohio St. 404, 26 N.E.2d 454 (1940), second syllabus, where this court stated:

A deviation by a servant will not, as a matter of law, be deemed to be an abandonment of his service to his employer, unless such deviation is so divergent from his regular duty that its very character severs the relationship of master and servant.

STATEMENT OF THE CASE AND FACTS

Appellant Anthony Nix was an inmate incarcerated at the Mansfield Correctional Institution in Mansfield, Ohio, under the direct supervision and control of the Appellee, Ohio Department of Rehabilitation and Correction.

Appellant filed a Complaint in the Court of Claims of Ohio alleging on July 9, 2011, Appellant was confronted by two correctional officers after leaving the dining area and Unit 4-D. Correctional Officer Garrett demanded to know why Appellant was exiting 4-D, when he lived in 3-House. Appellant told him and then the officer demanded Appellant show him what was concealed in his waist. Appellant lifted his shirt, without revealing anything.

Appellee's officer then, without provocation or justification, grabbed Appellant's arm and twisted it behind Appellant's back to cuff Appellant. Appellant submitted, but then Correctional Officer Campbell came and maced Appellant without provocation. Appellant pulled away, rubbed his eye and Appellant was again slammed to the ground and kned by the officer.

Appellant was pulled up and walked to the infirmary where he was thrown to the ground as they entered the sallyport. Appellant was then dragged to the back of the clinic where he was brutally beaten and assaulted by the officers. Appellant alleged the officers twisted his thumb, put on latex gloves, sprayed mace on the gloves and then rubbed mace into his eyes, nose and mouth. Appellant alleged one officer then pulled down Appellant's pants and underwear, grabbed his penis, maced his penis and maced his bare anus.

There were correctional officers and nurses present in the infirmary, but none of these employees did anything to stop the assault. Appellant sought relief for excessive use of force and failure to protect. Appellee asserted the officers were not entitled to immunity and that none of the other employees saw or heard the assault.

The evidence was, for the most part, not controverted. Inmate John Hodge was a block porter for C.O. Clevenger and C.O. Ingram. Tr. 43. He also had a working relationship with C.O. Campbell, an officer who regularly transported inmates to segregation. Tr. 43-44. Hodge stole a PacMan game from Nix's "cellie's" property when he was sent to segregation. Tr. 44. When Nix learned of this, since it was his game, he confronted Hodge and told him to give it back or pay for it. Tr. 18, 22. Hodge, along with C.O. Garrett, in the presence of C.O. Clevenger, concocted a plan to intimidate Nix and prevent him from harassing or doing anything further about the PacMan. Tr. 46-47.

Hodge testified Garrett and Campbell planned to confront Nix on the yard, pat him down, grab his ass and take him to the hole. Tr. 47. Hodge watched from his unit and observed Campbell and Garrett confront Nix. Garrett caused Nix to lift his shirt, then grabbed him and took him to the ground and then escorted him to the hole. Tr. 48-49. Later, Campbell told Hodge about how they had treated Nix and got him to say PacMan. Tr. 50. Campbell said to Hodge, "give Daddy a big hug." Tr. 50-51.

Trevor Clark, staff counsel for Appellee, Ohio Department of Rehabilitation and Correction, was assigned as special investigator and in coordination with Mansfield Inspector Hunsinger, investigated the incident. Tr. 52-54. Trevor Clark interviewed Appellant Nix, Inmate Hodge, Campbell, Clevenger, Ransom, Nurse Moore, Inmate Biddwell, Windom, as well as checked the infirmary block log and the blood crew documents and learned of the excessive amount of mace used by Garrett and Campbell. Tr. 55-78.

Appellant Anthony Nix testified he did confront Hodge and told him to return the game or pay for it. Tr. 22. After Nix was released from segregation, after chow, he went to 4-D to get food from a friend. Tr. 23. When Garrett and Campbell saw him on the yard they wanted to know what he had and he lifted his shirt and was grabbed and maced. One guard

grabbed his buttocks, took him to the ground, and then cuffed him and took him to the infirmary. Tr. 23-26. While in the infirmary he was taken back near a suicide cell where Garrett and Campbell started beating on him, maced him, rubbed mace on his buttocks, called him names and insisted he say "PacMan," and accept Jesus Christ. Tr. 26-28. During this time Nix screamed and cried and finally said "PacMan." Tr. 28.

Appellee had Departmental Attorney Trevor Clark do an independent investigation of Anthony Nix's complaint about Correctional Officers Campbell and Garrett. Attorney Clark confronted C.O. Campbell, who admitted what occurred. Trevor Clark's report, Exhibit 8, concludes:

C/O Campbell admits to being involved in a premeditated, unjustified, excessive use of force. He remains on administrative leave at this time.

C/O Garrett according to the testimony of the victim, two inmates and a confessing fellow officer was involved in a premeditated, unjustified, excessive use of force. C/O Garrett resigned his position before speaking with this writer. His statements to the institutional committee are not consistent with the testimony and admissions herein.

This writer has no explanation how C/O Windom and C/O Ransom had no knowledge of this incident. Due to the location of their assigned posts on this date, there is no explanation as to how they could not have heard, seen or smelled the use of force occurring in the rear of the infirmary as C/O Campbell described it. Additionally, the blood spill crew provided information to the institutional committee that Ransom directed them to the spilled blood.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: In the context of immunity, a state employee's wrongful act, even if it is unnecessary, unjustified, excessive, or improper, does not take such act manifestly outside the scope of employment; it is only where the acts of state employees are motivated by actual malice or other such reasons giving rise to punitive damages that their conduct may be outside the scope of their state employment, pursuant to R.C. 9.86 and R.C. 2743.02(F).

Magistrate Rambo, at page 3 of his Decision, Appendix "A", specifically states:

Plaintiff argues that the magistrate's decision is contrary to the law set forth in *Elliott v. Ohio Dept. of Rehab. & Corr.*, 92 Ohio App.3d 772 (10th

Dist.1994) and *Thomas v. Ohio Dept. of Rehab. & Corr.*, 48 Ohio App.3d 86 (10th Dist.1988). The issue in those cases was whether a CO's use of excessive force fell manifestly outside the scope of his employment. This case is distinguishable inasmuch as the magistrate, and the court, finds that Garret and Campbell acted with a malicious purpose when they continued their attack on plaintiff in the infirmary. Consistent with the magistrate's decision, the court concludes that Garrett and Campbell's sole purpose in attacking plaintiff was to punish him for his confrontations with Hodge and that such conduct was done with a malicious purpose. While Garrett initially searched plaintiff for contraband, he and Campbell then acted with a malicious purpose when they continued to beat plaintiff and spray him with Mace in the infirmary. Additionally, the court finds that Garrett and Campbell's conduct in maliciously assaulting plaintiff when there was no threat of violence or physical harm was manifestly outside the scope of their employment as COs...

Cases decided by the Tenth District Court of Appeals are factually more dramatic as to the conduct of state employees and make it clear that if the employee acted unnecessarily, unjustified, excessive or improper, the conduct would not be outside the scope of employment.

The Tenth District Court of Appeals in *Wassenaar v. Ohio Dept. of Rehab. & Corr.*, Ct. of Cl. No. 91-08743, 2008-Ohio-1220, interestingly contains the following comment, at ¶ 25, as follows:

Thus, generally, under R.C. 9.86, a state officer or employee who acts in the performance of his or her duties is immunity from liability. *Thomson v. Univ. of Cincinnati College of Medicine* (Oct. 17, 1996), Franklin App. No. 96API02-260. Furthermore, pursuant to R.C. 9.86, the immunity issue does not hinge on the mere fact that an employee or officer acted "wrongfully," "even if the act is unnecessary, unjustified, excessive, or improper." *Thomson*. Rather, under R.C. 9.86, if the state officer or employee "acts manifestly outside the scope of his or her employment or acts with malicious purpose, in bad faith, or in a wanton or reckless manner, the employee will be liable in a court of general jurisdiction."

(Emphasis added.)

The Court of Appeals, in the following cases, found immunity under facts more egregious than the court dealt with in *Nix*.

The Tenth District Court of Appeals in *Elliott v. Ohio Dept. of Rehab. & Corr.*, 92 Ohio App.3d 772, 637 N.E.2d 106 (10th Dist. 1994) rules the correctional officer was furthering his employer's purpose by enforcing discipline. Both Campbell and Garrett were, by the same reasoning, preventing Nix from harassing or injuring Inmate Hodge. Inmate Elliott had been dismissed and the correctional officer simply called him back and struck him. The event occurred in the prison environment and the officers, as did Martin, reacted inappropriately to what they perceived was Nix's threat to Hodge.

In *Thomas v. Ohio Dept. of Rehab. & Corr.*, 48 Ohio App.3d 86, 548 N.E.2d 991 (10th Dist.1988), the correctional officer told the inmate to shut up after a verbal exchange. Thomas kept talking and the correctional officer struck him with a slapjack across the inmate's nose. Judge Bowman in *Thomas*, at page 89, states:

...Hence, an agent is acting outside the scope of his authority where the act has no relationship to the conduct of the principal's business or the conduct is so divergent that its very character severs the relationship of employer-employee. See *Wiebold Studio, Inc. v. Old World Restorations, Inc.* (1985), 19 Ohio App. 3d 246, 250-251, 19 OBR 398, 403, 484 N.E. 2d 280, 287.

In *Peppers v. Ohio Dept of Rehab. & Corr.*, 50 Ohio App.3d 87, 90, 553 N.E.2d 1093 (10th Dist.1988), the inmates broke up a fight and an engineer supervising, as Peppers walked away, struck him in the back. Judge Whiteside in deciding the case stated at page 90:

This court has held that state employees “* * * can act unreasonably and still be in the scope of their duty so as to permit the doctrine of *respondeat superior* to apply to make their employer, the state, liable. * * *” *James H. v. Dept. of Mental Health & Mental Retardation* (1980), 1 Ohio App. 3d 60, 61, 1 OBR 6, 8, 439 N.E.2d 437, 440. Therefore, merely identifying the act as unreasonable does not automatically preclude liability. Furthermore, the Supreme Court of Ohio held in paragraph two of the syllabus of *Amstutz v. Prudential Ins. Co.* (1940), 136 Ohio St. 404, 16 O.O. 572, 26 N.E. 2d 454;

“A deviation by a servant will not be deemed to be an abandonment of his service to his employer, unless such deviation is so divergent *from his*

regular duty that its very character severs the relationship of master and servant.” (Emphasis added.)

We do not believe the Court in its Opinion followed the reasoning in *Elliott, supra*. Prison regulations and law do not justify, as in *Peppers, supra*, and *Thomas, supra*, an unprovoked assault. Correctional Officers Campbell and Garrett, using the reasoning of the cases cited, were more involved in performing a duty to protect than the officers in *Thomas, supra*, or *Peppers, supra*.

The Supreme Court in discussing immunity, based on acting outside the scope, in *Amstutz, Admr. v. The Prudential Ins. Co. of America, supra*, ruled in the second syllabus:

A deviation by a servant will not be deemed to be an abandonment of his service to his employer, unless such deviation is so divergent from this regular duty that its very character severs the relationship of master and servant.

The Tenth District Court of Appeals in *Caruso v. State*, 136 Ohio App.3d 616 (10th Dist. 2000) reversed the Court of Claims’ Decision denying immunity to a physician who committed an assault on a secretary. Judge Lazarus, at pages 620-621, discusses malicious purpose, bad faith and reckless conduct and as in all cases concluded if the act was to facilitate or promote the principal’s business, immunity was justified. Judge Lazarus pointed out the action of the employee must not be for personal gratification and motivated solely out of ill will.

Judge Lazarus ruled that denial of immunity applies when it is solely for the employee’s benefit. At page 622 of *Caruso*, Judge Lazarus states:

In cases in which employees have assaulted others, courts have found no immunity or no *respondeat superior* liability where the evidence showed the tortfeasor acted solely for his personal benefit. *Szydowski, supra* (psychological aide engaged in sexual conduct with prison inmates); *Taylor v. Doctors Hosp.* (1985), 21 Ohio App.3d 154, 21 OBR 165, 486 N.E.2d 1249 (radiation orderly sexually assaulted patient, but no *respondeat superior* liability when employee was outside of his appointed tasks and acting to gratify personal impulses); *Hester v. Church’s Fried Chicken* (1986), 27 Ohio App.3d 74, 27 OBR 93, 499 N.E.2d 923 (employee assaulted another

employee solely out of feelings of personal ill will and malice harbored against his victim).

We urge the Court to accept this case and adopt the propositions accepted by previous cases of the Tenth District Court of Appeals

CONCLUSION

The Supreme Court has not ruled on the immunity provisions set forth in R.C. 2743.02(F) and 9.86, which control immunity for state workers.

R.C. 2743.02(F) provides:

A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of the officer's or employee's employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims that has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action. The officer or employee may participate in the immunity determination proceeding before the court of claims to determine whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code.

R.C. 9.86 provides:

Except for civil actions that arise out of the operation of a motor vehicle and civil actions in which the state is the plaintiff, no officer or employee shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

This section does not eliminate, limit, or reduce any immunity from civil liability that is conferred upon an officer or employee by any other provision of the Revised Code or by case law. This section does not affect the liability of the state in an action filed against the state in the court of claims pursuant to Chapter 2743. of the Revised Code.

These sections were enacted to provide a shield for state employees performing duties for the state of Ohio. Law enforcement and correctional officers have high stress frustrating jobs which trigger acts that are not motivated by malice or intent to harm, but out of frustration with the people they must deal with.

To place these employees at the mercy of litigation in state or federal courts is untenable. Previously the Tenth District has recognized that even though conduct is unjustified, the fact it happened in the context of furthering their employment, they were entitled to immunity. This case has great importance to all citizens, state employees and attorneys and should be reviewed.

Respectfully submitted,

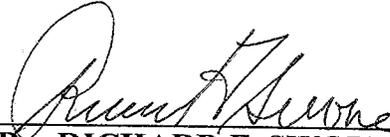


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction was served upon James P. Dinsmore, Assistant Attorney General, 150 East Gay Street, 18th Floor, Columbus, Ohio 43215, by regular U.S. mail, postage prepaid, on the 12th day of August, 2014.



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ANTHONY NIX

Plaintiff

v.

OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION

Defendant

Case No. 2011-11939

Magistrate Matthew C. Rambo

DECISION OF THE MAGISTRATE

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Plaintiff brought this action alleging assault and battery by employees of defendant. The issues of liability and damages were bifurcated and the case was tried to the magistrate on the issues of liability and civil immunity.

At all times relevant, plaintiff was an inmate in the custody and control of defendant at the Mansfield Correctional Institution (ManCI). On July 9, 2011, plaintiff was confronted on the ManCI yard by Corrections Officer (CO) Garrett for being "out of place." Plaintiff testified that Garrett ordered him to lift up his shirt and show him the waistband of his pants and that he complied. According to plaintiff, Garrett then shoved him and twisted his arm, at which point CO Campbell arrived on the scene, administered a burst of Mace, and the COs tackled plaintiff to the ground while Campbell continued to spray him with Mace. Plaintiff estimated this encounter lasted four or five minutes before he was placed in handcuffs and escorted to the infirmary. According to plaintiff, once in the infirmary, Garrett and Campbell threw him to the ground, dragged him into a cell at the rear of the building, and proceeded to "beat him." Plaintiff stated that at some point during the attack Campbell put on rubber gloves, soaked the gloves in Mace, and rubbed it in his eyes and mouth. Plaintiff further stated that the COs pulled his pants off and sprayed his anus and penis with Mace. According to plaintiff, during the attack, the COs made him say "Pac Man" repeatedly and made him swear to convert to Christianity and state that he believes in Jesus Christ. Plaintiff related that he screamed for help, but that the other employees

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in the area, two other COs and two nurses, did nothing. Plaintiff alleges that he suffered severe injuries as a result of the attack, including burns to this penis and scrotum, and asserts that the attack amounts to an unreasonable use of force by defendant's employees for which defendant is liable. Campbell and Garrett are no longer employed with defendant as a result of the incident.

Defendant argues that Garrett and Campbell acted maliciously and outside the scope of their employment, are not entitled to civil immunity, and defendant is therefore not liable for plaintiff's injuries.¹

R.C. 2743.02(F) states, in part:

"A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of the officer's or employee's employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action."

R.C. 9.86 states, in part:

"[N]o officer or employee [of the state] shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner."

Plaintiff testified that his troubles with Garrett and Campbell started when he confronted inmate John Hodge approximately three days prior to the attack regarding a

¹Counsel for defendant informed the court that Garrett and Campbell were advised of their right to representation and to participate in the hearing via certified mail. Neither appeared at trial.

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stolen "Pac Man" handheld video game. According to plaintiff, the game belonged to his cellmate, who was in segregation. Plaintiff related that he told Hodge to either replace the game or pay him \$50 before his cellmate was released from segregation. Plaintiff testified that he confronted Hodge a second time on the day of the attack about the game.

Hodge, also known as "Fuck You" because of a facial tattoo, testified that he was the "block porter" in plaintiff's housing unit and that his job was to take inmate property from the cells to storage when an inmate was away from the housing unit for an extended period of time. According to Hodge, Campbell was "cool" to him, and when an inmate gave Campbell problems, Campbell would permit Hodge to steal that inmate's property while he was performing his duties as block porter. Hodge admitted to stealing the video game and confirmed that plaintiff confronted him about it. According to Hodge, he was concerned for his safety and informed CO Clevenger of plaintiff's threats, who responded that he would "take care of it." Hodge testified that he observed the initial confrontation between plaintiff, Garrett and Campbell from a window in his housing unit. He stated that the next day, Campbell informed him that "we took care of it," that "we almost broke [plaintiff's] arms," and that "he was crying like a little bitch."

Trevor Clark serves as staff counsel for defendant and along with ManCI investigator Angela Huntsinger was tasked with conducting an investigation into the incident after another inmate wrote a letter regarding the incident to defendant's Office of the Chief Inspector. Clark testified that he interviewed plaintiff and that plaintiff related to him the same facts and details that he testified to during trial. Clark also testified that he was able to confirm most of the details of plaintiff's story except for the Mace soaked glove. Clark recounted that he interviewed COs Campbell, Ransom, Wyndam and Clevenger, and nurses Moore and Edgel; Garrett resigned prior to being interviewed. Clark related that Campbell placed most of the blame for the attack on Garrett and that while the other employees admitted to being in the infirmary at the time of the incident and were aware that plaintiff, Garrett and Campbell were in the infirmary, they denied all knowledge of the attack.

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"To prove assault under Ohio law, plaintiff must show that the defendant willfully threatened or attempted to harm or touch the plaintiff offensively in a manner that reasonably placed the plaintiff in fear of the contact. To prove battery, the plaintiff must prove that the intentional contact by the defendant was harmful or offensive. Ohio courts have held that, in a civil action for assault and battery, the defendant has the burden of proving a defense of justification, such as the exercise of lawful authority." (Citations omitted.) *Miller v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 12AP-12, 2012-Ohio-3382, ¶ 11.

The Ohio Administrative Code sets forth the circumstances under which force may be lawfully utilized by prison officials and employees in controlling inmates. Ohio Adm.Code 5120-9-01(C) provides, in relevant part:

"(2) Less-than-deadly force. There are six general circumstances in which a staff member may use force against an inmate or third person. A staff member may use less-than-deadly force against an inmate in the following circumstances:

- "(a) Self-defense from physical attack or threat of physical harm;
- "(b) Defense of another from physical attack or threat of physical attack;
- "(c) When necessary to control or subdue an inmate who refuses to obey prison rules, regulations or orders;
- "(d) When necessary to stop an inmate from destroying property or engaging in a riot or other disturbance;
- "(e) Prevention of an escape or apprehension of an escapee; or,
- "(f) Controlling or subduing an inmate in order to stop or prevent self-inflicted harm."

The court has recognized that "corrections officers have a privilege to use force upon inmates under certain conditions. * * * However, such force must be used in the performance of official duties and cannot exceed the amount of force which is reasonably necessary under the circumstances. * * * Obviously, 'the use of force is a reality of prison life' and the precise degree of force required to respond to a given situation requires an

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exercise of discretion by the corrections officer." (Citations omitted.) *Mason v. Ohio Dept. of Rehab. & Corr.*, 62 Ohio Misc.2d 96, 101-102 (Ct. of Cl.1990).

Based upon the testimony and evidence adduced at trial, the court finds that while Garrett was initially privileged to stop and search plaintiff pursuant to his duties to maintain security at ManCI, there was no evidence that plaintiff thereafter disobeyed any orders or presented a threat of harm to himself or others. Therefore, any use of force by Garrett and Campbell after the initial confrontation was unjustified, excessive, and constituted a battery. The issue is whether Campbell and Garrett were nevertheless entitled to civil immunity for their actions in the infirmary.

The issue whether an employee is entitled to immunity is a question of law. *Nease v. Medical College Hosp.*, 64 Ohio St.3d 396, 1992-Ohio-97, citing *Conley v. Shearer*, 64 Ohio St.3d 284, 292, 1992-Ohio-133. The question whether an employee acted outside the scope of his employment, or with malicious purpose, in bad faith, or in a wanton or reckless manner is one of fact. *Tschantz v. Ferguson* (1989), 49 Ohio App.3d 9.

"Malicious purpose encompasses exercising 'malice,' which can be defined as the willful and intentional design to do injury, or the intention or desire to harm another, usually seriously, through conduct that is unlawful or unjustified. Bad faith has been defined as the opposite of good faith, generally implying or involving actual or constructive fraud or a design to mislead or deceive another. Bad faith is not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. Finally, reckless conduct refers to an act done with knowledge or reason to know of facts that would lead a reasonable person to believe that the conduct creates an unnecessary risk of physical harm and that such risk is greater than that necessary to make the conduct negligent. The term 'reckless' is often used interchangeably with the word 'wanton' and has also been held to be a perverse disregard of a known risk." *Caruso v. State* (2000), 136 Ohio App.3d 616, 620-621. (Internal citations omitted.)

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An employee's wrongful conduct, even if it is unnecessary, unjustified, excessive or improper, does not automatically subject the employee to personal liability unless the conduct is so divergent that it severs the employer-employee relationship. *Elliott v. Ohio Dept. of Rehab. & Corr.* (1994), 92 Ohio App.3d 772, 775, citing *Thomas v. Ohio Dept. of Rehab. & Corr.* (1988), 48 Ohio App.3d 86, 89.

Based upon the foregoing, the court finds that while Campbell and Garrett were acting within the scope of their employment with defendant when they stopped and searched plaintiff, they then acted with a "malicious purpose" in that their only purpose in taking plaintiff into the infirmary was to punish him for his threats against Hodge by inflicting bodily injury upon him. Accordingly, the court concludes that Campbell and Garrett are not entitled to civil immunity pursuant to R.C. 9.86 and 2743.02(F) and that the courts of common pleas have jurisdiction over any civil actions that may be filed against them based upon the allegations in this case.

The issue of whether the other employees in the infirmary at the time of the incident were negligent remains. In order to prevail upon his claim of negligence, plaintiff must prove the existence of a duty, a breach of that duty, and an injury proximately resulting from such breach. *McDonald v. Ohio Dept. of Rehab. and Corr.*, 10th Dist. No. 02AP-735, 2003-Ohio-513, ¶ 8, citing *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77 (1984). "Ohio law imposes a duty of reasonable care upon the state to provide for its prisoners' health, care, and well-being." *Id.*, citing *Clemets v. Heston*, 20 Ohio App.3d 132, 136 (6th Dist.1985).

Clark testified that the other employees in the infirmary at the time of the incident informed him that they were unaware of the attack but was of the opinion that they should have been able to hear plaintiff's screams and smell the Mace being administered. However, those employees were not called to testify and plaintiff provided no other evidence to establish that they knew or should have known that plaintiff was being attacked and were negligent in failing to go to his aid. Accordingly, the court finds that plaintiff failed

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DECISION

to establish that those employees breached their duty to "provide for [plaintiff's] health, care, and well-being."

Judgment is recommended in favor of defendant.

A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).



MATTHEW C. RAMBO
Magistrate

cc:

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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

ANTHONY NIX

Plaintiff

v.

OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION

Defendant

Case No. 2011-11939

Judge Patrick M. McGrath
Magistrate Matthew C. Rambo

JUDGMENT ENTRY

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On January 8, 2013, the magistrate recommended judgment in favor of defendant. Civ.R. 53(D)(3)(b)(i) states, in part: "A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i)." Plaintiff filed objections on February 6, 2013, with leave of court. On the same day, plaintiff filed the trial transcript. Defendant did not file its own objections or otherwise respond to plaintiff's objections.

Upon review of the record, the court agrees with the magistrate's factual findings. Plaintiff, an inmate in the custody and control of defendant, approached inmate John Hodge twice regarding a stolen Pacman video game that belonged to plaintiff's cellmate. At trial, inmate Hodge admitted that he stole the video game and that he told Corrections Officer (CO) Clevenger that he was concerned for his safety because of plaintiff's confrontations, to which Clevenger responded that he would "take care of it."

On July 9, 2011, CO Garrett approached plaintiff in the yard and asked him to lift up his shirt as Garrett was looking for contraband. Plaintiff complied with Garrett's orders, at which time Garrett grabbed him and twisted his arm. CO Campbell then arrived and began to spray Mace on plaintiff. Plaintiff was placed in handcuffs and escorted to the infirmary, where Garrett and Campbell beat him and sprayed him with Mace in his face and genitals. After the attack on plaintiff, Campbell informed Hodge that "we took care of it."

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ENTRY

The issue of whether Campbell and Garrett were entitled to civil immunity was tried with the merits of the case. The magistrate determined that Garrett was initially privileged to stop and search plaintiff, but that the use of force by Garrett and Campbell after the initial confrontation with plaintiff was excessive and unjustified. Furthermore, Garrett and Campbell acted with malicious purpose when they inflicted bodily injury upon plaintiff. Accordingly, the magistrate concluded that Garrett and Campbell were not entitled to civil immunity pursuant to R.C. 9.86 and 2743.02(F) and that the courts of common pleas have jurisdiction over any civil actions that may be filed against them based upon the allegations in this case.

Plaintiff also alleges that defendant breached its duty to "provide for [plaintiff's] health, care, and well-being." Several employees of defendant were in the infirmary when Garrett and Campbell attacked plaintiff. The magistrate concluded that plaintiff failed to present sufficient evidence to find that the employees knew, or should have known, about the attack and failed to respond. Accordingly, the magistrate recommended judgment in favor of defendant.

Plaintiff raises four objections. Plaintiff's first and fourth objections relate to the magistrate's immunity determination. Plaintiff first contends that the magistrate erred in ruling that Garrett and Campbell were not entitled to civil immunity.

"An employee's acts are within the scope of his employment unless the act is so divergent that the very nature of it severs the relationship between an employer and employee." *Brooks v. Ohio State Univ.*, 111 Ohio App.3d 342, 250 (10th Dist.1996), citing *Wiebold Studio, Inc. v. Old World Restorations, Inc.*, 19 Ohio App.3d 246 (1st Dist.1985). Garrett and Campbell's attack on plaintiff was motivated by malice and a personal desire to punish plaintiff. During the attack in the infirmary, Garrett and Campbell made plaintiff say "Pacman" and told him to convert to Christianity. Additionally, Trevor Clark, who investigated the attack, determined that 28 grams of Mace was used during the attack on plaintiff, which he testified was a significant amount. For the reasons set forth by the

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magistrate, the court finds that Garrett and Campbell's unjustified and excessive actions were so divergent so as to sever the employer/employee relationship.

Plaintiff argues that the magistrate's decision is contrary to the law set forth in *Elliott v. Ohio Dept. of Rehab. & Corr.*, 92 Ohio App.3d 772 (10th Dist.1994) and *Thomas v. Ohio Dept. of Rehab. & Corr.*, 48 Ohio App.3d 86 (10th Dist.1988). The issue in those cases was whether a CO's use of excessive force fell manifestly outside the scope of his employment. This case is distinguishable inasmuch as the magistrate, and the court, finds that Garrett and Campbell acted with a malicious purpose when they continued their attack on plaintiff in the infirmary. Consistent with the magistrate's decision, the court concludes that Garrett and Campbell's sole purpose in attacking plaintiff was to punish him for his confrontations with Hodge and that such conduct was done with a malicious purpose. While Garrett initially searched plaintiff for contraband, he and Campbell then acted with a malicious purpose when they continued to beat plaintiff and spray him with Mace in the infirmary. Additionally, the court finds that Garrett and Campbell's conduct in maliciously assaulting plaintiff when there was no threat of violence or physical harm was manifestly outside the scope of their employment as COs. Upon review of the transcript, evidence, and plaintiff's objections, the court finds that the magistrate properly determined that Garrett and Campbell are not entitled to civil immunity and plaintiff's first objection shall be overruled.

Additionally, plaintiff contends that the magistrate erred in failing to join Garrett and Campbell as parties and notify them of their right to object and appeal the immunity determination. At trial, defense counsel informed the court that he sent Garrett and Campbell certified mail at their last known address notifying them that their immunity would be determined at the trial and of their right to participate in the proceedings. Counsel informed the court that he did not hear from either of them and neither appeared for the proceedings.

Pursuant to R.C. 2743.02(F), when the court of claims determines whether an officer or employee is entitled to personal immunity, "[t]he officer or employee *may participate in*

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the immunity determination proceeding before the court of claims * *.*" (Emphasis added.) "The Ohio legislature has enacted a statute which makes officers and employees of Ohio somewhat of a party in the Court of Claims when their immunity is being determined. Such officers and employees must have an appellate remedy if they are deprived of or refused immunity by the Court of Claims." *Marotto v. Ohio State Univ. Med. Ctr.*, 10th Dist. No. 12AP-27, 2012-Ohio-1078, ¶ 8, subsequent proceedings at 2012-Ohio-6158.

While an employee has the right to appeal the court's decision denying the employee immunity, R.C. 2743.02(F) does not require the court to join the employee as a party to the action. Garrett and Campbell were provided notice by defendant that their immunity was being contested and given the opportunity to appear and participate in the proceedings; however, they failed to appear at trial. Inasmuch as the court does not have mailing addresses for Campbell and Garrett and the statute does not require the court to serve them with the decision, plaintiff's objection is without merit. Accordingly, plaintiff's fourth objection shall be overruled.

In his second objection, plaintiff contends that "the Magistrate erred in ruling defendant's employees were not aware of [COs] Campbell and Garrett's assaults in the infirmary based on their clear proximity to the event, the level of noise, the acrid smell of Mace and the obvious blood indicating the ferocity of the attack."

To prove a cause of action for negligence, plaintiff must prove "the existence of a duty, a breach of the duty, and an injury resulting proximately from the breach." *McDonald v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 02AP-735, 2003-Ohio-513, ¶ 8, citing *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77 (1984). "Ohio law imposes a duty of reasonable care upon the state to provide for its prisoners' health, care, and well-being." *Id.*, citing *Clemets v. Heston*, 20 Ohio App.3d 132, 136 (6th Dist.1985).

Clark testified that other employees of defendant were in the infirmary at the time of the attack, including two COs and three nurses. When Clark questioned the two COs about the incident, they informed him that they did not see or hear the attack nor did they

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ENTRY

smell Mace. Clark testified that one nurse heard noise but she was told to mind her own business. None of these employees were called to testify at trial.

Plaintiff contends that based on the size of the infirmary, the employees present in the area should have known the attack was taking place. Upon review of the trial transcript, Clark's testimony as to the size of the infirmary was compared to the size of the room where the trial took place. Additionally, Clark testified that the infirmary has hallways and that one may not be able to see the entire infirmary from within it. Based on the record, the court is unable to determine the size of the infirmary and if employees would have seen the attack taking place.

While plaintiff testified that he recalled COs Random and Windom and nurses watching the attack in the infirmary, Clark testified that in the interviews he conducted, the COs and nurses said that they did not see the attack. This testimony is conflicting and as such, the court concludes that plaintiff has failed to prove by a preponderance of the evidence that defendant's employees in the infirmary knew the assault was occurring. Based upon this testimony, the court concludes that plaintiff has failed to prove by a preponderance of the evidence that defendant's employees should have seen the attack taking place in the infirmary.

Furthermore, the court finds that plaintiff failed to prove by a preponderance of the evidence that defendant's employees knew or should have known about the assault based on the noise and the smell of Mace. While Clark testified that the smell of Mace would be strong if it was discharged, he has no first-hand knowledge about any smell in the infirmary. Additionally, according to Clark, nurse Moore heard some sort of commotion, but another nurse told her to "mind her own business." The court concludes that plaintiff presented insufficient evidence to prove that defendant's employees heard the attack or smelled the Mace. Finally, the court finds that the fact that the blood crew was called to clean up blood does not prove that defendant's employees knew or should have known about the attack when it was occurring in the infirmary.

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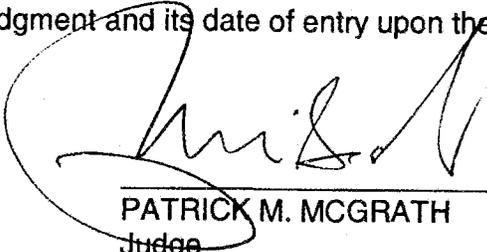
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ENTRY

Upon review of the trial transcript, the court finds that plaintiff has failed to prove by a preponderance of the evidence that defendant breached its duty to provide for plaintiff's care and well-being. Plaintiff's second objection shall be overruled.

Finally, plaintiff contends that the magistrate's decision is against the weight of evidence and contrary to law. For the reasons stated above, the court does not agree. Plaintiff's third objection shall be overruled.

Upon review of the record, the magistrate's decision and the objections, the court finds that the magistrate has properly determined the factual issues and appropriately applied the law. Therefore, the objections are OVERRULED and the court adopts the magistrate's decision and recommendation as its own, including findings of fact and conclusions of law contained therein. Judgment is rendered in favor of defendant. Additionally, the court determines that Garrett and Campbell are not entitled to civil immunity pursuant to R.C. 9.86 and 2743.02(F) and that the courts of common pleas do have jurisdiction over any civil actions that may be filed against them based upon the allegations in this case. 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 M. MCGRATH
Judge

cc:

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Anthony Nix,	:	
	:	
Plaintiff-Appellant,	:	
v.	:	No. 13AP-547
	:	(Ct. of Cl. No. 2011-11939)
Ohio Department of Rehabilitation & Correction,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	
	:	

D E C I S I O N

Rendered on June 30, 2014

Swope and Swope – Attorneys at Law, and Richard F. Swope, for appellant.

Michael DeWine, Attorney General, and James P. Dinsmore, for appellee.

APPEAL from the Court of Claims of Ohio.

BROWN, J.

{¶ 1} This is an appeal by plaintiff-appellant, Anthony Nix, from a judgment of the Court of Claims of Ohio overruling his objections to a magistrate's decision and rendering judgment in favor of defendant-appellee, Ohio Department of Rehabilitation & Correction.

{¶ 2} At all times relevant, appellant was an inmate at the Mansfield Correctional Institution. On October 11, 2011, appellant filed a complaint alleging that two corrections officers at the facility assaulted him, causing injuries, extreme pain and suffering, and emotional distress.

{¶ 3} The Court of Claims assigned the matter to a magistrate who conducted a trial October 30, 2012. Appellant testified on his own behalf and gave the following account of the events at issue. In July 2011, appellant learned that another inmate, John Hodge, had stolen a "Pacman" video game belonging to appellant's cellmate. (Tr. 22.) On two separate occasions, appellant asked Hodge about the missing game.

{¶ 4} On July 9, 2011, appellant was near the "4-D" area of the facility when a corrections officer ("CO"), Joshua Garrett, pulled up in a cart and asked appellant: "[W]hat you got on your waist? Look like you got something on your waist." (Tr. 23.) Appellant denied having anything on his waist.

{¶ 5} CO Garrett told appellant to lift up his shirt. Appellant complied, and showed the officer he did not have anything on his waist. CO Garrett "grabbed my arm and told me to cuff up." The CO grabbed appellant's arm and "twisted it around." (Tr. 24.) At this time, another CO, Jerry Campbell, arrived in a cart and "maced" appellant in the face. (Tr. 24.) The officers "kept saying, cuff up, cuff up." (Tr. 24.) Appellant put his arms behind his back and lifted his arms "so they can cuff me." (Tr. 24.) CO Garrett then said, "oh, so you refusing to cuff up?" (Tr. 24.) Appellant responded, "cuff me up." (Tr. 24.) CO Garrett then "slammed me to the ground." (Tr. 25.) The officers were "acting like I was refusing to give the other one the arm, and they started macing me. Campbell started macing me in the face. Every time I'd turn my face, he just maced me." (Tr. 25.) COs Garrett and Campbell cuffed appellant and walked him to the infirmary. Once inside the infirmary, they "threw me into the water fountain, told me to get up." (Tr. 26.)

{¶ 6} Two other COs, "CO Ransom" and "CO Windom," as well as several nurses, were inside the infirmary at the time. (Tr. 29.) There was a desk in the infirmary, and "CO Windom and Ransom and two nurses were behind the desk." (Tr. 29.) Another inmate, Paul Bidwell, was also inside the infirmary.

{¶ 7} COs Garrett and Campbell then took appellant to the back of the infirmary and threw him on the ground. Appellant gave the following testimony regarding the ensuing events:

They just started – that's when they started the assault. They started beating me, choking me. Campbell put a rubber glove on his hand and soaked the glove in mace and stuck it in my mouth. He kept macing the glove and he was rubbing it in my eyes and my nose. I was trying to get away. I was on the

ground squirming. Then he held me down and Garrett pulled my pants down and grabbed my penis and maced me in the penis.

(Tr. 27.)

{¶ 8} The COs told appellant "that's what I get for trying to extort one of their porters." (Tr. 27.) CO Campbell "kept making me * * * say Pacman. While he was macing me, he kept making me scream Pacman." (Tr. 27-28.)

{¶ 9} Shortly after the incident, appellant filed institutional complaints and several investigators contacted him regarding the incident. Appellant declined to talk with the investigators at the time because his family lived in the area and he did not want to risk being transferred from the Mansfield facility. (Tr. 32.) Appellant later spoke with two investigators, Trevor Clark and Angela Hunsinger, and explained to them what happened.

{¶ 10} In July 2011, John Anthony Hodge was an inmate at the Mansfield Correctional Institution. Hodge, who worked as a porter at the facility, testified that if anyone gave CO Campbell "problems, I'd take their property." (Tr. 43-44.) Hodge acknowledged stealing a Pacman video game. When appellant later confronted Hodge about the video game, Hodge denied taking it. Hodge then spoke with CO Clevenger, telling the CO that "this guy was bugging me about a video game system." (Tr. 46.) COs Garrett and Campbell then "pulled up on the golf cart, and Clevenger told them what I had told Clevenger." (Tr. 46-47.) COs Garrett and Campbell then "started coming up with a plan what they were going to do." (Tr. 47.) The officers planned to search appellant and make him turn around as if "he's posing a threat," and then "they were going to take him to the ground, mace him, take him back to the hole." (Tr. 47.)

{¶ 11} On July 9, 2011, as appellant was leaving the food hall, Hodge observed CO Campbell approach appellant and spray mace in his face. The CO took appellant to the ground, and several "[o]ther COs rushed over there." (Tr. 49.) The COs cuffed appellant and took him to the infirmary. CO Campbell later told Hodge: "[W]e took care of this for you, * * * he was crying like a little bitch, we almost broke his arm, we made him say Pacman." (Tr. 50.)

{¶ 12} Clark, staff counsel for appellee, investigated the incident. As part of his investigation, Clark interviewed appellant, who was initially hesitant to speak because he did not want to leave the Mansfield facility. According to Clark, appellant did not have any contraband at the time the COs confronted him, nor did they "take him to the hole for resisting." (Tr. 55.) Clark testified that appellant was honest regarding "the major details" of the incident. (Tr. 56.)

{¶ 13} During his investigation, Clark spoke with CO Ransom, who was on duty in the infirmary on the date of the incident. CO Ransom told Clark that "his only recollection was opening the door, and then from that point, he claims that he stayed out in the front area of the infirmary." (Tr. 59.)

{¶ 14} Clark interviewed CO Campbell as part of the investigation, and Clark "confronted him with the fact that 28 grams of mace was used from his canister." (Tr. 62.) CO Campbell "didn't really have a comment on that." (Tr. 63.) Clark interviewed CO Campbell a second time and the CO "broke down, crying, and indicated to me that he knew that they had screwed up." (Tr. 63.) CO Campbell "structured his explanation of the events to where his involvement was more restraining [appellant] while Garrett did the dirty work." (Tr. 63.) CO Campbell believed that "Garrett did, in fact, pull down [appellant's] pants and may have maced him in the anus and his genitalia." (Tr. 64.)

{¶ 15} Clark also spoke with CO Clevenger, who initially "said he had no knowledge of the incident whatsoever." (Tr. 68.) Later, Clevenger indicated he "saw Campbell standing up over top of [appellant], and that Garrett was holding him down on the ground, attempting to restrain him, but that he saw nothing unusual about the situation and turned and walked the other way." (Tr. 68.) CO Clevenger told Clark he did not smell mace.

{¶ 16} Clark interviewed a nurse, identified in Clark's report as "Nurse Moore," who was in a lunch break room in the infirmary at the time the officers arrived with appellant. Moore "claims that she came out to observe the commotion, and that Nurse Edgell confronted her and said, mind your own business. And then she went back in the break room and that was the end of her experience with it." (Tr. 73-74.) Clark interviewed "Nurse Edgell," who denied telling Moore to mind her own business. Clark interviewed a third nurse who did not recall anything about the incident.

{¶ 17} Clark also interviewed inmate Bidwell, who was in one of the infirmary cells at the time of the incident. According to Clark, Bidwell related that he heard "shouts and screams" from appellant and that he also heard COs "shouting Pacman at him." (Tr. 76.)

{¶ 18} Hunsinger, an institutional investigator at the Mansfield Correctional Institution, testified that there were no security cameras in the infirmary on the date of the incident. Following the events, an inmate "blood spill crew" reported to the infirmary, and a report indicated the crew cleaned up some blood at the front of a holding cell.

{¶ 19} The magistrate issued a decision January 8, 2013, finding that COs Campbell and Garrett were not entitled to civil immunity based upon a determination that the COs acted with malicious purpose. With respect to the issue of whether other employees in the infirmary at the time of the incident were negligent, the magistrate found that appellant "failed to establish that those employees breached their duty to 'provide for [plaintiff's] health, care, and well-being.'" The magistrate therefore recommended that the court render judgment in favor of appellee. On February 6, 2013, appellant filed objections to the magistrate's decision. By judgment entry filed May 21, 2013, the trial court overruled appellant's objections and rendered judgment in favor of appellee.

{¶ 20} On appeal, appellant sets forth the following four assignments of error for this court's review:

ASSIGNMENT OF ERROR NO. 1: THE MAGISTRATE AND THE COURT ERRED IN RULING C.O. CAMPBELL AND C.O. GARRETT WERE NOT ENTITLED TO IMMUNITY.

ASSIGNMENT OF ERROR NO. 2: THE MAGISTRATE AND THE COURT ERRED IN RULING DEFENDANT-[APPELLEE'S] EMPLOYEES WERE NOT AWARE OF CORRECTIONAL OFFICERS CAMPBELL'S AND GARRETT'S ASSAULTS IN THE INFIRMARY BASED ON THEIR CLEAR PROXIMITY TO THE EVENT, THE LEVEL OF NOISE, THE ACRID SMELL OF MACE AND THE OBVIOUS BLOOD INDICATING THE FEROCITY OF THE ATTACK.

ASSIGNMENT OF ERROR NO. 3: THE MAGISTRATE'S AND THE COURT'S DECISIONS AS TO BOTH ISSUES, IMMUNITY AND FAILURE TO PROTECT, ARE AGAINST

THE WEIGHT AND SUFFICIENCY OF THE EVIDENCE
AND CONTRARY TO LAW.

ASSIGNMENT OF ERROR NO. 4: THE FAILURE TO JOIN
GARRETT AND CAMPBELL AS PARTIES, ONCE THE
DEFENDANTS-APPELLEES ASSERTED THEY WERE NOT
ENTITLED TO IMMUNITY, OR TO NOTIFY THEM OF THE
RIGHT TO OBJECT AND APPEAL, WAS ERROR.

{¶ 21} Appellant's first, second, and third assignments of error are interrelated and will be considered together. Under the first assignment of error, appellant asserts the trial court erred in ruling that COs Garrett and Campbell were not entitled to immunity, while his second assignment of error challenges the court's ruling that he failed to prove appellee's employees were aware of the assaults by COs Garrett and Campbell. In his third assignment of error, appellant contends the above determinations by the court were against the manifest weight of the evidence and contrary to law.

{¶ 22} We initially address appellant's contention that the trial court erred in holding that COs Garrett and Campbell were not entitled to civil immunity. In accordance with R.C. 2743.02(F), the Court of Claims "has exclusive jurisdiction to determine whether a state employee is immune from liability under R.C. 9.86." *Johns v. Univ. of Cincinnati Med. Assoc., Inc.*, 101 Ohio St.3d 234, 2004-Ohio-824, syllabus. R.C. 2743.02(F) states in part as follows:

A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of the officer's or employee's employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims that has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action.

{¶ 23} R.C. 9.86, which confers immunity on state officers and employees, provides in part as follows:

[N]o officer or employee shall be liable in any civil action that arises under the law of this state for damage or injury caused

in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

{¶ 24} In general, "[m]alicious purpose encompasses exercising 'malice,' which can be defined as the willful and intentional design to do injury, or the intention or desire to harm another, usually seriously, through conduct that is unlawful or unjustified." *Caruso v. State*, 136 Ohio App.3d 616, 620 (10th Dist.2000). Under Ohio law, "[a] person is subject to liability for battery when he acts intending to cause a harmful or offensive contact, and when a harmful contact results." *Love v. Port Clinton*, 37 Ohio St.3d 98, 99 (1988).

{¶ 25} In arguing that the trial court erred in ruling that COs Campbell and Garrett were not entitled to immunity, appellant contends that these COs were acting in accordance with R.C. 2921.44(C)(3), which states in part: "No law enforcement officer shall negligently * * * [f]ail to control an unruly prisoner." Specifically, appellant contends the COs took action to prevent him from intimidating or injuring Hodge.

{¶ 26} In the instant case, the magistrate, in considering the issue of immunity with respect to COs Garrett and Campbell, found that "while Garrett was initially privileged to stop and search [appellant] pursuant to his duties to maintain security * * * there was no evidence [appellant] thereafter disobeyed any orders or presented a threat of harm to himself or others." The magistrate found that "any use of force by Garrett and Campbell after the initial confrontation was unjustified, excessive, and constituted battery." The magistrate further determined that, "while Campbell and Garrett were acting within the scope of their employment * * * when they stopped and searched [appellant], they then acted with a 'malicious purpose' in that their only purpose in taking [appellant] into the infirmary was to punish him * * * by inflicting bodily injury upon him."

{¶ 27} In addressing appellant's objections to the magistrate's decision, the trial court agreed with the magistrate's determination that COs Garret and Campbell acted with malicious purpose. Specifically, the court held that the "sole purpose" for the attack by the COs was to punish appellant for his confrontations with Hodge. The court

determined that, "[w]hile Garrett initially searched plaintiff for contraband, he and Campbell then acted with a malicious purpose when they continued to beat [appellant] and spray him with Mace in the infirmary." The trial court additionally found that "Garrett and Campbell's conduct in maliciously assaulting [appellant] when there was no threat of violence or physical harm was manifestly outside the scope of their employment as COs."

{¶ 28} Upon review of the record, the evidence supports the trial court's finding that COs Campbell and Garrett maced and assaulted appellant, without provocation or justification, for the malicious purpose of causing him harm. According to the testimony presented, appellant did not have contraband at the time the COs approached him, and he made no efforts to resist the COs. The evidence also indicated that the COs were not acting out of a perceived threat by the inmate but, rather, were motivated by a desire to intimidate appellant for questioning a porter about a missing video game. Appellant testified that the COs sprayed him with mace "more than 10 times" during the incident. (Tr. 36.) According to appellant, the COs sprayed mace "in my face, in my penis, my anus, and [one of the COs] soaked his glove and stuck it in my mouth and stuck it in my nose and rubbed it in my eyes." (Tr. 36-37.) Appellee's investigator, Clark, confirmed that the COs discharged a significant amount of mace (28 grams) from the canister belonging to CO Campbell. Here, the trial court's findings that COs Garrett and Campbell acted with malicious purpose and that such conduct was outside the scope of their employment are not against the manifest weight of the evidence. Accordingly, we find no error with the trial court's determination that COs Garrett and Campbell are not entitled to civil immunity.

{¶ 29} We next address appellant's contention that the trial court erred in finding that he failed to prove, by a preponderance of the evidence, that appellee's employees knew of the assault by COs Garrett and Campbell. Specifically, appellant challenges the trial court's determination that he failed to establish that employees inside the infirmary at the time of the incident should have been aware of the assault by the two COs.

{¶ 30} In general, "Ohio law imposes a duty of reasonable care upon the state to provide for its prisoners' health, care, and well-being." *McDonald v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 02AP-735, 2013-Ohio-513, ¶ 8.

{¶ 31} In the instant case, the magistrate noted that Clark, as part of his investigation, had interviewed employees who were inside the infirmary on the date of the incident. The magistrate further noted Clark's testimony that "the other employees in the infirmary * * * informed him that they were unaware of the attack," but that Clark himself "was of the opinion that they should have been able to hear [appellant's] screams" and smell the administration of mace. The magistrate, however, found insufficient other evidence to establish that appellee's employees knew or should have known of the attack by COs Garrett and Campbell.

{¶ 32} In addressing appellant's objections to the magistrate's determination, the trial court held in part:

Clark testified that other employees of [appellee] were in the infirmary at the time of the attack, including two COs and three nurses. When Clark questioned the two COs about the incident, they informed him that they did not see or hear the attack nor did they smell Mace. Clark testified that one nurse heard noise but she was told to mind her own business. None of these employees were called to testify at trial.

[Appellant] contends that based on the size of the infirmary, the employees present in the area should have known that the attack was taking place. Upon review of the trial transcript, Clark's testimony as to the size of the infirmary was compared to the size of the room where the trial took place. Additionally, Clark testified that the infirmary has hallways and that one may not be able to see the entire infirmary from within it. Based on the record, the court is unable to determine the size of the infirmary and if employees would have seen the attack taking place.

While [appellant] testified that he recalled COs Ran[s]om and Windom and nurses watching the attack in the infirmary, Clark testified that in the interviews he conducted, the COs and nurses said that they did not see the attack. This testimony is conflicting and as such, the court concludes that [appellant] has failed to prove by a preponderance of the evidence that [appellee's] employees in the infirmary knew the assault was occurring. * * *

Furthermore, the court finds that [appellant] failed to prove by a preponderance of the evidence that [appellee's] employees knew or should have known about the assault based on the noise and the smell of Mace. While Clark

testified that the smell of Mace would be strong if it was discharged, he has no first-hand knowledge about any smell in the infirmary. Additionally, according to Clark, nurse Moore heard some sort of commotion, but another nurse told her to "mind her own business." The court concludes that [appellant] presented insufficient evidence to prove that [appellee's] employees heard the attack or smelled the Mace. Finally, the court finds that the fact that the blood crew was called to clean up blood does not prove that [appellee's] employees knew or should have known about the attack when it was occurring in the infirmary.

{¶ 33} On appeal, appellant cites to the investigative report of Clark as evidence that CO Clevenger was aware of the attack in the infirmary. Appellant also contends there was evidence that a nurse heard the assault, but that another nurse told her to mind her own business. As noted above, appellant argued before the trial court that appellee's employees should have been aware of the attack based on the size of the infirmary. The trial court, however, found the record evidence insufficient to determine the size of the infirmary and whether or not other employees would have seen the attack taking place.

{¶ 34} With respect to evidence regarding the dimensions and layout of the infirmary, counsel for appellant relied upon the testimony of Clark, who conducted an investigation of the incident. The transcript indicates that counsel for appellant asked Clark if he could "describe the facilities so that we have some idea of the size and where * * * this took place." (Tr. 57.) Clark responded: "[T]here is a desk. There are some cells back there. Some of them are what you would * * * consider * * * a dry cell separation or a suicide watch cell. And then there's also a general holding cell. And down the one corridor, there is * * * another set of cells that's kind of separate and apart." (Tr. 57-58.) In response to counsel's inquiry as to whether the infirmary was as large as the parole hearing room in which the magistrate was conducting the trial, Clark stated that the infirmary was "larger than this." (Tr. 58.)

{¶ 35} Clark acknowledged "[t]here are some hallways that you wouldn't necessarily be able to see the entirety of the infirmary from." (Tr. 58.) At trial, counsel for appellant asked Clark the following: "[W]ith the door closed, would it be impossible to either smell or hear anything going on in that area?" (Tr. 59.) Clark responded: "I

wouldn't have an opinion on whether or not you would hear anything or not, because I'm not familiar enough with the institution to answer that question." (Tr. 59-60.)

{¶ 36} Clark further testified that he had interviewed the employees present at the infirmary during the incident, and that they all denied hearing or seeing an attack. Specifically, Clark testified that CO Windom claimed not to have seen or heard anything. According to Clark, CO Clevenger related that, at "one point in time, [he] saw Campbell standing up over top of [appellant], and that Garrett was holding him down on the ground, attempting to restrain him, but that he saw nothing unusual about the situation and turned and walked the other way." (Tr. 68.) When Clark asked CO Clevenger why he walked away, the CO "said he thought they had it under control because Campbell was standing." (Tr. 69.) CO Clevenger also told Clark that he did not smell any mace. Clark testified that CO Ransom "stayed consistent through all of the interviews," and that "his only recollection was opening the door for them to take him into the back area of the infirmary, and then claimed to stay out front." (Tr. 70.) CO Ransom told Clark that he did not smell anything.

{¶ 37} Appellant contends that CO Clevenger gave inconsistent statements to the investigator regarding whether an inmate crew was called to the infirmary following the incident to clean up blood. As noted by the trial court, however, such evidence does not address the issue whether employees were aware of the incident at the time of the assault. Further, while appellant points to Clark's testimony that Nurse Edgell was in the area at the time of the incident, Clark's own report states: "There is not definite evidence that she actually witnessed the use of force."

{¶ 38} Upon review, the trial court's finding that it was "unable to determine the size of the infirmary and if employees would have seen the attack taking place" in the back of the facility is not against the weight of the evidence. As noted, there was evidence that the infirmary contained hallways and a set of cells "separate and apart," and the evidence also indicated that COs Campbell and Garrett took appellant to the back of the infirmary to carry out the assault. In interviews with investigators, each of appellee's employees who were present in the infirmary denied observing the attack by the COs, and none of those individuals were called to testify at trial. Based upon the record on appeal, and in light of appellant's burden, we cannot conclude that the trial court erred in finding that

appellant failed to establish, by a preponderance of the evidence, that appellee's employees should have been aware of the assault by COs Garrett and Campbell.

{¶ 39} Accordingly, appellant's first, second, and third assignments of error are without merit and are overruled.

{¶ 40} Under the fourth assignment of error, appellant asserts the trial court erred in failing to join COs Garrett and Campbell as parties. We disagree.

{¶ 41} As noted by the trial court, while an employee "has the right to appeal the court's decision denying the employee immunity, R.C. 2743.02(F) does not require the court to join the employee as a party to the action."¹ In the instant case, the record indicates that appellee provided COs Garrett and Campbell with notice that their immunity was being contested and provided them the opportunity to appear and participate during the hearing before the magistrate. Upon review, we find no error by the trial court.

{¶ 42} Appellant's fourth assignment of error is without merit and is overruled.

{¶ 43} Based upon the foregoing, appellant's first, second, third, and fourth assignments of error are overruled, and the judgment of the Court of Claims of Ohio is hereby affirmed.

Judgment affirmed.

CONNOR and O'GRADY, JJ., concur.

¹ R.C. 2743.02(F) states in part: "The * * * employee may participate in the immunity determination proceeding before the court of claims to determine whether the * * * employee is entitled to personal immunity under section 9.86 of the Revised Code."

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Anthony Nix,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 13AP-547
v.	:	(Ct. of Cl. No. 2011-11939)
	:	
Ohio Department of Rehabilitation & Correction,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	
	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on June 30, 2014, appellant's four assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Court of Claims of Ohio is affirmed. Costs are assessed against appellant.

BROWN, CONNOR, & O'GRADY, JJ.

/s/ Judge
Judge Susan Brown

Tenth District Court of Appeals

Date: 06-30-2014
Case Title: ANTHONY NIX -VS- OHIO DEPARTMENT OF REHAB AND
CORRECTION
Case Number: 13AP000547
Type: JEJ - JUDGMENT ENTRY

So Ordered




/s/ Judge Susan Brown, P.J.

Electronically signed on 2014-Jun-30 page 2 of 2