

2021 DEC 17 AM 9:06

IN THE COURT OF CLAIMS OF OHIO

TERI GARKO

Plaintiff

v.

OHIO DEPARTMENT OF  
REHABILITATION AND CORRECTION

Defendant

Case No. 2020-00369JD

Judge Patrick E. Sheeran  
Magistrate Holly True Shaver

DECISION

On October 14, 2021, defendant filed a motion for summary judgment pursuant to Civ.R. 56(C). On November 15, 2021, plaintiff filed a response. The motion for summary judgment is now before the court for a non-oral hearing pursuant to L.C.C.R. 4(D).

**Standard of Review**

Motions for summary judgment are reviewed under the standard set forth in Civ.R. 56(C), which states, in part:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary

2021 DEC 17 AM 9:06

Case No. 2020-00369JD

-2-

DECISION

judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

"[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). To meet this initial burden, the moving party must be able to point to evidentiary materials of the type listed in Civ.R. 56(C). *Id.* at 292-293.

If the moving party meets its initial burden, the nonmoving party bears a reciprocal burden outlined in Civ.R. 56(E), which states, in part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

### **Factual Background**

Plaintiff is an inmate in the custody and control of defendant at Dayton Correctional Institution (DCI). Complaint, ¶ 2. In 2017, plaintiff was housed at the Ohio Reformatory for Women (ORW). *Id.*, ¶ 6. Plaintiff asserts that while she was housed at ORW from February 14, 2017, through September 2018, she was physically, sexually, and verbally abused by corrections officers. *Id.*, ¶ 7-8. In June 2019, plaintiff was diagnosed with a traumatic eye injury, and eventually lost vision in one eye. *Id.*, ¶ 13.



2021 DEC 17 AM 9:06

Case No. 2020-00369JD

-3-

DECISION

17. Plaintiff asserts claims of assault, negligence, and excessive use of force. *Id.*, ¶ 24-27.<sup>1</sup>

According to her answers to defendant's interrogatories, plaintiff admits that "no relevant incidents of sexual abuse physical or verbal ever occurred at either ORW or DCI." (Answers to interrogatories, p. 25 of 34.) Therefore, construing the evidence most strongly in plaintiff's favor, reasonable minds can conclude only that plaintiff has abandoned the claims in her complaint regarding sexual abuse, and defendant is entitled to judgment as a matter of law regarding any such claims.

In both her answers to defendant's interrogatories and her affidavit, plaintiff narrows her claims to the following incidents. On December 13, 2019, Lt. Shelby Bennett used OC (pepper) spray on plaintiff while she was escorting plaintiff from a Rules Infraction Board hearing to the Residential Treatment Unit. Plaintiff alleges that Bennett's use of force on her was excessive, in that Bennett sprayed her directly in her right eye at close range. Plaintiff alleges that Bennett's excessive use of force exacerbated her pre-existing eye injury and caused permanent blindness in that eye. Plaintiff also mentions that in 2016, she injured her head on a sink; that a Dr. Miller prescribed contact lenses for her in 2017 and failed to adequately diagnose her eye problem at that time; and that she was diagnosed with an eye injury on July 19, 2019, at The Ohio State University Medical Center. Plaintiff alleges that Dr. Miller rendered inadequate medical care in 2017, which led to additional eye problems in 2019.

In its motion, defendant asserts that it did not use excessive force on plaintiff during the December 13, 2019 incident, and that plaintiff's failure to obtain a medical expert precludes any claims of medical negligence.

<sup>1</sup> On December 14, 2020, plaintiff's state and federal constitutional claims, and her claim for punitive damages were dismissed pursuant to Civ.R. 12(B)(1) and (6).

see my  
affidavit  
+ ex-report  
in  
handcuffs  
(illegal)  
ex-force  
see  
ex-report

2021 DEC 17 AM 9:06

Case No. 2020-00369JD

-4-

DECISION

### **I. Use of Force**

It has been held that allegations of “unnecessary or excessive force against an inmate may state claims for battery and/or negligence.” *Brown v. Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 13AP-804, 2014-Ohio-1810, ¶ 13.

“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. Franklin No. 12AP-12, 2012-Ohio-3382, ¶ 11.

“To recover on a negligence claim, a plaintiff must prove by a preponderance of the evidence (1) that a defendant owed the plaintiff a duty, (2) that a defendant breached that duty, and (3) that the breach of the duty proximately caused a plaintiff’s injury.” *Ford v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 05AP-357, 2006-Ohio-2531, ¶ 10. “Ohio law imposes a duty of reasonable care upon the state to provide for its prisoners’ health, care, and well-being.” *Ensman v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 06AP-592, 2006-Ohio-6788, ¶ 5.

“The use of force is sometimes necessary to control inmates.” *Jodrey v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 12AP-477, 2013-Ohio-289, ¶ 17. “Correctional officers considering the use of force must evaluate the need to use force based on the circumstances as known and perceived at the time it is considered.” *Brown* at ¶ 15, citing Ohio Adm.Code 5120-9-01(C). “[T]he precise degree of force required to respond to a given situation requires an exercise of discretion by the corrections officer.” *Ensman* at ¶ 23. “In Ohio Adm.Code 5120-9-01, the Ohio



2021 DEC 17 AM 9:06

Case No. 2020-00369JD

-5-

DECISION

Administrative Code sets forth the circumstances under which correctional officers are authorized to use force against an inmate.” *Id.* at ¶ 6.

Ohio Adm.Code 5120-9-01 provides, in pertinent part:

“(C) Guidelines regarding the use of force. \* \* \*

“\* \* \*

“(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.” (Emphasis added.)

“Pursuant to Ohio Adm.Code 5120-9-01(C)(1)(a), correctional officers ‘may use force only to the extent deemed necessary to control the situation.’ Additionally, correctional officers ‘should attempt to use only the amount of force reasonably necessary under the circumstances to control the situation and shall attempt to minimize physical injury.’ Ohio Adm.Code 5120-9-01(C)(1)(b).” *Brown* at ¶ 16. Also pertinent is Ohio Adm.Code 5120-9-01(B)(3), which defines “excessive force” as “an application of force which, either by the type of force employed, or the extent to which such force is employed, exceeds that force which reasonably appears to be necessary under all the circumstances surrounding the incident.”