

IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
MIDDLE DIVISION

JAMES SMALLWOOD #330001,)
) Claim No. T20141695
 Claimant,)
)
 vs.)
)
 STATE OF TENNESSEE,)
) Regular Docket
 Defendant.)

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**ORDER GRANTING STATE'S MOTION TO DISMISS
OR FOR SUMMARY JUDGMENT**

This matter came before Robert N. Hibbett, Commissioner and judge of the facts and law, on the State's Motion to Dismiss or for Summary Judgment filed on September 15, 2015. Oral argument was not requested by either party. This issue is, therefore, decided upon the pleadings pursuant to Claims Commission Rule 0310-1-1-.01.

The Claimant, James Smallwood, is an inmate in the custody of the Tennessee Department of Correction. While housed at Turney Center Industrial Complex, at approximately 7:30 a.m. on August 23, 2013, inmate Robert Devito came from behind the Claimant and struck him in the back of the head with a rock. This knocked the Claimant unconscious. Inmate Devito hit the Claimant

again on the left side of his head then a final blow to the right side of his head. This assault caused serious bodily injury and fractured Claimant's skull. There is no dispute as to these tragic facts. However, because there was no forewarning of the assault on Mr. Smallwood, and because the attack was not foreseeable, the prison did not breach any duty to protect the Claimant and this case must be dismissed as a matter of law.

Burden of Proof

A claim for negligence requires proof of the following elements: (1) a duty of care owed by defendant to a claimant; (2) conduct by the defendant falling below the standard of care amount to a breach of the duty; (3) an injury or loss; (4) causation in fact; and (5) proximate causation. *Rice v. Sabir*, 979 S.W.2d 305, 308 (Tenn. 1998). Failure to establish any one of these elements results in the dismissal of the case.

Duty is the legal obligation owed by the defendant to a claimant to conform to a reasonable person standard of care for the protection against unreasonable risk of harm. *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995). A risk is unreasonable and gives rise to a duty to act with due care if the foreseeable probability and gravity of harm posed by defendant's conduct

outweigh the burden upon defendant to engage in alternative conduct that would have prevented the harm. *Id.* To determine whether a risk is unreasonable, one must consider: (1) the foreseeable probability of the harm of injury occurring; (2) the possible magnitude of the potential harm or injury; (3) the importance or social value of the activity engaged in by the defendant; (4) the usefulness of the conduct to defendant; (5) the feasibility of alternative, safer conduct and the relative costs and burdens associated with that conduct; the relative usefulness of the safer conduct; and (6) the relative safety of alternative conduct. *Id.* Establishing duty and breach of that duty alone does not entitle a claimant to recovery for injuries and damages. The mere occurrence of an injury does not prove negligence and a negligent act does not entail liability. *Doe v. Linder Const. Co.*, 845 S.W.2d 173, 181 (Tenn. 1992). The claimant must still establish the requisite causal connection between the defendant's conduct and the claimant's injury. *Id.*

In *Kinningham v. State of Tenn.*, 2001 WL 1089501 (Tenn. Ct. App. Sept. 18, 2001), a prisoner sued the State for alleged negligent custody or control of his person after he was attacked by another inmate. The Court of Appeals stated as follows:

In this case, there has been no showing that the State breached its duty to exercise ordinary and reasonable care. As established in *Cockrum v. State*, 843 S.W.2d 433, 436 (Tenn. App. 1992), prison officials are not insurers of a prisoner's safety. In a case such as this, the conduct of the prison officials must be commensurate with the prisoner's known condition.

In *Gillespie v. Metropolitan Govt.*, 1992 WL 9441 (Tenn. Ct. App. Jan. 24, 1992), the Court of Appeals focuses on the issue of foreseeability in an inmate assault. Inmate Charles Stevens assaulted inmate Wesley Gillespie after a fight over the alleged theft of socks. Another inmate apparently accused Gillespie of stealing his socks. Upon hearing this accusation, Gillespie had an altercation with inmate Stevens. Inmate Stevens left the area after being subdued by other inmates, but returned later, picked up a milk crate and struck inmate Gillespie in the face with it. *Id.* at *1.

Inmate Gillespie sued the Metropolitan Government for his injuries. Metro filed a motion for summary judgment, which was granted, and inmate Gillespie appealed to the Court of Appeal of Tennessee, Middle Section. Inmate Gillespie alleged that he told guards that he was having trouble with an inmate and wanted to be moved away from him. *Id.* at *2. The court acknowledged a dispute as to this testimony but nevertheless, held that merely asking to be

moved for vague and unspecified reasons was not sufficient to put Metro on notice that Mr. Stevens was a physical threat to inmate Gillespie. *Gillespie* at *3. In the instant case, unlike in *Gillespie*, there is no allegation that prison staff was forewarned of the attack by inmate Devito, making – in the instant case – an even stronger contention for entry of a dismissal.

The Court in *Gillespie* further held that penal institutions are not insurers of an inmate's safety in regard to inmate-on-inmate assaults.

The general rule is that penal institutions have a duty to use reasonable and ordinary care to prevent foreseeable attacks on inmates by other inmates. A breach occurs when the institution's authorities knew of or had reason to anticipate an attack and did not use reasonable care to prevent it. *Gillespie* at *1.

In this case, there was no prior notice of the attack on Mr. Smallwood, either by Mr. Smallwood himself, or by prison staff. Mr. Smallwood filed two affidavits by witnesses to the assault.¹ These affidavits speak concerning the assault itself and the action (or inaction) of a correctional officer during the assault. There is no reference to any prior incident or knowledge that would have put prison officials on notice that an assault could take place. The Claimant has not made any assertions that he or prison officials had reason to know that

¹ The Claimant filed formal sworn affidavits on October 14, 2015. These were accepted and considered by the Tribunal.

the assault was going to occur. As a general rule, the prison must have prior notice of an attack in order to be held liable. *Gillespie v. Metropolitan Govt.*, 1992 WL 9441 (Tenn. Ct. App. Jan. 24, 1992); *Harris v. State*, 297 A.2d 561, 563 (N.J. 1972). While the injuries sustained by the Claimant are most unfortunate, they simply were not foreseeable and this claim fails on that basis alone.

Summary Judgment

Summary judgment is proper when the moving party can demonstrate that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04. Taking into consideration the Claimant's own version of the incident, it appears that upon applying his account of the facts to the law the State is entitled to summary judgment and dismissal.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

That summary judgment is granted to the State of Tennessee and the claim is hereby dismissed with prejudice.

ENTERED this 18 day of November, 2015.



Robert N. Hibbett
Claims Commissioner
Sitting as the Trial Court of Record

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing document has been served upon the following parties of record:

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This 20 day of November 2015.

Paula Merrifield

PAULA MERRIFIELD
Administrative Clerk
Tennessee Claims Commission