

Foulty who told Rebecca to take Robinette to the "quiet area," handcuff him and take him to segregation. The quiet area is located near the officers' desk away from the cells.

{¶4} Rebecca took Robinette to the quiet area and told him to turn around and face the wall. He patted Robinette down and attempted to handcuff him. Suddenly, Robinette pushed off from the wall in an aggressive manner. Subsequently, Rebecca managed to wrestle Robinette to the floor, at which time plaintiff responded to assist Rebecca. Lieutenant George Terry, who had been making rounds in 4-house, also intervened. He kneeled on the floor to talk to Robinette in order to try to calm him. Robinette stated that he could not comply with Rebecca's order to put his hands behind his back because he was pinned to the ground and that the officers were hurting him. Terry asked Robinette if he would agree to be handcuffed if the COs allowed him to stand. Robinette said that he would. Terry then ordered Rebecca and plaintiff to allow Robinette to stand. Rebecca refused and stated that Robinette needed to be handcuffed while he was on the floor. Terry reiterated his order. As Rebecca and plaintiff released their hold on Robinette he eluded their control. Plaintiff struggled with Robinette to prevent him from attacking Rebecca and, during the struggle, Robinette pushed plaintiff into a bank of telephones and a restroom sink. Robinette was finally subdued by plaintiff, other COs and inmates. During the incident, Robinette threatened the lives of the COs.

{¶5} A "use of force review" was conducted as a result of the incident. The review committee concluded that Terry had used extremely poor judgment when he ordered the officers to release an

unrestrained inmate prior to the proper application of restraints. Plaintiff asserts that he has suffered deep tissue injuries, extreme mental distress and depression, and that his wife has suffered a loss of consortium. Plaintiff received Workers' Compensation benefits as a result of the incident.

{¶6} Defendant argues that in an effort to diffuse a tense situation, Terry used his best judgment in ordering the COs to release their hold on Robinette before he was handcuffed. Defendant further argues that plaintiff has failed to state a claim of intentional tort.

{¶7} Plaintiff testified that Robinette threatened to kill him and Rebecca before he was allowed up from the floor. Plaintiff also testified that he was trained not to let a hostile inmate stand before being secured.

{¶8} Rebecca testified that when Terry first ordered him to let Robinette stand, he refused because Robinette had threatened both him and plaintiff. Rebecca obeyed the second order after Terry assured him that Robinette would comply and that it was "his call" to make.

{¶9} Lt. Terry had been employed at BCI for six years at the time of the incident. He testified that he did not hear Robinette threaten the COs while Robinette was on the floor; that he was not aware that Captain Foulty had given an order to handcuff Robinette; that when he gave the order to let Robinette stand, he felt that Robinette was calm and would comply with the order to be handcuffed; that he made his order so that Robinette could be handcuffed and taken away quickly; and that he expected the COs to maintain control of Robinette and not to completely release him.

{¶10} Edwin Vorhees, Deputy Warden of Operations at BCI, testified that he was a member of the use of force committee that had investigated the incident and concluded that Terry had used extremely poor judgment. He further stated that Ohio Adm.Code Section 5120-9-01³ sets forth the policy regarding use of force against inmates, but that the use of handcuffs is discretionary.

{¶11} "[I]n order to establish 'intent' for the purpose of proving the existence of an intentional tort committed by an employer against his employee, the following must be demonstrated:

(1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task." *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, paragraph one of the syllabus. (Citations omitted.) See, also, *Arrigo-Klacik v. Germania Singing and Sports Soc.* (Aug. 30, 2001), Franklin App. No. 00AP-1397.

{¶12} "Mere knowledge and appreciation of a risk does not show intent on the part of the employer." *Cross v. Hydracrete Pumping Co., Inc.* (1999), 133 Ohio App.3d 501, 507. "Even if an injury is foreseeable, and even if it is probable that the injury would occur

³{a} 5120-9-01(B)(1) states:

{b} "'Excessive force' means 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 is reasonably necessary under all the circumstances surrounding the incident." (Emphasis added.)

if one were exposed to the danger enough times, there is a difference between probability and substantial certainty. The mere knowledge and appreciation of a risk - something short of substantial certainty - is not intent. Unless the employer actually intends to produce the harmful result or knows that injury to its employee is certain or substantially certain to result from the dangerous instrumentality or condition, the employer cannot be held liable. Accordingly, an intentional-tort action against an employer is not shown simply because a known risk later blossoms into reality. Rather, the level of risk-exposure must be so egregious as to constitute an intentional wrong." *Arrigo-Klackik supra*, quoting *Berge v. Columbus Community Cable Access* (1999), 136 Ohio App.3d 281, 308-309. (Citations omitted.)

{¶13} Under the circumstances in this case, the court finds that it was not either certain or substantially certain that plaintiff would sustain injuries when Lt. Terry ordered that Robinette be allowed to stand. Lt. Terry testified that at the time he made the order, he felt, in his discretion, that Robinette had calmed and would comply with the order to be handcuffed. The court finds that Lt. Terry believed that allowing Robinette up to be handcuffed was the best way to handle a tense situation. Upon review of all the evidence in this case, the court finds that plaintiffs have failed to prove their intentional tort claim by a preponderance of the evidence.

{¶14} "A claim for loss of consortium is derivative in that the claim is dependent upon the defendant's having committed a legally cognizable tort upon the spouse who suffers bodily injury." *Bowen v. Kil-Kare, Inc.* (1992) 63 Ohio St.3d 84, 93. Since plaintiffs have failed to prove their intentional tort claim, the loss of

{¶15}consortium claim must also be denied. Accordingly, judgment is recommended in favor of defendant.

HOLLY TRUE SHAVER
Magistrate

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