

STATE OF SOUTH CAROLINA
COUNTY OF LEE

Levi Bing,

Plaintiff,

vs.

South Carolina Department of Corrections,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

Case No.: 2014-CP-31-0100

**ORDER GRANTING SUMMARY
JUDGMENT TO THE SOUTH
CAROLINA DEPARTMENT OF
CORRECTIONS**

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SC Court of Appeals

This matter is before me pursuant to the Motion for Summary Judgment filed by the Defendant South Carolina Department of Corrections (hereinafter "SCDC").

BACKGROUND

Taking the facts in the light most favorable to the Plaintiff, the Plaintiff was incarcerated in the South Carolina Department of Corrections serving a forty-year sentence for murder, grand larceny and possession of a weapon during a violent crime. On or about June 7, 2010, the Plaintiff was assigned by the South Carolina Department of Corrections to Lee Correctional Institution in Lee County.

According to the Plaintiff's Complaint, the Plaintiff was transferred to his cell in the South Darlington Unit of Lee Correctional Institution in May of 2010. He was transferred because he had recently undergone surgery and was required to be on the first floor. (See Plaintiff's Complaint & 4).

The South Carolina Department of Corrections moved Willis Dorsey into that Dorm one month prior to the date of incident.

According to the Plaintiff's Complaint, the Plaintiff requested a transfer out of the room and away from Willis Dorsey. The Plaintiff made the request because Willis Dorsey was in possession of contraband and threatening to Plaintiff. (See Plaintiff's Complaint &5). Despite of the allegations of the Plaintiff being threatened by Willis Dorsey in his Complaint, in his Deposition, the Plaintiff testified otherwise. In the Plaintiff's Deposition of July 26, 2012, he stated that he did not receive any threats from Dorsey nor had any incidents:

Plaintiff's Deposition Page 49 through 50.

Q. And you never had an altercation with Dorsey before this incident here?

A. No, sir.

Q. He never threatened you about anything?

A. No, sir.

Q. He just had – he wasn't the best disciplinary – he wasn't the best inmate disciplinary –wise?

A. Correct.

Q. And that was your concern?

A. Yes, sir.

Q. You were concerned by being with him you were going to get in some disciplinary trouble?

A. I could have gotten anything, sir, anybody with weapons charges; you don't know what the case may be.

Q. Okay, and what do you mean by that?

A. I mean, if he had a weapon or a knife or something like that, you don't know what the situation may be. He could have a knife in the room and I could get charged with it. Whatever they find in the room, they charge both parties.

Q. So you're worried about what disciplinary trouble you may get into by being his roommate?

A. Yes, sir.

Q. Any other concerns you had about rooming with Dorsey that you expressed to the SCDC officials?

A. No, sir, not that I can remember.

According to his Deposition, it was the Plaintiff's understanding that an officer with the South Carolina Department of Corrections smelled marijuana while the Plaintiff was outside his room. Thus, the Plaintiff did not want to have any disciplinary problems due to the conduct of his roommate. Despite this concern, he never placed anything in writing or provides SCDC with specific writing of this concern.

Plaintiff's Deposition Page 46:

Q. Oaky. And everything else that you would have - did you write you wanted him to stay out - you wanted him out of the room to stay out of trouble or did you write he was smoking marijuana or were you specific in why -

A. No, sir.

Q. You were not specific?

A. No, sir. The officers were there because they were ones that witnessed it.

The Plaintiff eventually approached Lieutenant Goodman to request a room change. This request was because his roommate had a disciplinary history and he did not want to lose his Classification.

Plaintiff's Deposition at Page 52.

Q. Any your reasoning for putting – for making this request, was that he had a disciplinary history and you didn't want to get in trouble by being his inmate (sic)?

A. Yes, sir.

Q. And there were no reasons expressed to Lieutenant Goodman other than that?

A. No, sir.

Q. And so your sole reason for requesting a change of roommate, was because you were scared you were going to have a disciplinary infraction for something that Dorsey was doing in violation of the prison rules?

A. Yes, sir.

Q. No other reason?

A. I mean, no, sir.

Lieutenant Goodman then contacted the Plaintiff's Caseworker, Brenda Scott Hickman. The Caseworker stated that pursuant to SCDC policy, the Plaintiff was not eligible for a change of cellmates at this point. The policy of SCDC at that time, was to fill out a Form 18.3 and then the Institutional Classification Committee would review the request to make a decision. However, the Plaintiff was not eligible for a cell transfer at that time. Policy 48.2 states that an inmate can request a cell change every six months. Since

the Plaintiff had not been in the cell for six months with Willis Dorsey, he was not eligible for this change per the policy.

Plaintiff's Deposition Pages 52-53.

Q. And then after Lieutenant Goodman contacted your caseworker, and your caseworker said that wasn't a good enough reason to change roommates; is that right?

A. Yes, sir.

Q. And all that was verbal, correct?

A. Yes, sir.

Q. Nothing in writing?

A. No, sir, I was on the phone call.

Q. And you didn't make a written request to your caseworker, did you?

A. No, sir.

Q. And after that day, was there any more requests to change rooms, whether orally or in writing, with Dorsey?

A. No, sir. They wanted to move me upstairs after my surgery and Lieutenant Goodman got with me and said, Mr. Bing, I want to move you upstairs, but he said I'm not going to move you upstairs because of your medical reasons. You can't go up the stairs because I still had stitches in my groin area.

Despite this request, there is no evidence that Willis Dorsey was aware of the same. The Plaintiff testified in his Deposition that he did not tell Willis Dorsey of his request. Furthermore, there was no altercation or issues between the parties prior to the incident.

Plaintiff's Deposition Page 39 and 40.

Q. Did y'all ever have any altercations before this?

A. No, sir.

Q. You have any disagreements before this incident that we're involved with here today?

A. No, sir.

Q. Any cross words with one another before June of 2010?

A. No, sir.

On June 7, 2010, right after cell count, the Plaintiff was in the room with Inmate Dorsey. In the Dorm Room, there was a hot pot that the parties used to warm coffee. According to the Deposition of the Plaintiff, Dorsey routinely used the hot pot for coffee. The canteen records reflect that the Plaintiff purchased the hot pot through the canteen at Lee Correctional Institution. The canteen records were provided to the Court for its review. The Court notes that a hot pot was purchased by the Plaintiff. Conversely, the canteen records do not show where Willis Dorsey ever purchased a hot pot.

The Plaintiff testified that Inmate Dorsey began to heat up water. The Plaintiff presumed he was fixing a cup of coffee. As the Plaintiff was lying on his bed, Inmate Dorsey threw the hot water on him without warning. The Plaintiff said he jumped up and Dorsey pulled out a knife and stated "you know what I want".

The Plaintiff began to tussle with Inmate Dorsey. At the same time, he started kicking the cell which alerted the officers. The officers opened the door and broke up the altercation.

Once the guards opened the door, the skin peeled off the Plaintiff's torso and neck as he took off his shirt per his Deposition.

The Plaintiff was taken to the Medical Center at Lee Correctional Institution. He was briefly treated by Lee County EMS. He was then moved to the parking lot of the prison where he was airlifted to the Still Burn Center in Augusta, Georgia. He was surgically treated for a partial thickness burn wound that covered 22% of his total body surface and a burn in the cornea of his eye. He was released from the hospital on June 11, 2010 and returned to the Department of Corrections Medical Facility at Kirkland Correctional Institution in Columbia. As a result of the burns suffered by the Plaintiff, he has been permanently damaged and scarred.

After this, Dorsey was charged and found guilty before the Disciplinary Hearing Officer at Lee Correctional Institute with striking an inmate with or without a weapon.

The Plaintiff's Deposition testimony was that he never feared for his safety with Willis Dorsey as his cellmate.

Plaintiff's Deposition Page 75.

Q. You didn't tell them your life was in danger?

A. No, sir.

Q. Or you were scared of being assaulted or anything like that, did you?

A. No, sir.

Q. Just plainly you weren't compatible and you were worried he was going to get you in trouble?

A. Yes, sir.

The Plaintiff alleges that there was some alteration of the coffee pot because the coffee pot had an internal temperature control. The Plaintiff testified in his Deposition that he was unaware that Dorsey had altered the hot pot and did not tell anybody that the hot pot had been altered.

Plaintiff's Deposition Page 78 through 79.

Q. If you didn't know it, then it's fair to say you were not aware of anyone in the South Carolina Department of Corrections being aware that he had altered his coffee pot, are you?

A. I'm not going to answer that.

Q. Huh?

A. I'm not going to answer that.

Q. Well, let me repeat that question because you're going to have to answer, you don't have the right not to answer questions. He can object to them, but you're going to have to answer. Are you aware of anybody within the South Carolina Department of Corrections that knew Dorsey had altered his coffee pot?

A. I'm not sure, sir.

Q. So that means you're not aware of anyone who knew that?

A. I'm not aware.

Q. But you were not aware that he had altered his pot?

A. No, sir, I was not aware.

Q. Any you had roomed with him for about a month?

A. Yes, sir.

Q. And had seen him drink coffee about every day?

A. Yes, sir.

The Plaintiff has filed this action against the South Carolina Department of Corrections. His sole cause of action is negligence/gross negligence. The Plaintiff alleges in his Complaint that the Defendant has a duty to protect him from foreseeable assaults and that they breached that duty by not protecting him from this assault. The Plaintiff further alleges that they breached their duty in allowing Dorsey to possess equipment in his cell to heat waters to temperatures sufficiently high enough to cause third degree burns as well as to transfer Dorsey into a cell and that they should have known Dorsey had the means and motives to assault the Plaintiff. See Plaintiff's Complaint & 14 through 18.

The Plaintiff has retained the services of James Evans Aiken as an expert in Corrections. Mr. Aiken opined that (1) a hot pot should never be allowed in a Correctional Facility; (2) that Inmate Dorsey should have never been assigned to the Plaintiff although he has not seen the Classification File as of the Deposition; (3) he states that there is a complete system failure as there was no way to communicate with the guards of an attack. Mr. Aiken submitted an Affidavit prior to the Hearing. He supplemented his Deposition testimony by opining that SCDC should have conducted a contraband investigation after the Plaintiff's request to change rooms and/or place the Plaintiff in protective custody because he would now be labeled as a "snitch".

STANDARD OF REVIEW

Since it is a drastic remedy, summary judgment should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (quoting Watson v. S. Ry. Co., 420

F.Supp. 483, 486 (D.S.C.1975)). An appellate court reviews the grant of summary judgment under the same standard applied by the circuit court. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). The circuit court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." David, 367 S.C. at 250, 626 S.E.2d at 5.

DISCUSSION

I. SCDC IS ENTITLED TO SUMMARY JUDGEMENT PURSUANT TO THE SOUTH CAROLINA TORT CLAIMS ACT:

The South Carolina Tort Claims Act "governs all tort claims against governmental entities and is the exclusive civil remedy available in an action against a governmental entity or its employees." S.C. Code Ann. §15-78-10, et. seq. Pursuant to S.C. Code Ann. §15-78-20(b), the Tort Claims Act "constitutes the exclusive remedy for any tort committed by an employee of a governmental entity." Id. Governmental entities are defined by the act as "the State and its political subdivisions." S.C. Code Ann. §15-78-30(d). A governmental

entity includes political subdivisions and agencies thereof. See S.C. Code Ann. §§ 15-78-30(a), (c), (d), (h) (defining “agency,” “employee,” “governmental entity,” and “political subdivision”). A state employee is defined under the act as “any officer, employee, or agent of the State or its political subdivisions, including elected or appointed officials, law enforcement officers, and persons acting on behalf or in service of a governmental entity in the scope of official duty.” S.C. Code Ann. §15-78-30(c). Thus, Defendant in the present action is an agency of the state and any torts alleged to have been committed by any or all of its employees are governed by the provisions of the South Carolina Tort Claims.

A. DEFENDANT IS IMMUNE FROM LIABILITY PURSUANT TO S.C. CODE ANN. § 15-78-60(25).

S.C. Code Ann. §15-78-60(25) provides that a governmental entity is not liable from “responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, *patient*, **prisoner**, inmate or *client* of any governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner.” S.C. Code Ann. § 15-78-60(25)(emphasis added).

Gross negligence is the intentional conscious failure to do something which is incumbent upon one to do or the doing of a thing intentionally that one ought not to do. Etheridge v. Richland School District 1, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (S.C. 2000). “Gross negligence, in the context of liability by a governmental entity, is the intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do; it is the failure to exercise slight care.” Jinks v. Richland County, 355 S.C. 341, 345 (S.C. 2003). “Additionally, while gross negligence ordinarily is a mixed question of law and fact when the evidence supports but one reasonable inference, the question becomes a matter of law for the court.” Pack v.

Associated Marine Institutes, Inc., 362 S.C. 239, 245 (Ct. App. 2004)(citing Etheredge, 341 S.C. at 310)). The Plaintiff has the burden of proving gross negligence. See Stewart v. Richland Memorial Hospital, 450 S.C. 589 (Ct. App. 2002) (Finding that while a governmental entity has the initial burden of establishing a limitation upon liability or an exception to the waiver of immunity, the plaintiff must still prove that the governmental entity has waived immunity)).

As in Pack, there is absolutely no evidence in the record demonstrating that Defendant was grossly negligent. The Pack court determined that summary judgment was proper after finding that employees acted with at least slight care. Pack, 362 S.C. at 245. As in this case, the plaintiff in the Pack case argued the defendants could have done more to address a juvenile's behavior problems before the juvenile acted out. Id. However, the court determined "[t]he fact that more might have been done does not negate a finding that [defendant] employees exercised at least slight care." Id. (citing Etheredge, 341 S.C. at 311-12 (holding that where defendant had no knowledge of animosity between students, and principal and security monitored hallways, the fact that school district might have done more did not negate the fact it exercised slight care for purposes of determining whether gross negligence exception to Tort Claims Act was applicable)).

In cases in South Carolina seem to be scarce as it relates to inmate on inmate assaults. The only reported cases that could be located is McKenzie v. Leeke, 292 S.C. 568, 357 S.E.2d 721 (1987) and Jackson v. South Carolina Department of Corrections, 301 S.C. 125, 390 S.E.2d 467. Those cases demonstrate that the Court determines a Defendant is guilty of gross negligence if he is so indifferent to the consequences of his conduct as not to

give slight care to what he is doing. Anderson v. Ballenger, 166 S.C. 44, 164 S.E. 313 (1932). Gross Negligence involves a conscious failure to exercise due care. Id.

In Jackson, the South Carolina Department of Corrections placed an inmate who was diagnosed with having strong psychopathic patterns, being unpredictable and being prone to violent outbursts into the same cell as an 88-year-old inmate. The inmate had a history of attacks on inmates and correctional officers, as well as the killing of another inmate. Prior to this inmate's transfer to the general population at Kirkland, he had been incarcerated in the maximum security facility at Central Correctional Institute. The Court determined that the department knew all of these facts when it transferred the inmate to Kirkland.

The Court determined that the evidence light most favorable to the Plaintiff, a jury could reasonably have determined that the transfer exhibited a conscious indifference to the threat he posed to the safety of other inmates at Kirkland Institution. As such, the jury could have seen the transfer as a failure to exercise a slight care under the circumstances.

In McKenzie, an inmate was attacked with a shotgun while having a visitor in the parking lot. There was a policy that allowed inmates with "A" or "AA" custody received visitors within the parking lot. There was also a policy guideline adopted to automobiles coming into the parking states "the shift supervisor will be responsible for having a correctional officer spot check the vehicle every 45 minutes during visitation." There were no spot checks of vehicles prior to this incident.

The Court of Appeals found that the failure to abide by the policy still could not create an issue of foreseeability of the attack. Therefore, the Court of Appeals upheld summary judgment.

The Plaintiff argued through an expert as discussed hereinafter and in their Memorandum that SCDC should have done more to protect the Defendant.

As in Pack, the fact that more might have been done does not render a finding that SCDC failed to exercise at least slight care. The evidence demonstrates that there was no indication whatsoever that Willis Dorsey would attack the Plaintiff. While the Plaintiff never testified that he saw any drug or illegal activity, there is testimony that he was told this by an Officer. Furthermore, the testimony of Lieutenant Goodman stated that the Plaintiff said he was "a hot boy". A "hot boy" could be construed as someone with a disciplinary issue or involved in illegal activity. The Plaintiff fails to point to any policies or procedures of SCDC that requires an investigation into a request for reassignment of a cell mate based upon an unsubstantiated allegation for the request. A search of the cell following the incident did not locate any contraband, including the knife the Plaintiff alleges that Willis Dorsey pulled on him.

The Defendant also asserts that the Plaintiff's claim for gross negligence fails due to the failure of the Plaintiff to establish foreseeability. The Plaintiff's claims do not show any evidence of foreseeability of an attack.

In a negligence action, the plaintiff must prove proximate cause. *Rush v. Blarichard*, 310 S.C. 375, 426 S.E.2d 802 (1993). Negligence is not actionable unless it proximately causes the plaintiff's injury. *Bishop v. South Carolina Dep't of Mental Health*, 331 S.C. 79, 502 S.E.2d 78 (1998). It is clear that a plaintiff may only recover for injuries proximately caused by the defendant's negligence. *Parks v. Characters Night Club*, 345 S.C. 484, 548 S.E.2d 605 (Ct. App. 2001). "Proximate cause requires proof of both causation in fact and legal ceruse." *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 463, 494 S.E.2d 835, 842 (Ct. App. 1997). "Legal cause is proved by establishing foreseeability." *Id.* The test of forseability is whether the injury is the natural and probable consequence of the alleged negligent, act. *Koester v. Carolina Rental Ctr., Inc.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). "Where the injury complained of is not reasonably foreseeable there is no liability." *Crolley v. Hutchins*, 300 S.C. 355, 357, 387 S.E.2d 716, 717 (Ct. App. 1989). Where intervening acts occur, the original wrongdoer may be

liable despite intervening acts if the intervening acts are foreseeable, or if not foreseeable, if the original wrongdoer's acts " 'would have caused the loss in natural course.' " *Young v. Tide Craft, Inc.*, 270 S.C. 453, 463, 242 S.E.2d 671, 676 (1978). Legal cause, in contrast to the "but for" nature of causation in fact, is proved by establishing foreseeability. *Oliver*, 309 S.C. at 316, 422 S.E.2d at 131. The standard by which foreseeability is determined is that of looking to the natural and probable consequences of the complained of act. *Oliver*, 309 S.C. at 316, 422 S.E.2d at 131. A plaintiff therefore proves legal cause by establishing the injury in question occurred as a natural and probable consequence of the defendant's negligence. *Newton v. South Carolina Pub. Rys. Comm'n*, 319 S.C. 430, 462 S.E.2d 266 (1995). A negligent act or omission is a proximate cause of injury if, in a natural and continuousness of events, it produces the injury, and without it, the injury would not have occurred. *Vinson*, 324 S.C. at 401, 477 S.E.2d at 721. In other words, if the accident would have happened as a natural and probable consequence, even in the absence of the alleged breach, then a plaintiff has failed to demonstrate proximate cause. Where the injury complained of is not reasonably foreseeable, there is no liability. *Crolley v. Hutchins*, 300 S.C. 355, 387 S.E.2d 716 (Ct. App. 1989). In order for conduct to amount to negligence for which compensation can be collected, the defendant must have foreseen, or by the exercise of ordinary care should have foreseen, the probability that his conduct would likely cause injury to another: *Vinson*, 324 S.C. at 401, 477 S.E.2d at 721. One is not charged with foreseeing that which is unpredictable or which would not be expected to happen as a natural and probable consequence of the defendant's negligent act. *Id.* **Sprague v. Beach, 2013 WL 3197923 (2013)** Foreseeability is not determined from hindsight, but rather from the defendant's perspective at the time of the alleged breach. *Parks*, 345 S.C. at 491, 548 S.E.2d at 609. It is not necessary for a plaintiff to demonstrate the defendant should have foreseen the particular event which occurred, but merely that the defendant should have foreseen his or her negligence would probably cause injury to someone. *Greenville Mem'l Auditorium v. Martin*, 301 S.C. 242, 391 S.E.2d 546 (1990). Proximate cause is the efficient or direct cause of an injury. *Small*, 329 S.C. at 464, 494 S.E.2d at 843; *Vinson*, 324 S.C. at 401, 477 S.E.2d at 721.

*3 "Ordinarily, the question of proximate cause is one of fact for the jury and the trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence." *McNair*, 330 S.C. at 349, 499 S.E.2d at 497. Only in rare or exceptional cases may the question of proximate cause be decided as a matter of law. *Trivelas*, 348 S.C. at 137, 558 S.E.2d at 277. If there is a fair difference of opinion regarding whose act proximately caused the injury, then the question must be submitted to the jury. *Ballou*, 291 S.C. at 147-48, 352 S.E.2d at 493. The particular facts and circumstances of each case determine whether the question of proximate cause should be decided by the court or by the jury. *Collins v. Bisson Moving & Storage, Inc.*, 332 S.C. 290, 504 S.E.2d 347 (Ct. App 1998).

The Plaintiff's testimony was simply that he requested a transfer of cellmates which was denied. He never testified that he ever thought he was in danger. However, the Plaintiff's expert opined that SCDC should have known that a complaint about someone possibly being engaged in illegal activity or a disciplinary hearing should trigger an immediate move. Despite these

opinions, the Plaintiff does not identify any standard in that regard. Harris Teeter, Inc. v. Moore and Van Allen, PLLC, 390 S.C. 275, 289, 701 S.E. 2d 742, 749 (2010) held that “conclusory statements that the Respondents breached the Standard of Care does not create a genuine issue of material fact. The Plaintiff’s own Deposition testimony negates the issue of incompatibility. The Plaintiff’s only complaint was that he understood that a correctional officer smelled marijuana outside his room. The Plaintiff never alleged he was in the room or saw Inmate Dorsey smoking marijuana. He did not testify that he saw contraband with Inmate Dorsey. It is also revealing that the Plaintiff testified that Inmate Dorsey never threatened him, had an altercation with him or any disagreements prior to this attack.

The Plaintiff retained the services of James Aiken as an expert in corrections. Mr. Aiken testified in his Deposition and provided in an Affidavit that he had 45 years of experience in Correctional Administration, Correctional Facility Operations and Management and Correctional Facility Inspection and Assessment. Mr. Aiken testified in his Deposition that (1) a hot pot should never be allowed in a correctional facility; (2) that Inmate Dorsey should have never been assigned to the Plaintiff although he has not seen the classification file as of the date of his Deposition; (3) that there was a complete system failure as there was no way to communicate with the guards of an attack. The day before the Hearing, the Plaintiff’s attorney served an Affidavit of James Aiken upon the attorney for the Defendant. This Affidavit provided additional information that a properly trained correctional officer and/or prison administrator either knew or should have known that the Plaintiff’s action in requesting a cell change due to his cell mate being involved in illegal activity would have marked him as a “snitch” and made him a target for retaliation or physical violence from Willis Dorsey. He further opined that the

Plaintiff should have been warned and advised that he may be received as a snitch and should have been placed in protective custody whether he wanted to or not.

Lastly, Mr. Aiken's Affidavit opined that to a reasonable degree of professional certainty, the failure of the Department of Corrections and its employees to expend the elementary effort necessary to undertake steps to protect which should have been a known danger to the Plaintiff, contributed to the severity of his injuries from the attack.

The Defendant's attorney objected to the introduction of the Affidavit pursuant to the Rule 56(c). Rule 56 (c) states "that the adverse party may serve opposing Affidavits not later than two (2) days before the Hearing". The attorney for SCDC advised that the Affidavit was served in the afternoon prior to the Hearing.

The Court notes that Rule 56 (c) requires supporting/opposing Affidavits to be made on personal knowledge. These Affidavits "shall set forth facts such as would be admissible with evidence, and shall show affirmatively that the affiant is competent to testify in matters stated therein." Furthermore, SCRCR Rule 56 (e) states "when a Motion for Summary Judgment is made and supported as provided in this Rule, the adverse party may not rest upon mere allegations or denial of his pleadings, but his response, by Affidavits or otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, Summary Judgment, if appropriate, shall be entered against him.

Other than the issue of the hot pot, as the Court addresses hereinafter, the opinions contained in the Affidavit of Mr. Aiken do not set forth specific facts showing there is a genuine issue for trial. This is based upon the fact that many of his opinions contained in the Affidavit are nothing more than "conclusory statements" of a breach in the Standard of Care. Obviously, the Plaintiff's expert realized that there was an insufficiency in his testimony when they

submitted the post Deposition Affidavit in an attempt to rescue their claim. While the Court reviewed the factors in *Cothran v. Brown*, 357 S.C. 210, 218, 592, S.E. 2d 629, 633 (2004) to determine whether this post Deposition Affidavit is a sham affidavit, the Court finds that is not necessary due to the fact that Mr. Aiken's testimony fails to establish a Standard of Care.

The correct Standard of Care is a degree of skill, care, knowledge, and judgment used and possessed and exercised by members of a profession. See, *Holy Loch Distribs, Inc. v. Hitchcock*, 340 S.C. 20, 26, 531 S.E. 2d 282, 285 (2000).

Aiken only speaks in generality when he opined that SCDC violated the Standard of Care. His generalities fall woefully short of the Court's admissibility standards for experts in a gross negligence case. Therefore, this Court finds that Mr. Aiken's testimony does not help the Plaintiff survive SCDC's Motion for Summary Judgment.

While this Court does not exclude the Affidavit of Mr. Aiken, the Court finds that it fails to establish foreseeability and/or any articulated breach in the Standard of Care which would rise to the level of gross negligence.

B. HOT POT AS A DANGEROUS INSTRUMENTALITY

The Plaintiff's expert opines that "in a maximum-security setting such as Darlington Unit in the Lee Correctional Facility, inmates should not have been permitted to possess, in their locked cell and outside of the immediate site and controlled security staff, any instruments such as "hot pot" capable of heating water to scolding temperatures". The Plaintiff's expert further opines that "SCDC should have reviewed and identified from the inmate's inventory and possession and taken control of and removed any instrument in Willis Dorsey's cell capable of being weaponized and causing injury such as a hot pot." While the Court realizes that the only

evidence of possession of a hot pot was by the Plaintiff, the Court does find that this is not a dangerous instrumentality that should not be allowed in prison.

While there is no case law in South Carolina, there are a number of other jurisdictions that have assessed this issue.

In Hayes v. State of Illinois, 47 Ill. Ct. Ci. 389 (1994), the court found that the State is not an insurer as to the safety of an inmate in its custody. It does, however, have a duty to exercise reasonable care under the circumstances and prevent its inmates from suffering harm at the hands of other inmates. However, in cases where inmates have been assaulted by other inmates, the Court has to determine that to prove foreseeability of potential harm, it must be shown that respondent's agents anticipated or should have anticipated third persons would commit criminal acts against a particular inmate who was attacked. The Court found that even though hot water was thrown on another inmate, there was no evidence, as in this case, that the Plaintiff warned the State's agent or that they otherwise knew of the danger of an attack. Thus, the Court granted Summary Judgment.

Next, in Carter v. United States of America, another inmate splashed the Plaintiff in that case with a "super-heated homemade concoction of scalding hot coffee, oral and cleaning chemicals mixed together". The Court stated that "due to the difficulty of prison management, Courts typically provide great deference to the decisions of prison administrators." Citing, Thornburg v. Abbot, 490 U.S. 401, 407-08 (1989). "The Judiciary is ill equipped to deal with the difficult and delicate problems of prison management." Therefore, Courts must "afford considerable deference to the determinations of prison administrators". Turner v. Safley, 482 U.S. 78, 84-85 (1987). ("Running a prison is an inordinarily difficult undertaking that requires expertise, planning and commitment of resources").

Again, the Court again found, pursuant to this Federal Tort Claims Act, that there was no foreseeability and that it was not reasonable to presume that the Plaintiff had an inmate that had the capability to harm another and that, in and of itself, made an instrument inherently dangerous. Thus, the Court dismissed the Plaintiff's case.

Next, the case of *Anderson v. Wilkerson*, 440 Fed. Appx. 379 (2011) dealt with an inmate who had a microwave that heated water to a boil. The inmate then scalded the other inmate with the hot water. The Plaintiff in that case sued stating the prison was deliberately indifferent to the serious risk of hot water throwing attack when they made the microwave available to inmates during sleep times without regulation, monitoring, or having the oven secure. Again, the Court found that the evidence adduced at trial does not support a finding that the prison was aware of facts from which the inference could be drawn as a substantial risk of serious harm existed by having a microwave that could heat water to a boil. Thus, the Court dismissed the Plaintiff's case.

The Plaintiff has not produced any evidence that there were numerous other boiling water incidences at the Lee Correctional Institution. There is nothing in the records that show any foreseeability of an attack with a hot pot or an issue that would put Lee Correctional Institution on notice that the use of hot pots could be a dangerous instrument. In fact, based upon the Affidavit of the Defendant's expert, Emmett Sparkman, states that "to say that hot pots should never be allowed in cells is contrary or in (sic) contrary to policies of a number of prison systems around the country." Despite having the opportunity to address that issue in his Affidavit, Mr. Aiken never disputes that other prison systems around the country utilize hot pots.

The Court also notes that Mr. Aiken states that any heating devices should be in common areas. Logic would only dictate that liquids could be heated up in a microwave and taken into a cell to produce the exact type of injury as in this case.

C. DUTY TO PROTECT INMATES FROM VIOLENCE

Lastly, the Plaintiff argued that prison officials are responsible for “protecting prisoners from violence at the hands of other prisoners”. See, Farmer v. Brennan, 511 U.S. 825, 833, 114 S. Ct. 1970, 1976, 128 L.Ed. 2d 811 (1970); Dancer v. Stansberry, 772 F. 3d, 340, 346 (4) Cir. 2014”). This duty is formed under the Federal “Deliberate Indifference” standard as it applies to cruel and unusual punishment per the United States Constitution. This standard does not apply to cases under the South Carolina Tort Claims Act against the SCDC.

Furthermore, the Plaintiff references the duty to provide those in custody a safe environment. That is not a duty created per the South Carolina case law but rather, a federal duty created under the Deliberate Indifference Standard. Thus, the act or duty if misapplied by the Plaintiff and their expert.

The Plaintiff also references, Mackenzie v. Lee, Jackson v. South Carolina Department of Corrections, and Faile v. South Carolina Department of Juvenile Justice, 350 S.C. 315, 336, 566 S.E. 2d, 536, 547 (2002) as creating a duty to protect an inmate from assault on another inmate. The Court has reviewed these cases as referenced earlier in this Order. This Court does not see where such a duty has been created, especially when there is no foreseeability to such an attack.

CONCLUSION

None of the evidence contained in this record demonstrates that SCDC failed to exercise slight care. The Plaintiff’s expert Affidavit makes allegations which are conclusory in nature. The Plaintiff’s expert, through his Affidavit, which was filed untimely, fails to establish any

Standard of Care. Pursuant to Rule 56 (e), SCRCP, “supporting and opposing Affidavit should be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to matters stated therein.” None of the evidence or opinions of the Plaintiff’s experts demonstrate that SCDC failed to exercise slight care. The evidence contained in the record supports only one inference. That inference is that SCDC exercised slight care. Thus, SCDC is entitled to Summary Judgment as a matter of law.

NOW, THEREFORE, based upon the foregoing, it is hereby

ORDERED that the Defendant South Carolina Department of Corrections’ Motion for Summary Judgment pursuant to Rule 56 SCRCP is hereby granted and the Plaintiff’s action is dismissed with prejudice as to the Defendant South Carolina Department of Corrections.

AND IT IS SO ORDERED.

George M. McFaddin, Jr.
Presiding Judge for the Court of Common Pleas
Third Judicial Circuit

At Chambers:

Sumter, South Carolina.

_____ 2018.



Lee Common Pleas

Case Caption: Levi Bing VS Anthony Padula , defendant, et al
Case Number: 2014CP3100100
Type: Order/Summary Judgment

So Ordered

S/George M. McFaddin, Jr., #2759