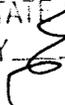


FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

NO. 37167-7-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

CRAIG STOVER

Plaintiff,

PIERCE COUNTY CORRECTIONS
HEALTH CLINIC, PIERCE COUNTY
JAIL, and PIERCE COUNTY, a local
governmental entity of the State of
Washington

Defendants.

RESPONSE TO ISSUES RAISED IN BRIEF OF RESPONDENT

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**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

CRAIG STOVER)
)
Appellant,)
)
vs.)
)
PIERCE COUNTY CORRECTIONS)
HEALTH CLINIC, PIERCE COUNTY)
JAIL, and PIERCE COUNTY, a local)
governmental entity of the State of)
Washington)
)
Appellee.)

Court of Appeals No.: 37167-7-II

**RESPONSE TO ISSUES RAISED
IN BRIEF OF RESPONDENT**

The Plaintiff submits the following in response to Defendant's Brief.

ISSUE NO. 1:

In providing argument against Plaintiff's Eighth Amendment violation claim, the Defendant has advised the Court that a prison official must have a "sufficiently culpable mind", and cites *Farmer v. Brennan*, 511 US 825, 114 S. Ct. 1970, 128 L.Ed. 2d 811. The Court in Farmer pointed out that the previous test of "deliberate indifference" had been modified by the decision in *Estelle v. Gamble*, 429 US at 104, 50 L.Ed 2d 251, 97 S. Ct. 285, and that deliberate

1 indifference entails something more than mere negligence. But the Court also pointed out that a
2 violation is satisfied by “something less than acts or omissions for the very purpose of causing
3 harm or with knowledge that harm will result”. The Court went on to point out, however, that
4 where prison officials are charged with “using excessive physical force” then the claimant must
5 show that officials applied force “maliciously and sadistically for the very purpose of causing
6 harm”. And the Court went on to point out that the standard of knowingly causing harm is not
7 necessary for claims challenging conditions of confinement. The Court said:

8 “This standard of purposeful or knowing conduct is not, however,
9 necessary to satisfy the mens rea requirement of deliberate
10 indifference for claims challenging conditions of confinement: ‘the
11 very high state of mind prescribed by Whitley does not apply to
12 prison conditions cases.’”

13 The Court went on to enunciate the test for violation of the Eighth Amendment as
14 follows:

15 “Under the test we adopt today, an Eighth Amendment claimant
16 need not show that a prison official acted or failed to act believing
17 that harm actually would befall an inmate; it is enough that the
18 official acted or failed to act despite his knowledge of a substantial
19 risk of serious harm.”

20 Further, the Court went on to hold that this presented a question of fact. The Court said:

21 “Whether a prison official had the requisite knowledge of a
22 substantial risk is a question of fact subject to demonstration in the
23 usual ways, including inference from circumstantial evidence... and
24 a fact finder may conclude that a prison official knew of a
25 substantial risk from the very fact that the risk was obvious.”

26 In this appeal, we have Mr. Stover presenting testimony of continuing indifference to his
complaints and to obvious medical problems. The Defendant knew from previous records that
Plaintiff had a known seizure disorder. The Plaintiff complained of impending seizures at
booking and the following morning. In spite of this, the Plaintiff was placed in handcuffs and a

1 belly chain. Following the Plaintiff's return from the emergency room, he was briefly placed in
2 the medical unit and then removed. Mr. Stover advised the Trial Court that "I requested on
3 several occasions to see the doctor because of concerns about my medication and because of
4 concerns I had about considerable swelling and discoloration about my right eye which I struck
5 when I fell in the holding tank during my seizure. I was only allowed to see the doctor on one
6 occasion. My medical condition had deteriorated to such an extent that the other inmates in my
7 cell were also asking that I be allowed to see a doctor." (CP 271) Mr. Stover was held in the
8 Pierce County jail from March 10 or 11 until March 31, 2004. (CP 132) Further, the chart notes
9 from the jail reflect that on 3-19-04 that Mr. Stover complained of "visual disturbance in L eye
10 since last p.m. – no previous complaints c/o visual disturbance ā i/m also voiced wanting to see
11 Dr. re: medications. Advised i/m we will put him on the list for next week – notify clinic if there
12 is a major change in vision before then". (CP 324)

13 **ASSIGNMENTS OF ERROR 3 AND 4:**

14
15 The Defendant takes issue with Plaintiff's citation to the record. The Defendant argues
16 that Clerk's Papers 626 does not reflect "that any conversation took place with Safeway".
17 (B.O.R. 21) First, Plaintiff submits that it does, but, secondly, and more importantly, Defendant
18 fails to advise the Court of the context in which this statement was made. The Plaintiff brought
19 to the Court's attention that Mr. Stover recalled the booking nurse calling Safeway pharmacy and
20 being advised of his medication, Tegretol, and the dose level. The reference to page 626 of the
21 Clerk's Papers, reflecting the conversation with Safeway, is to support the Plaintiff's recollection.
22 Further, page 626 not only contains the information "Safeway Puyallup Meridian", as the
23 Defendant contends, but also contains the following: "Booking nurse called name/time". This
24 was followed by a handwritten signature which appears to be that of Becky Hay. Becky Hay
25
26

obviously did not call Craig Stover as Craig Stover was immediately in front of her. The only
1 reasonable presumption is that Becky Hay called Safeway. (CP 626) Craig Stover clearly

2 advised the Trial Court of this when he declared:

3 “To clarify the statements I made in my Supplemental Declaration
4 wherein I state that I told the booking nurse I was on Tegretol and
5 the dose level that I took, I did tell her that I was on Tegretol and
6 that I took it three times a day. As a matter of fact, when she and I
7 were together and when she was asking me these questions, she
8 called the Safeway Pharmacy and the pharmacy told her that I was
9 on Tegretol but that I had not purchased any from them for a year.
10 When she told me this, I told her that I did not have to purchase the
11 Tegretol from Safeway because I had ample supplies at my home.
12 And, the Defendant’s statement that I was ‘unable or unwilling to
13 provide specific information including dosages etc.’ is absolutely
14 incorrect. I did tell the booking nurse that I was taking Tegretol
15 and that I took this medication three times a day. At this time, the
16 booking nurse told me to ‘sit down and shut my mouth or she was
17 going to put me in the hole.’” (CP 268-269)

18 Further, Clerk’s Paper 626 contains the following:

- 19 Would not respond
20 Uncooperative/intoxicated
21 Non-English speaking, language?”

22 The section referring to intoxication was not checked. (CP 626)

23 Additionally, when Mr. Stover, the following day, was taken to St. Joseph’s Hospital, the
24 healthcare providers again had an opportunity to assess any possible alcohol effect where the
25 form provided for “recent alcohol intake” and, again, this was not checked. (CP 182)

26 The Defendant also states that “Plaintiff did not use the word ‘aura’. He consistently
referred to ‘pet mals’ in his declarations.” (B.O.R., 30) However, Dr. Balderrama clearly
understood Plaintiff’s symptoms to be auras. He said:

1 “Your statement. It’s very rare. Most of the patients if they are
2 going to have a complex tonic-clonic seizure – if they are of the
3 category of patients that will have auras, basically what you are
4 referring to – (CP 598).”

5 **Defendant’s Attempt to Define Plaintiff’s Issues:**

6 The Defendant continues to attempt to define for the Court the issues raised by the
7 Plaintiff. However, the Defendant is creating its own issues. They are not the issues of the
8 Plaintiff. The Defendant advises this Court:

9 “Plaintiff argued below that Defendants were negligent in two
10 areas. First, for their failure to immediately provide Plaintiff with
11 medication for his seizure condition, and, secondly, for placing
12 Plaintiff in handcuffs the following morning while awaiting a
13 Court appearance in Tacoma Municipal Court.” (B.O.P., p. 24)

14 The Defendant has created these issues because, in part, it can make some semblance of
15 providing answers to them. However, the Defendant, essentially, avoids the real issues on appeal.
16 These issues are set forth in Appellant’s Brief, pages 16-17. In the first issue, medication does
17 enter the discussion but it is not the issue. The point that Plaintiff makes is that in addition to
18 advising the Defendant of his need for medication, Plaintiff also advised the Defendant of his
19 seizure disorder and his feeling of pending pet mals/auras. And the matter of questioning the
20 Plaintiff to determine his real medical needs was aborted when Plaintiff was told to “sit down and
21 shut my mouth or she was going to put me in the hole”. (CP 268-269) And, while Dr. Balderrama
22 testified that the failure to engage Plaintiff in such a questioning process was a violation of the
23 standard of care,(CP 599) the danger of not doing so is that the healthcare provider will not be
24 aware of the “kind of auras” that the patient is describing. (CP 599) Dr. Balderrama was very
25 clear that he did not see “any” questioning from nursing in that regard. He testified:

26 “Q: Do you know of any questions that were placed to Craig
 Stover of that nature as we sit here today?”

1 A: When I reviewed the chart, I do not recall seeing any from
nursing, I do recall seeing evidence from Mr. Ortiz.” (CP 600)

2 The doctor went on to state that Mr. Ortiz’s questions, however, occurred after the
3 Plaintiff had sustained his injuries. (CP 600-601) Mr. Ortiz engaged in his questioning on
4 March 15, 2004 whereas Plaintiff was injured March 12, 2004.

5 The point, however, in failing to conduct the appropriate questioning was, first, that
6 Plaintiff was placed at risk by not providing him with his medication, and, secondly, and
7 probably more importantly, that no precautions were taken by the jail staff to restrain the Plaintiff
8 against his impending seizure (not only were no measures taken to restrain, and thereby prevent
9 injury, but, to the contrary, the Plaintiff was placed in handcuffs and a belly chain and taken to
10 the holding tank), and, thirdly, the Plaintiff was not placed in a medical unit nor provided access
11 to a doctor the following day. As Dr. Balderrama said:
12

13 “Q: Or, if you are denied access to your medication?
14

15 A: If you don’t take your medication, by all means, yes; you
are at risk.

16 Q: So if you are denied access to it, you wouldn’t be taking it,
17 correct?

18 A: If you are denied, of course.

19 Q: So in that setting a person would still be at risk for another
20 seizure?

21 A: Yes. (CP 598)

22 A: Again if someone – if I’m seeing a patient and the patient is
23 telling me ‘I have auras’ basically I have to be ready for a seizure...

24 Q: And by other means would be to be ready to restrain the
25 person if a seizure should come about?
26

A: That is correct.” (CP 599)

1 Defendant takes issue with Dr. Balderrama’s testimony that he “did not recall” seeing
2 questions put to the Plaintiff from the nursing staff and that, somehow, this testimony was less
3 than conclusive. (B.O.R. p. 31) However, the questioning of Dr. Balderrama on this issue was
4 much more complete than that. The entire chart records and medical records of Craig Stover
5 were given to Dr. Balderrama and whereas he easily noted questions from Mr. Ortiz on March
6 15, he could not find any questions from nursing at the time of Mr. Stover’s booking.
7

8 Dr. Balderrama testified:

9 “Q: So if the arrestee provides the booking nurse with that
10 history of seizure disorder, feeling auras, and not having his
11 medication, then the nurse has to go through a series of questions
12 to eliminate every other potential cause?

12 A: Yes.

13 Q: And that would be the standard of care, right?

14 A: Yes.

15 Q: Do you know of any questions that were placed to Craig
16 Stover of that nature as we sit here today?

17 A: When I reviewed the chart, I do not recall seeing any from
18 nursing, I do recall seeing evidence from Mr. Ortiz.

19 Q: Mr. Ortiz what, please?

20 A: I saw evidence that he evaluated the patient.

21 Q: But not on that day did he, not on March 11?

22 A: What happened on March 11?

23 Q: That was the booking. I’m sorry, that was the booking. I
24 don’t want you answering these blind, so to speak. Let me give
25 you – now this has been identified as his clinical record. Tell me if
26

you see anything in there that would indicate that Mr. Ortiz evaluated Mr. Stover or his condition on March 11...

1 Q: Do you see anything in the records that I've placed in front
2 of you that would indicate that Mr. Ortiz participated in any fashion
3 in the booking process or clarification process of Mr. Stover on
4 March 11, 2004?

5 A: And the answer is no.

6 Q: When do you understand that Mr. Ortiz first became
7 involved in that?

8 A: The first note that I have here from PA Ortiz is on March
9 15.

10 Q: Now as you look at the records that I've put in front of you
11 does that appear to be the complete chart notes and medical records
12 for Craig Stover within the Pierce County jail?

13 A: Yes.

14 Q: In 2004?

15 A: In 2004." (CP 600-601)

16 The Defendant has referred to the Plaintiff's injuries as "minor" and advises the Court
17 that those consisted of a "one centimeter lip laceration and a facial bruise". (B.O.R. p. 28)
18 Again, that is not quite what the record reflects. The records from St. Joseph's Hospital indicate
19 that Plaintiff sustained "trauma with injury to the left face and eye region". (CP 191) Further,
20 the Plaintiff testified that "I requested on several occasions to see the doctor because of concerns
21 about my medication and because of concerns I had about considerable swelling and
22 discoloration about my right eye which I struck when I fell in the holding tank during my
23 seizure". (CP 611) This testimony of Mr. Stover is given support by the medical records which
24 state that on 3-19-04 that he complained of a "visual disturbance in L eye since last p.m. ... i/m
25
26

also voiced wanting to see doctor re: medications. Advised i/m we will put him on the list for
1 next week. Notify clinic if there is a major change in vision before then.” (CP 137)

2 And, nursing supervisor Mary Scott testified that to have not engaged in the proper
3 questioning procedure would be a violation of the rules and regulations (CP 602) and that when it
4 was learned that Plaintiff did not have his prescription on his person for Tegretol that he should
5 have been placed on a list of inmates to be seen by the medical practitioner on March 12, 2004,
6 rather than having him placed in a chain gang and taken to a Municipal Court holding tank.
7
8 (CP 603)

9 Further, if there was some need to take Plaintiff to the Municipal Court on March 12,
10 prior to having been seen by the medical practitioner, then the procedure set forth by Chief
11 Ronald Hyland should have been followed; namely, that he should have been strapped into a
12 chair to prevent a fall during a seizure. Chief Hyland said:

13 “I am the retired Chief of Police of the City of Sumner where I
14 served for 27 years as Chief and a total of 38 years in law
15 enforcement. For the 27 years I served as Chief of Police I was in
16 charge of the jail.

17 I have reviewed all of the arrest, booking and detention records
18 Craig Stover compiled as a result of his arrest on March 11,
19 2004... It is my opinion that he should have been housed in the
20 medical unit of the jail.

21 It is my further opinion that he either should not have been
22 handcuffed in the holding tank, or if handcuffed that he should
23 have been strapped to the chair in such a fashion that he could not
24 have fallen from the chair should he have a seizure.

25 Violation of both, or either, of the above would be a violation of
26 reasonable law enforcement practices in the operation of a jail
27 facility. This would be indicative of inadequate training,
28 supervision or both.” (CP 266-267)

Proximate Cause:

1 Proximate cause is generally a question for the jury. As the Court said in *Stalter v. State*,
2 113 Wn. App. 1, 51 P. 3d 837:

3 “The question of proximate cause is for the jury unless the facts are
4 undisputed and there is only one logical inference.”

5 And, the facts are hardly undisputed here and there is hardly only one logical inference.

6 However, even though this is the general law in the State of Washington, Mary Scott also
7 testified that persons having seizures in jail facilities are subject to injuring their persons.

8 Ms. Scott said:

9 “Q: That’s a fairly common source of injury to persons in
10 correctional facilities, is it not? The – the actual happening of a
11 seizure, people get injured that way don’t they?

12 A: People get injured having seizures, yes.” (CP 602)

13 The Defendant appears to proceed on the basis that Mr. Stover was out of compliance
14 with his medication. Such was not the case, however. The reference to the three-week period
15 from St. Joseph’s Hospital came immediately after Plaintiff had had a Grand mal seizure. And,
16 as Plaintiff stated: “When a person has a Grand mal seizure they literally lose their orientation as
17 to time, location, events occurring etc. If this statement was taken from me, it was not an
18 accurate statement as I take Tegretol three times a day. (CP 320) As to the reference to Dr.
19 Brooks counseling me about failing to consistently take my medication, there was a brief period
20 of time when my medical coverage was cancelled. However, this was corrected and ever since
21 then I have consistently taken my medication. (CP 320)”

22 The second issue on the question of medical negligence, the necessity to be ready to
23 restrain a person with seizure disorder (B.O.A., p. 17) was dealt with in the above discussion.
24
25
26

1 This is also true of the third issue on the question of medical negligence, that is the proper
2 questioning of an inmate who reported an impending seizure. And, Mary Scott testified that the
3 jail's rules and regulations were violated in this regard. (CP 601-603)

4 On the fourth issue of medical negligence, that is the proper response to the Defendant's
5 contention that it was not aware of Plaintiff's proper medication nor dose level. Nursing
6 supervisor Mary Scott testified that in such instances the nursing guidelines require that the
7 inmate be placed on a list to be seen by the medical practitioner on March 12, rather than being
8 placed in handcuffs and a belly chain. (CP 603)

9 The Defendant argues that Plaintiff cannot prove that but for the denial of medication at
10 booking he would not have injured in a fall during a seizure. The Defendant alleges that there is
11 "no guarantee" the Tegretol would have prevented the seizure. (B.O.R., p. 27) First, Plaintiff
12 states that this is not the standard for review of the Defendant's actions, that is to prove by a
13 guarantee of the evidence that such would have occurred. And, again, it is not solely a matter of
14 failure to provide Plaintiff with his medication. It was, as Chief Hyland testified, a failure to
15 place him in the medical unit and a failure to properly restrain him when taken to the Municipal
16 Court. Further, it was also a failure, as nursing supervisor Scott testified, to not have Mr. Stover
17 seen by the medical practitioner on the day following his booking.

18 And, Dr. Balderrama testified that Mr. Stover would have been at increased risk by
19 denying him the Tegretol and Nurse Scott testified that it is foreseeable that a person having a
20 seizure will suffer injury. That is all that is required. As the Court stated in *Herskovits v. Group*
21 *Health*, 99 Wn. 2d 609, 664 P. 2d 474:

22 "Under the Hamil decision, once a Plaintiff has demonstrated that
23 the Defendant's acts or omissions in a situation in which Section
24 323(a) applies have increased the risk of harm to another, such
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1 evidence furnishes a basis for the fact finder to go further and find
2 that such increased risk was in turn a substantial factor in bringing
3 about the resultant harm. The necessary proximate cause will be
4 established if the jury finds such cause. It is not necessary for a
5 Plaintiff to introduce evidence to establish that the negligence
6 resulted in the injury or death, but simply that the negligence
7 increased the risk of harm or death. The step from the increased
8 risk to causation is one for the jury to make.”

9 Could anyone, anyone, say that it is reasonable conduct for a jail staff to place an inmate
10 with a known seizure disorder, known from its own records and from the inmate’s history, in a
11 belly-chain gang, handcuffed, and then taken to a holding tank without review by a medical
12 practitioner? (CP 604, 605)

13 In a case with many similarities to instant appeal, the Court in *Nicholson v. Veal*, 52 Wn.
14 App. 814, 764 P. 2d 1007, was faced with a medical negligence action against a surgeon who had
15 replaced Plaintiff’s hip with a prosthesis and which, subsequently, caused considerable pain to
16 the Plaintiff. In rejecting the Defendants’ doctors affidavits and in reversing the grant of
17 Summary Judgment, the Court stated that the affidavits did not describe how the injury occurred.
18 The Nicholson Court also quoted from *Hash v. Children’s Orthopedic Hospital*, 49 Wn. App.
19 130, 741 P. 2d 584, where a six year old girl had suffered a fracture during physical therapy at
20 Defendant’s hospital. The hospital moved for Summary Judgment relying upon the affidavit of
21 Dr. Wallace who stated that Plaintiff had weaker bones than normal and that the standard of care
22 was met during the course of physical therapy. In rejecting these affidavits, the Court stated:

23 “The Court had no evidence from which to determine how the
24 fracture occurred. At the very least, to support a Motion for
25 Summary Judgment, the moving party is required to set out its
26 version of the facts and allege that there is no genuine issue as to
the facts as set out. In this case, these facts should have included
an account of the circumstances surrounding Hash’s injury from
the only adult witness to the injury, the physical therapist who had
been treating her at the time. We find it impossible to uphold a

ruling where there is no genuine issue as to any material fact when the record contains all questions and no facts.”

1 And, that is precisely the case we have here. The Defendant submitted the Declaration of
2 Dr. Miguel Balderrama (CP 112-113) and the most that Dr. Balderrama states in this affidavit
3 concerning the nature of Plaintiff’s injuries is that “it is a common occurrence in most individuals
4 experiencing Grand mal seizures the inability to control or direct their body making it nearly
5 impossible/improbable for a person to effectively ‘break their fall’ during a seizure; and that it
6 was ‘highly probable there were no residual therapeutic effects from Tegretol or Dilantin in
7 Plaintiff’s system’...” But no where in Dr. Balderrama’s declaration does he state how the injury
8 occurred. His affidavit, like the affidavits in Nicholson and Hash simply create questions.
9

10 And his affidavit probably supplies more support for Plaintiff’s position. Dr. Balderrama
11 also states that “it is the practice of the Pierce County correctional health clinic for the booking
12 nurse or similar personnel to place the recently booked inmate’s medication information in a
13 location that indicates the inmate’s need to be seen the same day, next day or two weeks later
14 according to the clinical situation.” (CP 113)
15

16 And, Nursing Supervisor Scott testified that Mr. Stover’s name was not included in any
17 such lists.
18

19 The Plaintiff has shown several instances of medical negligence that violated the standard
20 of care. However, even before considering this, it is required that the moving party, the
21 Defendant, demonstrate a lack of factual issues and a showing of how the injury occurred. The
22 Defendant has not done this. Summary Judgment should not have been granted. The Nicholson
23 Court states:
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25 “The party moving for Summary Judgment bears the burden of
26 showing that there is no issue of material fact; the Court must

1 resolve all reasonable inferences against the moving party and will
2 grant the motion only if reasonable people could reach but one
3 conclusion.

4 If the moving party does not sustain its burden, the Court shall not
5 grant Summary Judgment, regardless of whether the non-moving
6 party has submitted affidavits or other evidence in opposition to the
7 motion. The burden shifts to the non-moving party to set forth
8 facts showing that there is a genuine issue of material fact only
9 after the moving party has met its burden of producing factual
10 evidence showing that it is entitled to judgment as a matter of law.”

11 And, the decision in Harris v. Groth, 31 Wn. App. 876, 645 P. 2d 1104, sets forth the
12 standard by which to review the negligence of health care providers. The Court said:

13 “The standard of care in a medical malpractice case is generally
14 established only through the testimony of a physician. Medical
15 testimony is required to establish the negligence of a physician
16 unless the negligence is so apparent that a layman would have no
17 difficulty in recognizing it. Nor can the expert be called upon to
18 give an opinion as to questions of mixed law and fact, e.g. whether
19 Dr. Groth was negligent. The determination of expertise and
20 admission of such testimony is largely within the discretion of the
21 Trial Court and will not be disturbed on appeal absent a showing of
22 abuse.”

23 Can anyone deny the existence of negligence on the part of the jail where an inmate, at
24 booking, with a prior history of seizure disorder in the records of the jail, and who, again, advises
25 the jail of the seizure disorder and of his need for medication and of his having “pet mals” that
26 such jail staff would not only not place him in the medical unit and would not have him seen by
the jail doctor that evening, or the following day, but would, rather, place him, with knowledge of
impending seizures, in handcuffs and a belly chain and take him to, and leave him in, a holding
tank with no means of protecting himself against a fall, could anyone say that such would not
constitute common-law negligence and medical negligence?

1 After the failure of the Defendant to properly assess Mr. Stover and to place him in a
2 medical unit and to have him seen by a physician the following day and to provide him with his
3 medication the Defendant advises the Court that there was no negligence on the part of Officer
4 Hernandez, the transport officer. The Defendant even advises the Court that “there is no
5 evidence that CO Hernandez transported Plaintiff that morning”. (B.O.R., p. 36) However, that
6 is not what CO Hernandez testified to in his deposition. He testified:

7 “A: I was one of the two officers assigned to that Court room...

8 Q: Now are the persons who are assigned to the Court room,
9 are they the persons who go in to the cells and obtain the inmates
10 and bring them to the Court?

11 A: Initially we do.

12 Q: Okay.

13 A: First thing in the morning we get our Court docket for the
14 Court that we are assigned to and we go and get us what – we are
15 allowed to transport at once to the Court room and...

16 Q: Okay. Now when you bring the inmates from the jail to the
17 Court, do you stay there with them or do you go back and get other
18 inmates if there are still others that have to be brought?

19 A: No, we stay with them and then other officers will assist to
20 bring the remainder.

21 Q: To bring the others?

22 A: Correct.

23 Q: Is that what happened on the day that Mr. Stover –

24 A: To the best of my recollection, yes sir.” (CP 568 – p. 7, 8)

25 We know from this testimony that Officer Hernandez was seated in an adjoining room on
26 the day that Craig Stover had his seizure and we know that he was the officer who rushed into the

1 holding tank because he heard “a thumping noise” of such magnitude that he thought there was
2 an altercation in the room. (CP 569 – p.14) And, we know that Officer Hernandez filled out the
3 report on the incident. (CP 77) Plaintiff submits that the evidence clearly, if not
4 overwhelmingly, demonstrates that Officer Hernandez was the transport officer. And, more
5 importantly, on the issue of the Summary Judgment, the Defendant presented no evidence that he
6 was not the transport officer.

7 The status of Officer Hernandez, as the transport officer, while not critical to a related
8 issue is certainly important, and that is that Defendant also advises the Court that “again, there is
9 no evidence Plaintiff told CO Hernandez he was about to have a seizure”. (B.O.R. p. 37)

10 However, and again, this is not accurate. Mr. Stover testified by declaration:

11 “When I said, in that Declaration, that I can ‘feel’ a seizure coming
12 on, I begin having what I call ‘pet mals’, or seizures much smaller
13 in degree than a Grand Mal. I was having these as I was being
14 booked into the jail and on the day that they transported me to the
15 Municipal Court. I told both the booking nurse and the officer in
16 charge of my transportation to the Municipal Court that I was
17 having these ‘pet mals’ and that this generally preceded a larger
18 seizure.” (CP 604, 605)

19 Further, as to the question of handcuffs and chains, Officer Hernandez testified:

20 “Q: Okay. They would be brought in handcuffs to the jail – to
21 the holding tank, wouldn’t they?”

22 A: They would be chained up on chain based on how many
23 Defendants that we have. If they are cooperative inmates if they
24 are behaving, then they would be in different types of restraints.

25 Q: Then there might be leg shackles in addition to the
26 handcuffs is that it?

A: It’s belly chains which is a chain around the waist with –

Q: Oh, okay.

1 A: - handcuffs to each of the wrists. And the - if leg
restraints, if its required, and that's usually inmates that are
behavioral charges...

2 Q: Do you recall any of the other inmates who were in that
3 holding tank.

4 A: No, I don't recall which inmates were there at that moment.

5 Q: So you don't know if there were any other inmates with Mr.
6 Stover who may have had behavior problems or who may for other
7 reasons may have been in shackles and/or the belly chains and the
leg shackles, you don't recall if there were any in that category or
8 not?

9 A: I can't say 100 percent, no." (CP 569 - p. 16; CP 570 - p.
10 17)

11 Plaintiff submits that this is not what Dr. Balderrama meant when he said that the
12 standard of care requires officers "to be ready" to restrain the person when they are at risk for
13 having a seizure nor is it what was meant by Chief Hyland when said that the inmate should be
14 strapped to the chair in such a way that they could not fall once the seizure begins.

15 Plaintiff submits that all of these areas of testimony clearly demonstrate that the Court
16 should have granted Plaintiff's Motion for Summary Judgment on the issue of liability and
17 certainly should not have granted the Defendant's Motion for Summary Judgment.

18 Respectfully submitted this 14th day of August, 2008.

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21 

22 Richard F. DeJean WSBA #2548
23 Attorney for Plaintiff

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

CRAIG STOVER)
)
 Plaintiff,)
)
 vs.)
)
 PIERCE COUNTY CORRECTIONS)
 HEALTH CLINIC, PIERCE COUNTY)
 JAIL, and PIERCE COUNTY, a local)
 governmental entity of the State of)
 Washington)
)
 Defendants.)

Court of Appeals No.: 37167-7-II

CERTIFICATE OF SERVICE

I, Brenda M. High, certify under penalty of perjury under the laws of the State of Washington that on August 15, 2008 I served the documents; namely, Response to Issues Raised in Brief of Respondent, to which this is attached to the party listed below in the manner shown:

Grace Kingman
Deputy Prosecuting Attorney
955 Tacoma Ave. S., Suite 301
Tacoma, WA 98402-2160

- By United States Mail
- By Legal Messenger
- By Facsimile
- By Overnight Fed Ex Delivery

[Signature]
Brenda High

Legal Secretary for Richard F. Dejean
**LAW OFFICES OF
RICHARD F. DEJEAN**