IN THE CLAIMS COMMISSION FOR THE STATE OF TENNESSEE
WESTERN DIVISION

FILED
FEB 25 2009
Tennessee Claims Commission
CLERK'S OFFICE

MICHAEL UNDERWOOD,

Claimant

v.

Claim Number 20-061-400
REGULAR DOCKET

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C/S=COMM
DCA
AG
ALJ
FEE PAID
NOTICE SENT
FILED

STATE OF TENNESSEE,

Defendant

JUDGMENT

THIS MATTER CAME TO BE HEARD on September 16, 2008, before Nancy C. Miller-Herron, Commissioner of Claims for the Western Grand Division of the State of Tennessee. Carroll C. Johnson, II, Esq., appeared for the Claimant. Kellena Baker, Esq., appeared for the State of Tennessee.

This matter comes before the Commission pursuant to Tennessee Code Ann. § 9-8-307(a)(1)(E), for negligent care, custody and control of persons. It arises out of an assault or assaults on the Claimant by two other prisoners. Claimant avers that an inmate named Robert Campbell jumped on him and stabbed him. Claimant

alleges that if TDOC policies regarding searches had been conducted properly, he would not have been stabbed. Underwood also claims state employee and Correctional Office Heather Franklin was negligent in failing to take reasonable steps to prevent another inmate, Timothy Inman, from kicking him in the head.

The State insists that it had no prior warning of the attack on Claimant and that the correctional officers on the yard came to Claimant's aid.

Based upon the evidence presented at trial, the testimony of the parties, the statements of counsel and the record as a whole, the Commission **ORDERS** that this Claim be **DISMISSED**.

I.

FACTS

On June 6, 2006, Claimant, Michael Underwood, was in the custody of the Tennessee Department of Corrections and an inmate at the Northwest Tennessee Correctional Complex, hereafter referred to as NWCX.

Associate Warden Alan Bargery was called by Claimant to authenticate certain documents, including incident reports (Coll. Tr.

Ex. 8) which had been produced by the State of Tennessee during pretrial discovery.

Associate Warden Bargery confirmed his earlier deposition testimony that a report would have been created if Officer Heather Franklin had discharged her mace during the altercation. Bargery confirmed he had been unable to find such a report. (Tr., p. 27, lines 3-21)

Bargery also confirmed that when he was asked in a hypothetical whether after one officer got the inmate assaulting Mr. Underwood on the ground, the other correctional officer should be able to prevent somebody else from coming up and assaulting Underwood again, he replied, "Yes." (Tr., p. 28, lines 2-11; Tr. Ex. 9) He went on to say he thought it was the officer's job "[t]o try and help on that." (Tr., p. 28, line 20)

Bargery testified that no information was available on the searches done in Underwood's housing unit in the six months before his assault. (Tr., p. 29, lines 21-p. 30, line 3) He said the state was asked in discovery about searches on Underwood's unit; he could not find a log book to document searches. (Tr., p. 30, lines 5-7) He acknowledged that under TDOC policies, searches are supposed to

be documented. (Tr., p. 30, lines 8-11) Bargery went on to say that the assailants lived in unit 11, a different unit from Underwood, who lived in 12, and he does not know whether there is documentation for searches in unit 11. (Tr., p. 30, lines 21-25)

Bargery conceded that the facility is supposed to be searched at least once a quarter. (Tr., p. 127, lines 10-13)

Bargery testified that at the time Mr. Underwood was attacked, he was "the lieutenant, which was the institutional investigator." (Tr., p. 121, line 25- p. 122, line 1) He investigated an incident that occurred on June 1, 2005, which Claimant avers was the motive for the subsequent attack on him. (Tr., p. 122, lines 2-12) In conducting the investigation, Bargery interviewed inmates involved in it, as well as other inmates in the pod at the time. (Tr., p. 122, lines 17-19)

Bargery stated that nothing in his investigation revealed that Mr. Underwood was involved in the June 1st incident. (Tr., p. 123, lines 15-18) Bargery acknowledged that if Underwood had admitted being involved, he would have been put in segregation. (Tr., p. 131, lines 4-12) He said he did not have a reason to suspect Underwood would be assaulted subsequently. (Tr., p. 123, lines 19-21)

Bargery said that when an inmate voices a fear that he needs protection, an investigation is done to see if he needs to be put in protective custody. (Tr., p. 124, lines 1-5) He acknowledged that inmates in protective custody cannot have prison jobs unless they already have a job in that protective custody unit. (Tr., p. 129, lines 11-17) They are allowed recreation two hours a day, one more hour than prisoners in segregation for disciplinary reasons. (Tr., p. 130, lines 4-8)

Bargery testified that inmates often sharpen actual furnishings in the institution and turn them into shanks. (Tr., p. 124, lines 7-13) They also frequently make them out of a toothbrush and a razor blade. (Tr., p. 124, lines 14-18) Bargery testified that the weapons, which are illegal, are confiscated if they are found. (Tr., p. 126, lines 1-3)

Claimant then called Correctional Officer Keith Ferrell. Ferrell testified that prior to the assault on Claimant, he was standing in front of the program building near the ashtray with Claimant and two other inmates. Officer Franklin was five to eight feet away by the gate. (Tr., p. 36, lines 11-22; p. 37, lines 19-24) He explained that both units 11 and 12 have exercise yards which are separated by a fence;

the gate to the fence is near the program building. (Tr., p. 37, lines 11-18)

Ferrell testified that he told Franklin he could see inmates in the unit 13-14 core area where they were not supposed to be, so he headed over there to run them out. (Tr., p. 38, lines 6-11) Once he had gone through the gate and was in the exercise area for units 13 and 14, he heard a commotion over the radio. (Tr., p. 38, lines 12-17) Ferrell says he turned around and saw the assault on Mr. Underwood taking place. (Tr., p. 38, lines 19-20) Ferrell testified that as soon as he turned around, he saw Campbell stick Underwood with a homemade knife. (Tr., p. 39, lines 8-9)

Ferrell stated, "I took out running as fast as I could and got through the gate and tackled Inmate Campbell to the ground." (Tr., p. 39, lines 14-16) He acknowledged he had run past Officer Franklin to get to Campbell. (Tr., p. 39, lines 17-18) Ferrell testified that he held Campbell on the ground, with his hand on the wrist holding the knife, until help arrived. (Tr., p. 39, lines 21-24)

Ferrell testified that the first help to arrive was Unit Manager Tirey, who came some 25-30 feet from Unit 11-12. (Tr., p. 40, lines

1-9) By the time Tirey and Ferrell got the knife from Campbell, 20 or 30 officers had arrived. (Tr., p. 40, lines 13-15)

Ferrell testified that while he was struggling with Campbell, an inmate named Inman became involved in the altercation. (Tr., p. 40, lines 16-24) Ferrell stated that while he was laying there, restraining Campbell, Inman came up and kicked Underwood, "just kicked him dead square in the jaw." (Tr., p. 41, lines 2-5) Ferrell estimated that Officer Franklin was 10 or 12 feet away. (Tr., p. 41, lines 15-16)

When asked whether Franklin stepped up and tried to assist him, Ferrell replied: "Not that I seen her. She was behind me somewhere." (Tr., p. 42, lines 9-10) When asked again if she ever approached and became involved, Ferrell replied: "Not that I'm aware of." (Tr., p. 43, line 2) Ferrell said he was not aware of any reason Franklin could not have used her mace. (Tr., p. 43, lines 13-16) When asked whether Franklin discharged her mace, Ferrell replied, "Not that I'm aware of." (Tr., p. 43, line 12)

Later in the trial, Officer Ferrell testified as follows:

Q. When did you know something was taking place back on the 11-12 yard?

A. As soon as I heard the commotion on the radio when I turned around.

Q. Okay. And when you turned around, what did you see?

A. I seen Officer Franklin pinned up against the fence[1] with Inmate Michael Bass. There was an inmate standing in front of them. And I also seen the assault at the same time.
(Tr., p. 89, lines 3-12)

Ferrell also testified that he heard the commotion on the radio within seconds of leaving yard 11-12. (Tr., p. 89, line 23-p. 90, line 3) He said as soon as he saw Officer Franklin up against the fence with an inmate between her and the assault, he took off running toward the assault. (Tr., p. 90, lines 13-19) He estimated it took him only seconds to reach the assault. (Tr., p. 91, lines 1-2)

Ferrell said when he reached the assault he didn't see any other inmates right around there. He focused on keeping Campbell's shank where he could see it. (Tr., p. 91, lines 6-19) Ferrell said he was facing the 11-12 building and could not see Franklin. (Tr., p. 91, lines 20-24)

Ferrell said the kick by the other inmate happened very quickly. (Tr., p. 92, lines 7-10) He said after the inmate kicked Underwood, he saw Unit Manager Tirey coming out of the building. (Tr., p. 92, lines

[1] Ferrell explained that it looked like the inmate was shielding Officer Franklin from the assault, but he was sure Franklin could see the assault. (Tr., p. 96, lines 8-18) Ferrell acknowledged on cross-examination, that it might be more accurate to say the inmate was standing between Franklin and the assault. (Tr., p. 97, lines 6-11)

19-20) Ferrell said Tirey reached the assault about ten seconds after he did. (Tr., p. 93, line 2) Tirey got the knife from Campbell and they cuffed him. (Tr., p. 93, lines 9-10)

Tirey said when he got up, there were other officers responding. (Tr., p. 93, lines 12-14) They were already there when he was getting up off the ground. (Tr., p. 93, lines 18-19)

Tirey testified that correctional officers are trained to deal with inmate fights. (Tr., p. 93, lines 23-25) They were taught to use common sense, to give verbal commands. (Tr., p.94, lines 3-7)

Ferrell stated that when an inmate expresses fear that another inmate may hurt him, Ferrell contacts "the unit manager or the OIC." (Tr., p. 94, line 21- p. 95, line 2) He said Claimant never told him he needed to be placed in protective custody. (Tr., p. 95, lines 3-5)

Michael Underwood testified on his own behalf. He said on the day of the assault, he was in the unit yard near the ashtray, waiting for a call from his boss. He was talking with Officers Franklin and Ferrell and an inmate named Bass. (Tr., p. 47, lines 4-8) He estimated Officer Franklin was five feet away. (Tr., p. 48, lines 17-19)

Underwood heard someone holler "Get him," just before he was attacked. (Tr., p. 48, line 21) He was attacked and stabbed by

Inmate Robert Campbell, who he did not know. (Tr., p. 48, lines 24-25) Underwood testified that Campbell stabbed him 18 times. (Tr., p. 49, line 16) He said that while he was being stabbed, he could see Officer Franklin just standing there. (Tr., p. 49, lines 21-22) Underwood said he wondered why she was not helping him. (Tr., p. 49, line 25) He said he felt a body next to his, then heard Ferrell screaming, "That's enough. I said that's enough." (Tr., p. 50, lines 2-3)

Underwood testified that he then sat up and looked at Officer Franklin. He felt something hit him in the side of his head. That is his last memory before waking up in the prison infirmary. (Tr., p. 50, lines 14-18) Underwood said when he saw Officer Franklin, she had not moved from the place where she was. (Tr., p. 51, lines 5-6) He said of Officer Franklin: "I never saw her with a radio, a can of mace, anything. She made no effort to intervene at all whatsoever." (Tr., p. 51, lines 10-12)

Underwood said he was transferred from the prison infirmary to the Union City hospital to Meharry Hospital in Nashville that same day. (Tr., p. 52, lines 11-15) He then spent five months at DeBerry Special Needs Facility. (Tr. p. 53, lines 16-19)

Underwood testified that he had several surgeries to put steel plates in his face to hold his jaw together. A plate also was inserted "to hold my eye socket together." (Tr., p. 53, lines 7-8)

At DeBerry, he received pain medication and the gauze on the wounds all over his body was changed frequently. (Tr., p. 53, lines 14-17) Claimant said he was in a great deal of pain in his head, face and side. His mouth was wired shut. (Tr., p. 54, lines 1-8) He said after a second surgery, his mouth was wired shut for a month or two. (Tr., p. 55, line 25)

Underwood testified that it was a long time before his pain got better. (Tr., p. 56, lines 7-8) Some of the time it hurt him to breathe, prompting panic attacks because he felt like he was suffocating. (Tr., p. 56, lines 13-15) Underwood reported he had braces on his teeth for several months. (Tr., p. 56, line 25)

Claimant said he was taken off pain medication after he left DeBerry, though he still experienced pain. (Tr., p. 57, lines 4-7) Underwood testified that he still has pain to this day:

> I still have the constant numbness [on the left side of my face], the tingling, the twitching in the eye. My mouth still feels like I am wearing a mouthpiece.

> The sinus cavity is still painful. It gives me headaches, especially in cold weather.
>
> The side, I can still touch the scar on the side and feel pain.
>
> My knee, I've had trouble with it [from being stabbed twice in the knee].
> (Tr., p. 58, line 21- p. 59, line 4)

Claimant testified that he has eighteen scars all over his body. (Tr., p. 59, lines 15-18)

When asked whether he knew what prompted the men to assault him, Claimant said that he did. (Tr., p. 59, lines 19-21) On the Wednesday before the Monday assault, "[t]here was an altercation between members of the brotherhood [Aryan Nation] and three or four guys that I know and associated with." (Tr., p. 60, lines 23-25) Claimant said he went to the aid of an inmate, Mark Peck, and took him back to his cell. (Tr., p. 61, lines 5-6)

Claimant said after he intervened in the fight between members of the Aryan Nation and the other inmates, "I thought there would be some trouble." (Tr., p. 61, lines 19-20) Claimant said the next day he saw Aryan Nation leader James DuVaugh and asked him if they had a problem with anything he had done. DuVaugh told him they didn't have a problem with him. (Tr., p. 61, line 24-p. 62, line 4)

Underwood said he "assumed everything was fine." (Tr., p. 62, line 5) Underwood found out later the men who attacked him were part of this gang, the Brotherhood Forever. (Tr., p. 63, lines 15-16)

Underwood said if he hadn't assumed everything was fine, he could have asked for protective custody. (Tr., p. 62, line 8)

On cross examination, Claimant conceded that when he was attacked by Robert Campbell, Officer Franklin was the only officer in the yard on the 11-12 side. (Tr., p. 64, lines 18-22) He said that while Campbell was stabbing him, there were other inmates on the yard when the attack began, but he couldn't see them. (Tr., p. 65, lines 1-7)

Underwood claimed that while Campbell was stabbing him, he could see Officer Franklin. (Tr., p. 66, lines 6-9) He said he "kept waiting for her to help me." (Tr., p. 67, line 3) He admitted he did not have his eyes on Franklin the entire time. (Tr., p. 67, lines 8-9)

Underwood acknowledged that Campbell's attack on him ceased when Officer Ferrell tackled Campbell. (Tr., p. 67, lines 16-19) He said Ferrell had not been there long when he sat up and Timothy Inman kicked him. (Tr., p. 67, line 23- p. 68, line 5)

Underwood said he was sure that there were no other inmates in the immediate vicinity when he was being assaulted. (Tr., p. 77, line 21- p. 78, line 7)

Underwood conceded that during a pre-trial deposition, he testified as follows:

> He [Ferrell] laid down on me and screamed. He was screaming, and it seemed like he was screaming - screaming in my ear and that - I heard nothing. I heard nothing else going on around. I don't know if I was kicked while he was laying on me - don't know." (Tr., p. 69, lines 13-18)

Underwood also conceded that if no code had been called, he would not have expected to see other officers at the scene. (Tr., p. 70, line 25- p. 71, line 3)

Underwood testified that he had talked to a previous leader of DuVaugh's gang about the fact that DuVaugh owed him money. (Tr., 73, lines 5-9)

Melvin Tirey testified on behalf of the State of Tennessee. He is a unit manager at NWCX, the same job he had in June, 2005. (Tr., p. 79, lines 6-10)

Tirey testified that he responded to the attack on Underwood. When Tirey heard a radio transmission about the attack, he was

"inside the core office in Building 11 and 12." (Tr., p. 79, line 25- p. 80, line 5) He immediately went to the yard where he saw Officer Ferrell on the ground with two inmates. (Tr., p. 80, line 20- p. 81, line 2)

Tirey said as he was running to the area, "another inmate that was standing in the general area took steps toward where they were laying and kicked Underwood right in the face." (Tr., p. 81, lines 11-14) This inmate wasn't standing right next to Underwood, "he was some feet away." (Tr., p. 81, line 21) Tirey estimated he was around twelve feet from Underwood when Underwood was kicked. (Tr., p. 83, line 19- p. 84, line 2)

Tirey said he was the first officer to get there after the inmate kicked Underwood. (Tr., p. 82, lines 7-8)

Tirey stated that if an inmate feels threatened by another inmate, he can request protective custody. (Tr., p. 82, lines 13-15) When an inmate indicates they are afraid, prison officials fill out a form and put the inmate in segregation. Officials then investigate to see if the danger is well-founded. (Tr., p. 82, lines 21-24)

Tirey testified that Underwood never told him he feared being assaulted and never requested that he be placed in protective custody. (Tr., p. 83, lines 1-6)

Tirey testified that he did not remember seeing Officer Franklin in the immediate vicinity of the attack, but acknowledged he was focused on the inmates. (Tr., p. 86, lines 12-19)

Officer Heather Franklin testified on behalf of the State of Tennessee. On June 6, 2005, she was a correctional officer at NWCX, assigned to the 13 and 14 unit yard. (Tr., p. 100, lines 19-24)

Franklin testified that just prior to the assault on Underwood, she was on the yard with Underwood, Bass and Officer Ferrell. There also were other inmates present throughout the yard. (Tr., p. 102, lines 8-15) Franklin stated that just before the assault, she was "securing the gate between 11 and 12 and 13-14." (Tr., p. 103, lines 4-5) "I heard a man yell behind me as I was securing the gate." (Tr., p. 103, lines 11-12)

Franklin said when she turned around, Underwood was already on the ground and Campbell was hitting him. (Tr., p. 103, lines 14-16) She said she immediately grabbed her radio and called, "fight on 11 and 12 yard." (Tr., p. 103, lines 20-21) She said everyone on

yards 11 through 14 would have heard the radio transmission, as well as central control. (Tr., p. 103, lines 24-25)

She said central control would have then "called a fight on all calls so everyone hears." (Tr., p. 104, lines 6-7)

When asked what happened next, Franklin explained: "I took a step forward to go help Mr. Underwood, and then another inmate came up and blocked my path." (Tr., p. 104, lines 12-14) She said the inmate, "stood in front of me with his arms out and wouldn't let me by." (Tr., p. 104, lines 16-17) She didn't know the inmate's name. Franklin said inmate Michael Bass was beside her at that time. (Tr., p. 104, lines 23-25)

Franklin said that she next grabbed her canister of mace and inmate Michael Bass tackled the inmate who was in her way. (Tr., p. 105, lines 3-5) She said by that time, Officer Ferrell had tackled Campbell. (Tr., p. 105, lines 6-8) She said there were still inmates on both yards. (Tr., p. 105, lines 9-14)

Franklin admitted during cross examination that by the time Officer Ferrell came through the gate, the inmate who had stepped in front of her was no longer there and was not interfering with her. (Tr., p. 114, lines 15-23)

Franklin insisted that she moved forward to help Ferrell and Underwood as soon as she could. (Tr., p. 105, lines 20-21) She said that during this time she was telling the other inmates "to get back and go back inside, to clear the yard." (Tr., p. 106, lines 2-3)

Franklin said as she was trying to get the inmates to step back, another inmate came up to Underwood and kicked him in the head. (Tr., p. 106, lines 10-12) Franklin estimated that only seconds elapsed between the time Ferrell tackled Campbell and the time Underwood was kicked. (Tr., p. 106, lines 19-24) She said the inmate who kicked Underwood was approaching him from the other side. (Tr., p. 107, lines 6-7) Franklin said she did not think this inmate was preparing to assault Underwood. (Tr., p. 107, lines 18-22)

She said by the time the second inmate approached Underwood and kicked him, there were several other officers on the scene. (Tr., p. 107, lines 14-17) There also were other inmates still on the yard. (Tr., p. 107, lines 23-25)

Franklin testified that she was trained to do certain things if there was a fight between inmates. She was told to call for help and wait for back-up if she was alone. (Tr., p. 108, lines 8-16) She

explained that when there are more than two inmates, her job is to keep security on the yard. (Tr., p. 108, lines 19-23)

Franklin said that when the inmate kicked Claimant, she "sprayed mace in his direction," (Tr., p. 109, line 20) but "[t]he wind came back and blew it back into my face." (Tr., p. 109, lines 22-23) Franklin estimated that she was six or eight feet away from the inmate when she discharged her mace. (Tr., p. 117, lines 17-19) She acknowledged the use of mace would have been more affective if she had been closer. (Tr., p. 118, lines 10-13)

Franklin said she did not know if a report was prepared about her use of the mace. (Tr., p. 118, lines 18-20)

Franklin testified that she did not know Campbell and the other inmate were going to assault Claimant. (Tr., p. 110, lines 9-13) She also said Mr. Underwood never expressed fear of being assaulted to her. (Tr., p. 110, lines 22-24)

II.

MEDICAL TESTIMONY

Russell Peck, an oral and maxillofacial surgeon, testified by deposition on behalf of Claimant on July 30, 2008. Dr. Peck testified that Mr. Underwood sustained a "Le Forte II fracture of the face, left

orbital fractures and a pneumomediastinum which the facial fracture is a result of an altercation." (Peck Dep., p. 6, lines 14-17) Dr. Peck stated the injuries were consistent with being kicked in the face. (Peck Dep., p. 6, lines 19-21)

Dr. Peck stated that the Le Forte II fracture is a "fracture across the...upper jaw and into the left eye socket." (Peck Dep., p. 7, lines 7-11) Peck stated that Dr. Bennett performed surgery to "restore the normal form and function of the jaw and the tooth—the teeth and occlusion." (Peck Dep., p. 7, lines 21-22) Peck testified that the surgery involved the placement of "titanium fixation plates, to hold the bones in proper position." (Peck Dep., p. 7, lines 23-24)

Peck testified that Claimant's medical records indicate that he was admitted to DeBerry Special Needs Unit on June 6, 2005, and discharged on October 14, 2005. (Peck Dep., p. 8, lines 4-5)

Peck stated that the July 8th consultation notes indicated that he had blurred vision and his left side was malpositioned so the upper and lower jaw were not coming together right. (Peck Dep., p. 8, line 21- p. 9, line 14) Claimant's left infraorbital nerve was damaged. (Peck Dep., p. 10, lines 16-18) Dr. Peck opined that Mr.

Underwood's condition was directly related to his injury. (Peck Dep., p. 10, lines 5-8)

Dr. Peck said Claimant was scheduled for a reconstructive procedure called the "Le Forte osteotomy procedure." (Peck Dep., p. 12, line 22) Peck stated this procedure involves taking the bones and simulating "fractures by making cuts and chisel separations," (Peck Dep., p. 12, lines 23-24) then positioning the bone fragments. Peck explained that

> [T]heir goal here was to free up his entire upper jaw with the teeth involved and wire his teeth together to try to hold them here to let them heal up so they would be touching again evenly. (Peck Dep., p. 13, lines 3-6)

Peck stated that it appears Claimant's jaw was wired shut from September 5th to October 14th. (Peck Dep., p. 14, lines 7-18) Peck testified that the surgeon "both wired his jaw shut and put the rigid fixation plates in." (Peck Dep., p. 15, lines 16-17)

Peck testified that Claimant also had nasal bone deviations, or "[d]isplaced bones at the root of the—of the nose between the eyes." (Peck Dep., p. 16, lines 5-6) Peck noted that this injury, combined with Claimant's septal deviation, can cause congestion and trouble breathing. (Peck Dep., p. 16, line 23- p. 17, line 3)

Peck testified the arch bars, which helped surgeons to position Claimant's teeth, were not removed until November 22, 2005. (Peck Dep., p. 17, lines 19-22)

Peck testified that Claimant's records indicate that by December 20, 2005, he is pain free with a stable occlusion, but that he has a chronic infection in bone plate. (Peck Dep., p. 19, lines 10-14)

Peck testified that when he examined Claimant he found the following long-term results from the assault:

> stable occlusion; severe nasal septal deviation; he has posterior transverse malocclusion, severe occlusion, attrition and chronic sinus tract in the are of Number 13, 14 area probably from the Zygomatic plate. (Peck Dep., p. 21, lines 19-23)

Peck noted that Claimant's jaws probably had been malaligned since he was a teenager. (Peck Dep., p. 22, lines 18-19) Peck could not say whether the nasal septal deviation was related to his injury, but he thought it was likely. (Peck Dep., p. 23, lines 10-12)

Peck opined that the chronic sinus infection is "related to the injury and the subsequent treatment" of it. He said this could be treated by removing the plate where the infection is. (Peck Dep., p. 24, lines 8-11) Peck estimated it would cost around $700.00 to remove the plate. (Peck Dep., p. 25, lines 10-12)

Peck opined that the numbness in Claimant's left cheek and upper jaw are related to the assault and are permanent. (Peck Dep., p. 25, lines 13-22)

III.

LEGAL ANALYSIS

The Claims Commission statute provides that the State's liability is to be predicated upon "traditional tort concepts of duty and the reasonably prudent person's standard of care." § 9-8-307(c), Tenn. Code Ann. (Supp. 2004). Thus, the State's liability standard under § 9-8-307(a)(1)(E), Tenn. Code Ann. (Supp. 2004) is a simple negligence standards.

To prevail on a negligence claim, a Claimant must prove, by a preponderance of the evidence, that the State owed a duty to the Claimant, that the State breached that duty, that the Claimant was injured and that the State's breach was the proximate cause of the injury. *White v. Lawrence,* 975 S.W.2d 525, 529 (Tenn. 1998); *Staples v. CBL & Associates, Inc.,* 15 S.W.3d 83 (Tenn. 2000).

Duty, the first element of the claim, is the legal obligation the State owes to the Claimant to conform to the reasonable person standard of care in order to protect against unreasonable risks of

harm. *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995). The existence and scope of the duty of the State in a particular case rests on all the relevant circumstances, including the forseeability of harm to the claimants. *Pittman v. Upjohn Co.*, 890 S.W.2d 425, 433 (Tenn. 1994).

It is clear that the State of Tennessee owed a duty of reasonable care to Mr. Underwood as his custodian through the Tennessee Department of Corrections. However, under Tennessee law, prison officials are not insurers of prisoners' safety. *Cockrum v. State,* 843 S.W.2d 433, 436 (Tenn. Ct. App. 1992) With regard to prison assaults, the question of liability often turns on the forseeability of harm. Although there are no reported Tennessee cases of which the Commission is aware,[2] the general rule is that prisons have a duty of care to prevent attacks on prisoners by other prisoners. A breach of that duty occurs when institutional authorities had reason to anticipate an attack, but failed to use reasonable care to prevent it. *See Harris v. State,* 61 N.J. 585, 297 A.2d 561, 563 (N.J. 1972).

In the case at bar, it is clear that what happened in June, 2005, was not a fight between Underwood and the other inmates. Instead,

[2] There are a series of unreported cases which look at factors such as whether there had been threats made against the injured inmate which had been reported to prison authorities and whether there was evidence presented that the assailant had a history of assaulting other inmates,

an inmate named Campbell viciously stabbed Mr. Underwood with a shank. While Officer Ferrell had Campbell pinned to the ground, a second inmate, Inman, approached and kicked Underwood in the head. Whether the two aggravated assaults on Underwood were part of a common scheme was not entirely clear, but it is clear that only seconds separated the two attacks. No evidence was presented to indicate that either Campbell or Inman had a history of assault.

Moreover, it is undisputed that Underwood never notified officials concerning the potential that he might be attacked. Underwood, in fact, testified that he was not concerned about an attack after he went to the aid of a fellow inmate being attacked by members of the Aryan Nation on June 1, 2005. He said he subsequently talked with Aryan Nation leader James DuVaugh and DuVaugh apparently told him the Aryan Nation didn't have a problem with him. (Tr., p. 61, line 24- p. 62, line 4) Underwood also testified that he had not asked prison officials to place him in protective custody. (Tr., p. 62, lines 9-18)

Bargery, who investigated the June 1st attack on Claimant's fellow inmate did not find evidence that Claimant had been involved in that June 1st incident. (Tr., p. 123, lines 3-5)

Claimant alleges that if Officer Franklin had intervened, the second attack on him by Inman would not have occurred. Specifically, Claimant alleges that if Franklin had stepped up sooner, she would have been in a position to use her mace effectively against Inman.[3] However, no evidence was introduced to suggest that Campbell's stabbing frenzy put state officials on notice that a second inmate was about to kick him in the head. Tirey, who saw Inman walking toward Underwood, did not think he was about to attack Underwood.

Moreover, it should be noted that it seems clear that Officer Franklin called a code on the radio as soon as the assault began. Officer Franklin herself testified that she did and Unit Manager Tirey testified that he responded to a radio call and that other officers were there when he got up. In addition, testimony established that officers are trained to wait for sufficient back-up to arrive before intervening in an inmate on inmate assault. (Tr., p. 108, lines 11-23) Franklin testified that while Officer Ferrell had Campbell pinned down, she gave verbal commands to inmates on the yard to get back inside and

[3] Claimant alleges that contrary to Franklin's testimony, she did not discharge her mace at all because a report would have been made if she had. Claimant urges the Commission to infer that she did not discharge her mace.

that she was trying to "keep security on the yard." (Tr., p. 108, lines 22-23)

Finally, the testimony established that the response of officers to the initial attack on Underwood was only seconds after it began and that only seconds elapsed between the time Underwood was first assaulted and the subsequent kick by Inman. Even if Officer Franklin never discharged her mace, and even if she could have better handled the melee, the fact is that prison officials responded to the brutal attack immediately and Officer Ferrell probably saved Claimant's life at considerable risk to his own.

IV.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commissioner has thoroughly reviewed the record in this case, including the testimony of the witnesses who appeared at the hearing of this cause, the testimony of Russell Peck, D.D.S., whose deposition was introduced for proof, the arguments of counsel, and, indeed, the entire record as a whole.

After carefully weighing the credibility of each of the witnesses, the Commission **FINDS** that Claimant did not prove by a preponderance of the evidence that prison officials had reason to

anticipate either the first attack on him by inmate Campbell or the second by inmate Inman. The Commission further **FINDS** that Claimant failed to establish by a preponderance of the evidence that the State was negligent in his care, custody and control under § 9-8-307(a)(1)(E) (Supp. 2004), Tenn Code Ann.

Accordingly, judgment is entered for Defendant, State of Tennessee, and this matter is **DISMISSED.**

IT IS SO ORDERED.

NANCY C. MILLER-HERRON,
COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed by first class U.S. mail, postage prepaid, to:

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This the 25 day of February, 2009.

Marsha Richeson

MARSHA RICHESON, CLERK