

**Gulliver v State of New York**

2024 NY Slip Op 34588(U)

November 4, 2024

Court of Claims

Docket Number: Claim No. 135921

Judge: Frank P. Milano

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**ORIGINAL**

**STATE OF NEW YORK**

**COURT OF CLAIMS**

**OMALIE GULLIVER,**

**Claimant,**

**DECISION**

**-v-**

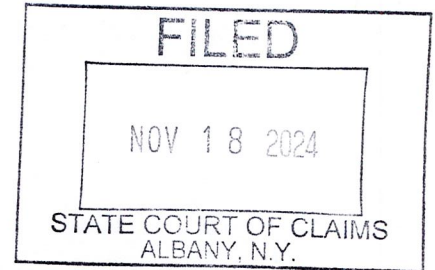
**THE STATE OF NEW YORK,**

**Claim No. 135921**

**Defendant.**

**BEFORE:**

**HON. FRANK P. MILANO**  
**Judge of the Court of Claims**



**APPEARANCES:**

**For Claimant:**  
**RICKNER PLLC**  
**By: Robert Rickner, Esq.**  
**Stephanie Panousieris, Esq.**

**For Defendant:**  
**HON. LETITIA JAMES**  
**New York State Attorney General**  
**By: Michael Krenrich, Esq.**  
**Assistant Attorney General**

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Omalie Gulliver (claimant), while incarcerated at Washington Correctional Facility (Washington), was attacked and slashed with a razor by a fellow incarcerated on June 24, 2020. Claimant had been transferred to Washington nine (9) days earlier from Greene Correctional Facility (Greene), where he had been similarly cut on February 18, 2020.

Claimant's amended claim alleges that the injuries resulted "from the negligence, recklessness, deliberate indifference, and intentional conduct of the State of New York . . . in the

operation, maintenance, supervision, and control of the Washington Correctional Facility, and of the incarcerated individuals housed therein.”

The amended claim then went on to allege:

“The State had notice of the dangers to Claimant from the prior warning, but did nothing to prevent Claimant’s injuries. Claimant had previously attempted to gain protection from the correction officers, as he was aware of the threats, but his complaints were dismissed and he was sent away without help. The State of New York and Washington Correctional Facility were thus on notice, both specifically from the known threats to Claimant, and constructively due to rampant gang violence and other factors, of the specific danger posed, but did nothing to prevent the assault.”

“Having assumed physical custody of inmates, who cannot protect and defend themselves in the same way as those at liberty can, the State owes a duty of care to safeguard inmates, even from attacks by fellow inmates” (Sanchez v State of New York, 99 NY2d 247, 252 [2002]).

“This duty, however, is limited to providing reasonable care to protect inmates from risks of harm that defendant knew or should have known were foreseeable” (Di Donato v State of New York, 25 AD3d 944 [3d Dept 2006]). “The State . . . is not an insurer of inmate safety, and negligence cannot be inferred solely from the happening of an incident” (Colon v State of New York, 209 AD2d 842, 843 [3d Dept 1994]).

In determining if the State provided reasonable care to protect an incarcerated individual from assault the court may consider whether the claimant had previous known encounters with his assailant or had listed his assailant on an “‘enemies list’ with the institution” (Elnandes v State of New York, 11 AD3d 828, 829 [3d Dept 2004]). The court may also consider whether the assailant was “a known dangerous prisoner” (Auger v State of New York, 263 AD2d 929, 930 [3d Dept 1999]; see Wilson v State of New York, 36 AD2d 559 [3d Dept 1971]). Further, the

court may consider whether “claimant was a known assault risk” (Stanley v State of New York, 239 AD2d 700, 701 [3d Dept 1997]).

The State’s potential liability for negligent supervision with respect to an incarcerated-on-incarcerated assault is not limited, however, to situations in which actual notice of a particular claimant’s vulnerability or a particular assailant’s violent propensities can be shown. The State is also charged with the duty of protecting an incarcerated individual from reasonably foreseeable risks of harm based upon “what the State reasonably should have known--for example, from its knowledge of risks to a class of inmates based on the institution’s expertise or prior experience, or from its own policies and practices designed to address such risks” (Sanchez, 99 NY2d at 254 [emphasis in original]).

The fact that a correction officer is not present at the exact time and place of an assault does not rise to an inference of negligence absent a showing that facility officials had notice of a foreseeable dangerous situation (Colon v State of New York, 209 AD2d 842 [3d Dept 1994]; Padgett v State of New York, 163 AD2d 914 (4th Dept 1990), *lv denied* 76 NY2d 711 [1990]).

Trial of the claim was conducted September 16, 2024 and September 17, 2024. Six witnesses testified: Claimant, Correction Officer (CO) Scott O’Neill, claimant’s expert Marc Bullaro, retired Correction Sergeant (Sgt.) Christopher Bascue, Acting Correction Captain Peter Boudrieau and Correction Education Counselor Suzanne Trevellyan.

Claimant was first incarcerated by defendant at Upstate Correctional Facility (Upstate). During his initial processing, when questioned by correctional facility staff about his possible gang affiliation with Folk Nation, a group aligned with the Crips gang, and therefore an enemy of the Bloods gang, claimant denied any gang affiliation.

After three weeks at Upstate, the Department of Correction and Community Supervision (DOCCS) transferred claimant to Greene. Shortly after his arrival at Greene, he was asked by a fellow incarcerated to act in a diversionary manner while another incarcerated was attacked and assaulted. Claimant refused that request.

The next day, after finishing his workout in the recreation yard, claimant was attacked and cut on the side of his face. Claimant testified that he exclaimed, "red hat, red scarf," and soon after, related the same information to a guard as a means of identifying his attacker. Claimant explained that the color red is traditionally associated with the Bloods gang.

After being assaulted at Greene on February 18, 2020, claimant was taken to the infirmary. A Sgt. K [indecipherable] signed a Voluntary Protective Custody Status Consideration Form (Exhibit 1) which included the following narrative: "Inmate Gulliver 19R2300 was cut in the yard by a rival gang member, identified as inmate Royal [redaction]. Inmate Gulliver is an admitted member of Folk Nation Gang. Inmate Royal is a Blood Member."

The Sergeant then went on to write: "Based on my interview and investigation, I substantiated a valid threat."

Exhibit 1 contains claimant's signature, although claimant testified at trial that he signed a blank form and the Sergeant's narratives were added later.

Claimant was thereafter placed in protective custody (PC) for the balance of his time at Greene, four months, at which point in time DOCCS transferred claimant to Washington.

Claimant testified that upon his transfer to Washington, he expressed concerns for his safety during his intake processing and requested that he be placed in PC. Claimant did not identify the correctional facility staff to whom he made known the concerns for his safety.

Claimant, despite his assertions that he requested PC upon arriving at Washington, was housed in G-2 dorm, general population, a dorm with an open floor plan, housing between 45-60 incarcerated individuals. The G-2 dorm is monitored by one correction officer.

Nine days after arriving at Washington, on June 24, 2020, late at night in the G-2 dorm, claimant was again cut, this time on the right side of his face. Claimant identified his assailant by informing correctional facility staff of the assailant's "cube" location, "bed 21." His injuries required approximately forty (40) stitches to address.

The next day, claimant signed another "Voluntary Protective Custody Status Consideration Form" (Exhibit 6). Claimant wrote the narrative (and signed it) which read: "I'm affiliated with another gang, that is not populated in the jail & an inmate that cut me is affiliated with a rival gang, & I don't feel safe for my life in this correctional facility, I fear for my life in this jail."

On Exhibit 6, a Sgt. Becker wrote,

"The inmate has already been cut and I believe if he is left in general population he will be cut again."

Claimant was then placed in PC for a few weeks during the balance of his incarceration at Washington, before being transferred by DOCCS to Wyoming Correctional Facility.

Correction Officer Scott O'Neill testified at trial, as he was the CO on duty in dorm G-2 at Washington on the evening claimant was assaulted and cut on June 24, 2020. He indicated that the G-2 dorm houses approximately 50 residents and that he was the only assigned officer there during his 11:00 p.m. to 7:00 a.m. shift.

Officer O'Neill did not observe the altercation involving claimant, but only discovered claimant's circumstance when claimant approached him to report he had been cut by resident Addison, located in cube #21, and identified Addison as his assailant. Officer O'Neill wrote a misbehavior report on Addison.

Officer O'Neill additionally testified that he had received no training on gang affiliations, nor was he aware of any gang affiliations of the G-2 dorm residents, including claimant. He further indicated that he had not observed any threats to claimant's safety prior to June 24, 2020, nor had claimant expressed any safety concerns to him prior to that date.

Marc Bullaro testified as an expert witness for claimant. He testified generally about gang affiliations in prisons, opining that defendant inadequately considered and/or investigated claimant's purported gang affiliation before it placed claimant in general population housing at Washington. He additionally opined that defendant's failure to have a policy in place to address gang affiliation in prison was a deviation from the standard of care defendant owed to incarcerated individuals.

Next, more specifically, Mr. Bullaro stated that the assault upon claimant at Washington was foreseeable and preventable, that upon claimant's arrival at Washington defendant should have placed claimant in PC because claimant had been slashed at Greene, because claimant had been placed in PC at Greene, and because claimant had informed DOCCS about the identity of his assailant at Greene. Mr. Bullaro also testified that DOCCS's failure to place claimant in PC at Washington fell short of the standard of care defendant owed claimant.

Mr. Bullaro additionally opined that DOCCS should have placed claimant in PC upon his transfer to Washington, even if the claimant had not requested it.

Christopher Bascue, now retired, was employed at Washington as a Correction Sergeant in June 2020, acting as an intake coordinator for newly arriving incarcerated individuals. Mr. Bascue testified that DOCCS internal tracking system, know as the “FPMS” system, had pedigree information about newly arriving incarcerated individuals, such as name, disciplinary history and DIN number, but that the system did not indicate why an individual was being transferred between facilities, nor would it “necessarily” reveal that an incoming individual had been previously assaulted at another facility.

Peter Boudrieau was a sergeant at Washington in June 2020, conducting intake interviews. He testified that the FPMS system would not have “separation orders” for incoming incarcerated, but that a sergeant would have access to unusual incident reports for incoming incarcerated that detailed whether the transferring incarcerated had been assaulted at a previous facility.

Suzanne Trevellyan was an Education Counselor at Washington in June 2020. Exhibits B, C and D reflect that Counselor Trevellyan met and interacted with claimant upon his arrival at Washington and that she interviewed claimant. Counselor Trevellyan testified, and Exhibits B, C and D reflect, that between June 15, 2020 (the date of claimant’s arrival at Washington from Greene) and June 22, 2020, claimant expressed no concerns for his safety while at Washington.

Although claimant testified earnestly and otherwise credibly, the Court found several aspects of his trial testimony questionable.

For example, claimant testified at trial that upon entering DOCCS custody, he was no longer a gang member of Folk Nation, an apparent gang enemy of the Bloods gang. His trial testimony on the issue was contradicted by Exhibit 6, in which claimant wrote on June 25, 2020

(after being assaulted on June 24, 2020 at Washington), “I’m affiliated with another gang that is not populated in this jail & an inmate that cut me is affiliated with a rival gang.”

Also, when claimant testified that he had disavowed his affiliation with Folk Nation, the Court asked claimant when he had disavowed that affiliation. The claimant curiously answered, “I don’t know how to answer that,” a reply that the Court found unsatisfactory.

Upon cross-examination, certain issues were explored that demonstrated claimant’s trial testimony was contradicted by his pre-trial deposition testimony. Those contradictions included whether or not claimant had expressed concerns for his safety during the intake process at Washington prior to being assaulted there on June 24, 2020 and whether or not he had submitted any written requests for PC at Washington prior to being assaulted on June 24, 2020.

Be that as it may, deficiencies in claimant’s trial testimony do not obviate the duty defendant owed claimant, nor do they necessarily render defendant’s conduct and treatment of claimant non-negligent.

To the extent claimant maintains that trial proof established defendant’s culpability by demonstrating that the State of New York’s administrative policy of choosing not to train its correctional officers on gang affiliations and on gang related protocols in prison was negligence that caused claimant’s injuries, the Court of Claims lacks subject matter jurisdiction over the claim:

In City of New York v State of New York (46 AD3d 1168, 1169-1170 [3d Dept 2007], *lv denied* 10 NY3d 705 [2008]), the court explains that:

“Two inquiries must be made to determine if the Court of Claims has subject matter jurisdiction. As that court has ‘no jurisdiction to grant strictly equitable relief’ (Psaty v Duryea, 306 NY 413, 416

[1954]), but may grant incidental equitable relief so long as the primary claim seeks to recover money damages in appropriation, contract or tort cases (see Ozanam Hall of Queens Nursing Home v State of New York, 241 AD2d 670, 671 [1997]), ‘the threshold question is “[w]hether the essential nature of the claim is to recover money, or whether the monetary relief is incidental to the primary claim”’ (Madura v State of New York, 12 AD3d 759, 760 [2004], *lv denied* 4 NY3d 704 [2005], quoting Matter of Gross v Perales, 72 NY2d 231, 236 [1988]). The second inquiry, regardless of how a claimant categorizes a claim, is whether the claim would require review of an administrative agency’s determination--which the Court of Claims has no subject matter jurisdiction to entertain (see Hoffman v State of New York, 42 AD3d 641, 642 [2007]), as review of such determinations are properly brought only in Supreme Court in a CPLR article 78 proceeding (see Matter of Scherbryn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 77 NY2d 753, 757 [1991]).”

Further, the fact that DOCCS does not, as a practice, segregate incarcerated individuals by gang affiliation in prison is not, in and of itself, negligence. How, when and where DOCCS deploys its resources and how it chooses to maximize the safety of incarcerated individuals and staff in correctional facilities is the exclusive prerogative of DOCCS.

It is well-settled that a correctional facility superintendent has discretion to “provide for such measures as he may deem necessary or appropriate for the safety, security and control of correctional facilities” (see Correction Law § 137[2] and § 18[2]; see Matter of Shabazz v Portuondo, 260 AD2d 733 [3d Dept 1999], *lv denied* 94 NY2d 756[1999]). In general, courts should defer to prison authorities in matters of internal prison security (Matter of Blake v Selsky, 10 AD3d 774, 775 [3d Dept 2004]).

Having said that, the Court now turns to the question of whether, under the specific facts of this claim, the attack upon claimant on June 24, 2020 at Washington Correctional Facility was

reasonably foreseeable and further, to what extent, if any, the actions or inactions of defendant were negligent and a proximate cause of claimant's injuries.

The Appellate Division Third Department, in R.S. v State of New York (No. CV-23-0142, 2024 NY Slip Op 05253, [3d Dept Oct. 24, 2024]), recently reminded,

"It is well settled that "[h]aving assumed physical custody of [incarcerated individuals], who cannot protect and defend themselves in the same way as those at liberty can, the State owes a duty of care to safeguard [incarcerated individuals], even from attacks by fellow [incarcerated individuals]. . . . Like other duties in tort, the scope of the State's duty to protect [incarcerated individuals] is limited to risks of harm that are reasonably foreseeable" (Sanchez v State of New York, 99 NY2d 247, 252-253 [2002] [citations omitted]). "Foreseeability is defined . . . in terms of both actual and constructive notice, i.e., anything the State was aware of or should have been aware of" (McDevitt v State of New York, 197 AD3d 852, 854 [4th Dept 2021] [citation omitted]; see Campbell v State of New York, 186 AD3d 1849, 1850 [3d Dept 2020]). "More specifically, constructive notice includes whatever information the State reasonably should have known from its knowledge of the risks to a class of [incarcerated individuals] based on its institutional expertise, its prior experience, and its policies and practices" (McDevitt, 197 AD3d at 854 [citation omitted])."

Initially, the Court is uncertain that claimant expressed concerns about his personal safety to facility officials at Washington after being transported there on June 15, 2020. However, to that point, claimant's subjective beliefs do "not circumscribe defendant's nondelegable duty to protect him" (McDevitt, 197AD3d at 855). Further, as Mr. Bullaro opined, the ultimate responsibility to reasonably protect claimant rested with DOCCS.

As such, in consideration of all of the foregoing, the Court finds, for the following reasons, that Claim No. 135921 has been proven by a preponderance of the credible evidence, that claimant's assault at Washington on June 24, 2020 was reasonably foreseeable, that

defendant's care and custody of claimant at Washington was negligent and that defendant's negligence was a proximate factor that caused claimant to be assaulted and injured on June 24, 2020:

1. Claimant was assaulted and cut at Greene on February 18, 2020;
2. Claimant identified his assailant at Greene, which then marked him to both correctional staff and incarcerated individuals as a "snitch," a circumstance likely exposing claimant to amplified danger;
3. Claimant was placed in PC at Greene after he was cut and remained there for the balance of his time at Greene, a period of four months;
4. After being cut at Greene, Sgt. K concluded that claimant was the subject of a "valid threat;"
5. Upon claimant's transfer to Washington, during the intake process, the FPMS system utilized by DOCCS to monitor the transfer of individuals, did not indicate claimant had been previously housed in PC at Greene, and may, or may not, have indicated that he was the subject of a previous assault at Greene;
6. The Court credits Mr. Bullaro's expert opinion that it was not incumbent upon claimant to request PC at Washington upon his arrival; rather, it was defendant's duty to assess the dangers to claimant and to place claimant in PC if his safety was adjudged to be at risk;
7. Claimant was placed in general population upon his arrival at Washington, in G-2, a dorm with an open floor plan; and,
8. Claimant was cut and assaulted at Washington nine (9) days after his arrival there; and,

9. The Court credits Mr. Bullaro's expert opinions that the attack upon claimant at Washington on June 24, 2020 was reasonably foreseeable and preventable and that DOCC's failure to house claimant in PC at Washington fell short of the duty defendant owed claimant.

The Department of Corrections and Community Supervision is a unified organization, responsible for the oversight and management of its various correctional facilities. The individual correctional facilities are not independently owned and operated businesses, much as franchisees of a fast-food conglomerate might be. They are not silos, being overseen and managed independently of each other, reluctant or unable to share information with each other. In claimant's case, relevant and significant information about claimant was not shared between correctional facilities incarcerating him.

The Court finds that it was reasonably foreseeable to the defendant, based upon all of the information available to it, that claimant was at a high risk of harm of attack by a fellow incarcerated individual if he was not placed in protective custody or otherwise provided reasonable measures to protect him upon his transfer to Washington. Defendant breached its duty to protect claimant from that foreseeable risk.

By reason of all of the foregoing, the Court finds that defendant was negligent in its care and custody of claimant at Washington and that its negligence caused claimant to be assaulted and injured on June 24, 2020. The Court attributes no liability to claimant.

All motions not previously decided are hereby denied.

Let interlocutory judgment be entered accordingly.

A trial on damages will be scheduled by the Court upon consultation with the parties.

Albany, New York  
November 4, 2024



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FRANK P. MILANO  
Judge of the Court of Claims