[Cite as *Salser v. Dept. of Rehab. & Corr.*, 2017-Ohio-8282.]

MATTHEW DAVID SALSER Plaintiff v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION Defendant	Case No. 2016-00785 Judge Patrick M. McGrath Magistrate Gary Peterson ENTRY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

{¶1} On June 5, 2017, defendant filed a motion pursuant to Civ.R. 56(B) for summary judgment. On July 3, 2017, plaintiff filed a memorandum in opposition.

{¶2} Civ.R. 56(C) states, in part, as follows:

{¶3} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." *See also Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977).

{¶4} According to the complaint, plaintiff is an inmate in the custody and control of defendant at the Warren Correctional Institution (WCI). The complaint provides that in October 2015, plaintiff was assigned to work in the prison chow hall where the food service operation is performed by Aramark, a private company. The complaint goes on

to provide that the chow hall has tile floors and that water from cleaning and cooking regularly covers the floors. As a consequence of the water on the floor, a "detail crew" conducts spot-mopping for safety and there are numerous "wet floor" signs in the area. Plaintiff alleges in the complaint that Aramark employees are provided with non-slip shoes for their safety whereas requests from inmates to be accommodated with similar shoes have been denied. Plaintiff states that the "state shoes" that defendant does provide have little or no grip and are extremely slippery on the chow hall floor.

{¶5} Plaintiff alleges that on October 8, 2016, while working his shift, he encountered a wet floor that was not marked with signs or a mop bucket, and as a result, slipped and fell. Plaintiff was wearing his own personal boots at the time. Plaintiff suffered an "A.C. tear in his right shoulder." Plaintiff brings this action for negligence.

{¶6} Defendant moves for summary judgment, arguing that it was not negligent and that its actions did not proximately cause plaintiff's alleged injury. In support, defendant submitted affidavits from Corrections Officer Cody Barrett, Warden Chae Harris, Corrections Officer Mark Sims, and Business Administrator Dawn Vencill. All of the individuals are employed by defendant at WCI.

{¶7} Barrett avers that on October 8, 2016, he was doing security rounds in the food service area when he was called to the dish room "car wash" area where plaintiff was lying on the floor. Barrett states that plaintiff alleged that he had slipped and fallen. Barrett contacted medical to check on plaintiff. Barrett asserts that on the date of the accident, plaintiff was assigned to work in food service as a cook, plaintiff did not need to be in the dish room, and plaintiff was therefore out of place.

{¶8} According to Barrett, "[t]here was, and always is, a wet floor sign displayed in the area where [plaintiff] fell because the floor is often wet. This is the area where inmates wash dishes so it is inherently wet. Given that there are dishes being cleaned in the dish room, the floor is wetter in the dish room than it is in the area where the

cooks cook." Affidavit ¶ 4. As a result, there are 5-7 inmates working in food service whose sole responsibility it is to mop the floors and keep them in the best possible condition while the inmates are working. Barrett further provides that the dish room floor is "a rough, concrete—as opposed to a smooth tile—which helps the inmate keep traction with the floor." *Id.* at ¶ 5.

{¶9} Finally, Barrett avers that "[b]efore this incident, no inmate working in food service had ever said anything to me about a concern that their shoes were inadequate at preventing slipping. I have never seen or heard of another inmate slipping and falling because of slippery floors in food service." *Id.* at ¶ 8.

{¶10} Warden Harris avers that he has never received any communication from plaintiff or other inmates regarding the adequacy of footwear while working in food service at WCI. Regarding the flooring, Warden Harris provides that the flooring in the area of the dish tank is an epoxy, non-slip floor that helps inmates keep traction between their shoes and the floor. Additionally, wet floor signs are placed around food service to remind inmates to be careful, and galosh style boots are available for inmates to wear while working. Warden Harris adds that several inmates work in food service to clean up water on the floor. Finally, Warden Harris avers that there is no reoccurring problem at WCI of inmates slipping and falling while working in food service and that WCI does not provide footwear or control the type of footwear that Aramark employees wear.

{¶11} Sims avers that calf-high rubber boots are available for inmates to wear while working in food service and have been available for the entire five years that he has worked in food service at WCI.

{¶12} Vencill avers that she does not have any record of plaintiff requesting non-slip shoes prior to March 22, 2017. Vencill provides that such shoes are available and that she received a kite from plaintiff on March 22, 2017 requesting such shoes. Vencill

asserts that the shoes are indicated as slip resistant. Vencill adds that inmates are able to order shoes from outside vendors or have someone else order shoes for them.

{¶13} Plaintiff responded to defendant's motion by filing a memorandum in opposition and an unnotarized "declaration." In federal proceedings, 28 U.S.C. 1746 authorizes declarations under penalty of perjury that are not sworn before a notary, but "Ohio has never recognized that these unsworn declarations may serve as a substitute for a valid affidavit." *Disciplinary Counsel v. Squire*, 130 Ohio St.3d 368, 2011-Ohio-5578, ¶ 45, fn. 3. Accordingly, the court will not consider plaintiff's unsworn declaration.

{¶14} "To recover on a negligence claim, a plaintiff must prove by a preponderance of the evidence (1) that a defendant owed the plaintiff a duty, (2) that a defendant breached that duty, and (3) that the breach of the duty proximately caused a plaintiff's injury." *Ford v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 05AP-357, 2006-Ohio-2531, ¶ 10.

{¶15} "Typically under Ohio law, premises liability is dependent upon the injured person's status as an invitee, licensee, or a trespasser. * * * However, with respect to custodial relationships between the state and its inmates, the state has a duty to exercise reasonable care to prevent prisoners in its custody from being injured by dangerous conditions about which the state knows or should know." *Cordell v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 08AP-749, 2009-Ohio-1555, ¶ 6; *see also Moore v. Ohio Dept. of Rehab. & Corr.*, 89 Ohio App.3d 107, 112 (10th Dist.1993). "The state's duty of reasonable care does not render it an insurer of inmate safety." *Allen v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 14AP-619, 2015-Ohio-383, ¶ 17.

{¶16} "Notice may be actual or constructive, the distinction being the manner in which the notice is obtained rather than the amount of information obtained." *Watson v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 11AP-606, 2012-Ohio-1017, ¶ 9. "Actual notice is notice obtained by actual communication to a party." *Powers v. Ohio*

Dept. of Rehab. & Corr., 10th Dist. Franklin No. 03AP-504, 2003-Ohio-6566, ¶ 10. "Constructive notice is that notice which the law regards as sufficient to give notice and is regarded as a substitute for actual notice." *Hughes v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 09AP-1052, 2010-Ohio-4736, ¶ 14. "To support an inference of constructive notice, a plaintiff may submit evidence that the condition existed for such a length of time that the owner or its agent's failure to warn against it or remove it resulted from their failure to exercise ordinary care." *Jenkins v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 12AP-787, 2013-Ohio-5106, ¶ 12, citing *Presley v. Norwood*, 36 Ohio St.2d 29, 31-32 (1973); *see also Hill v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 12AP-265, 2012-Ohio-5304, ¶ 13.

{¶17} As stated above, while plaintiff did file a response to defendant's motion, he did not provide the court with an affidavit or other evidence of the type listed in Civ.R. 56(C) to support his allegations. Civ.R. 56(E) states, in part, that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party."

{¶18} Upon review of the uncontested affidavits put forth by defendant, the court must conclude that defendant did not breach any duty owed to plaintiff. While defendant is aware that the floor in the dish room where plaintiff fell is often wet, there is no dispute that defendant takes measures to prevent injury. The only evidence before the court is that the floor is composed of a rough surface to help inmates maintain traction between their shoes and the floor. There are signs in the dish room reminding inmates that the floor is often wet and there was such a sign in the area where plaintiff fell. *Powers* at ¶ 12 ("warning signs are usually sufficient to satisfy the duty of

reasonable care"). Furthermore, defendant assigns 5-7 inmates to mop up any spills or standing water. Additionally, inmates are able to use galosh style boots if desired. Moreover, it is uncontested that plaintiff was out of place when he fell and therefore could have avoided the area.

{¶19} There is no evidence that defendant had any notice that the shoes that plaintiff used may not have provided plaintiff with adequate traction. The uncontested evidence establishes that plaintiff did not request non-slip shoes until after he fell. Furthermore, both Corrections Officer Barrett and Warden Harris testified in their affidavits that they were not aware of any reoccurring problem with inmates slipping while working in food service. Additionally, Barrett and Warden Harris added that neither had been told of any concern regarding inadequate footwear for inmates working in food service. Finally, to the extent that plaintiff seeks a declaration that his rights were violated, this theory is clearly predicated upon his theory of negligence and consequently must fail.

{¶20} Based upon the foregoing, it can only be concluded that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law on plaintiff's claim. Accordingly, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. All previously scheduled events are hereby VACATED. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge

cc:

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