[Cite as *Gumins v. Ohio Dept. of Rehab. & Corr.*, 2011-Ohio-3314.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

David Gumins,	:	
Plaintiff-Appellant,	:	
		No. 10AP-941
v.	:	(C.C. No. 2006-06132)
Ohio Department of Rehabilitation & Correction,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 30, 2011

Swope and Swope, and *Richard F. Swope*, for appellant.

Michael DeWine, Attorney General, *Daniel R. Forsythe* and *Douglas R. Folkert*, for appellee.

APPEAL from the Court of Claims of Ohio.

DORRIAN, J.

{¶1} Plaintiff-appellant, David Gumins ("appellant"), appeals from a decision of the Court of Claims of Ohio overruling his objections and adopting a magistrate's decision in favor of defendant-appellee, Ohio Department of Rehabilitation and Correction ("appellee"), on appellant's negligence claim. For the reasons that follow, we affirm.

{¶2} At the time of the incident forming the basis of appellant's claim, appellant was an inmate in the custody of appellee at Grafton Correctional Institution ("GCI"). Appellant initially worked as a dishwasher in the kitchen at GCI and later took a job

cleaning ovens in the kitchen. On the day of the incident, appellant was directed to clean large oven racks, which had to be placed on the floor to be cleaned. Appellant had previously cleaned small oven racks, placing them in a sink for cleaning, but this was the first time he cleaned the large oven racks. One of appellee's employees provided appellant with gloves and several cups of a cleaning chemical in a bucket. Appellant spent several hours on his hands and knees scrubbing the oven racks and returned for refills of cleaner multiple times. After working for some time, appellant's knees began to hurt; he lifted his pants and saw that his legs were red and burned. Appellant then requested to go to the infirmary, and he was later transported to a nearby emergency room for treatment. Appellant filed suit in the Court of Claims, asserting a claim of negligence against appellee. The issues of liability and damages were bifurcated, and the issue of liability was tried before a magistrate on February 5, 2008.

{¶3} At trial, appellant testified that he received no formal training for the oven-cleaning job and was simply given some paperwork to sign. Appellant signed forms indicating that he understood the rules for inmates working in the kitchen and that he received training in housekeeping and proper use of chemicals. Other inmates who had worked in the kitchen at GCI also testified that they received no training in the use of chemicals but were told to sign various forms. Three of appellee's employees testified that inmates are given training orientations before beginning work in the kitchen, although they were unable to testify as to whether appellant actually attended a training session. Appellant testified that when he had previously cleaned small oven racks in the sink, he went through multiple pairs of gloves because they dissolved and tore as he was cleaning. Appellant also testified that his hands were left red and raw after these cleaning

jobs. He testified that he asked for better gloves, but his requests were refused and he eventually stopped asking for them. When he was assigned to clean the large oven racks, appellant did not request an apron or goggles.

{¶4} After appellant reported the incident, the institutional inspector for GCI conducted an investigation. She found that appellant had been provided with "chemical resistant gloves," but no other safety equipment. The inspector concluded that the staff who issued chemicals needed additional training.

{¶5} Based on the evidence and testimony presented at the hearing, the magistrate concluded that appellee was negligent in failing to properly train appellant in the use of caustic chemicals generally and in the use of the specific chemical cleaner used in this incident. The magistrate also found that, based on appellant's prior experience cleaning small oven racks, he should have known that the cleaning chemical was potentially harmful and found that appellant was negligent for not seeking further instruction on how to use the cleaner or requesting protective equipment to ensure his own safety. The magistrate found that appellant's negligence outweighed appellee's negligence and recommended judgment in favor of appellee.

{¶6} Appellant filed objections to the magistrate's decision and filed a "statement of proceedings," pursuant to App.R. 9(C), in support of these objections.[1] Appellant also filed an affidavit of indigency, attesting to the fact that he had no funds to pay for a

[1] App.R. 9(C) provides that "[i]f no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection." The statement is provided to the court and used to settle the record, along with any objections or proposed amendments from the appellee. App.R. 9(C).

transcript of the hearing. Appellee filed objections to appellant's statement of proceedings and filed its own proposed statement of proceedings under App.R. 9(C).

{¶7} The trial court overruled appellant's objections to the magistrate's decision, citing the requirement under Civ.R. 53(D)(3)(b)(iii) that such objections must be supported by a transcript of the evidence or an affidavit of the evidence. The court noted that an affidavit of the evidence could only be used where a transcript was unavailable and held that, where a transcript can be produced, it is available for purposes of the rule and must be submitted in support of the objections. Because appellant's objections were unsupported by a transcript, the trial court overruled them and adopted the magistrate's findings of fact and conclusions of law as its own. Appellant appealed the trial court's ruling. This court held that "a transcript is unavailable under Civ.R. 53 if the litigant is indigent and cannot afford to procure the transcript." *Gumins v. Ohio Dept. of Rehab. & Corr.* (July 20, 2010), 10th Dist. No. 09AP-1063 (Memorandum Decision), ¶10, citing *Gill v. Grafton Corr. Inst.*, 10th Dist. No. 09AP-1019, 2010-Ohio-2977. We concluded that, because appellant filed an uncontested affidavit of indigency, the trial court erred in finding that the transcript was available. This court remanded for further proceedings consistent with its decision.

{¶8} On remand, the trial court held that appellant's proffered statement under App.R. 9(C) did not constitute an affidavit of the evidence as required under Civ.R. 53(D)(3)(b)(iii). Because the appellant's objections were unsupported by a transcript or affidavit, the trial court overruled the objections. The trial court adopted the magistrate's findings of fact and conclusions of law as its own and rendered judgment for appellee.

{¶9} Appellant appeals from the trial court's order adopting the magistrate's decision granting judgment in favor of appellee, setting forth three assignments of error:

> ASSIGNMENT OF ERROR NO. 1
> THE TRIAL COURT ERRED IN FAILING TO SETTLE THE RECORD UTILIZING BOTH PARTIES' STATEMENTS AND THE MAGISTRATE'S FINDINGS.
>
> ASSIGNMENT OF ERROR NO. 2
> UTILIZING THE MAGISTRATE'S FACTS THE COURT COULD FIND THE RULING CONTRARY TO LAW.
>
> ASSIGNMENT OF ERROR NO. 3
> THE TRIAL COURT'S AND MAGISTRATE'S DECISIONS ARE NOT IN ACCORD WITH LAW AND AGAINST THE WEIGHT OF THE EVIDENCE AND NOT SUPPORTED BY THE EVIDENCE.

{¶10} In his first assignment of error, appellant asserts that the trial court erred in failing to settle the record utilizing the proffered statements provided by both parties. This court's prior decision remanded the case so that the trial court could "determine whether to use affidavits under Civ.R. 53(D)(3)(b)(iii) or utilize the statements the parties proffered." *Gumins* at ¶11. On remand, the trial court held that Civ.R. 53 requires the use of an affidavit to support objections to a magistrate's decision when a transcript is unavailable. The trial court concluded that appellant's proffered statement was not an affidavit and, therefore, ruled that appellant failed to properly support his factual objections to the magistrate's decision.

{¶11} The trial court's decision involved an interpretation of the requirements of Civ.R. 53, which is a question of law. See *Wedemeyer v. USS F.D.R. (CV-42) Reunion Assn.*, 3d Dist. No. 1-09-57, 2010-Ohio-1502, ¶9 ("The interpretation of a civil rule * * * presents a question of law, which we review de novo."); *State v. South*, 162 Ohio App.3d

123, 2005-Ohio-2152, ¶9 (reviewing application of a rule of criminal procedure under de novo standard); *State v. Miller*, 7th Dist. No. 98-JE-51, 2001-Ohio-3397 (reviewing issue of retroactive effect of change in rules of criminal procedure under de novo standard). We review questions of law de novo. *Pep Boys-Manny, Moe & Jack of Delaware, Inc. v. Vaughn*, 10th Dist. No. 04AP-1221, 2006-Ohio-698, ¶39.

{¶12} Civ.R. 53(D)(3)(b)(iii) provides that objections to a magistrate's factual finding "shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available." Although a transcript of appellant's hearing exists, it is unavailable for purposes of the rule because appellant is indigent and cannot afford to procure it. *Gumins* at ¶10, citing *Gill*. Therefore, the plain language of the rule requires that appellant's objections be supported by an affidavit of evidence. An affidavit is a sworn statement, made under penalty of perjury. *State v. Clark* (Mar. 13, 2001), 10th Dist. No. 00AP-577. See also R.C. 2319.02 ("An affidavit is a written declaration under oath, made without notice to the adverse party."). "An affidavit must appear, on its face, to have been taken before the proper officer and in compliance with all legal requisites." *In re Disqualification of Pokorny* (1992), 74 Ohio St.3d 1238. Appellant's proffered statement under App.R. 9(C) fails to meet these requirements. It is not a sworn statement, and there is no indication that it was made before an officer authorized to witness such statements.[2] Appellant and his counsel are clearly familiar with the requirements for affidavits because they filed several other properly sworn and witnessed affidavits in this case. However, appellant chose not

[2] We note that the trial court's first judgment entry refers to a "sworn 'statement of proceedings' " filed in support of appellant's objections. A review of the docket, however, indicates that the proffered App.R. 9(C) statement was not a sworn statement.

to submit a sworn statement in support of his objections to the magistrate's findings. The trial court properly concluded that appellant's statement is not an affidavit. See *Gill* at ¶23 (Sadler, J., dissenting); *Frees v. ITT Technical School*, 2d Dist. No. 23777, 2010-Ohio-5281, ¶17.

{¶13} Moreover, even if appellant's proffered statement satisfied the legal prerequisites to constitute an affidavit, it would be insufficient under Civ.R. 53(D)(3)(b)(iii). An affidavit under that rule must contain a description of all the relevant evidence, not just the evidence deemed relevant by the party objecting to the magistrate's findings. *Gill* at ¶23 (Sadler, J., dissenting), quoting *Levine v. Brown*, 8th Dist. No. 92862, 2009-Ohio-5012, ¶18 (internal citations omitted). A comparison of the statement proffered by appellant with appellee's proposed statement of the evidence and the magistrate's factual findings indicates that appellant's statement omits certain evidence. For example, appellant's statement does not include appellant's testimony that, after using a degreaser to clean small racks on prior occasions, his hands were left raw. Due to omission of certain evidence, appellant's proffered statement fails to meet the requirements of the civil rules and would properly be rejected as a basis of support for appellant's objections.

{¶14} Appellant cites to the portion of Civ.R. 53(D)(3)(b)(iii) permitting the use of "alternative technology or manner of reviewing the relevant evidence," and argues that his proffered statement is an alternative manner of reviewing the evidence. We note there are few decisions applying this provision. However, even assuming appellant's proffered statement would constitute an alternative manner of reviewing the evidence under the rule, an objecting party must seek leave of court to utilize such an alternative method. Civ.R. 53(D)(3)(b)(iii). Here, appellant did not seek leave of court before filing his

statement. We reject appellant's contention that the trial court tacitly granted leave by not objecting to appellant's submission of the statement. Because appellant did not seek and receive leave of court to use an alternative method of presenting the evidence for the trial court's review, his proffered statement cannot be considered under that provision of the rule. *Gill* at ¶26 (Sadler, J., dissenting).

{¶15} Appellant argues that another appellate court has recognized a statement under App.R. 9(C) as the "functional equivalent" of a Civ.R. 53(D) affidavit, citing *Zartman v. Swad*, 5th Dist. No. 02CA86, 2003-Ohio-4140. In that case, there was a recording malfunction, and only a portion of the transcript of the hearing before the magistrate was available. Id. at ¶2. Because of the gap in the transcript, the trial court ordered the parties to prepare a statement of facts pursuant to App.R. 9(C). Id. Although the appellate court referred to the unsworn statement as the "functional equivalent" of an affidavit under Civ.R. 53, the court also stated that it "would find [that] appellant was required to attach an affidavit of evidence" in support of his objections, but noted that the unsworn statement was prepared at the direction of the trial court. Id. at ¶70. In the present case, the trial court did not order the preparation of an unsworn statement, and appellant had an opportunity to submit an affidavit in compliance with the requirements of the civil rules. Thus, the reasoning in *Zartman* does not apply to this case.

{¶16} Finally, appellant argues that the affidavit process under Civ.R. 53(D) is "totally unfair, inadequate and an unconstitutional method of establishing a record." (Appellant's brief at 9.) Procedural rules are to be "construed and applied to effect just results." Civ.R. 1(B). However, "the Civil Rules are not just a technicality, and we may not ignore the plain language of a rule in order to assist a party who has failed to comply

with a rule's specific requirements." *LaNeve v. Atlas Recycling, Inc.*, 119 Ohio St.3d 324, 2008-Ohio-3921, ¶23. The plain language of Civ.R. 53(D) requires filing an affidavit to support objections to a magistrate's decision where the transcript is unavailable or seeking leave of court for an alternative method of reviewing the evidence. Appellant's proffered statement does not meet the legal prerequisites to constitute an affidavit, and it does not describe all of the evidence presented to the magistrate. Appellant did not request leave of court to support his objections with an unsworn summary of the evidence. The trial court properly concluded that appellant failed to support his objections to the magistrate's decision in accordance with the requirements of Civ.R. 53(D).

{¶17} Accordingly, the first assignment of error is without merit and is overruled.

{¶18} In his second and third assignments of error, appellant challenges the trial court's decision as contrary to law and against the weight of the evidence. As explained above, appellant failed to support his objections to the magistrate's decision with a transcript of the evidence or an affidavit of the evidence as required by Civ.R. 53(D)(3)(b)(iii). "The Ohio Supreme Court has held that, '[w]hen a party objecting to a [magistrate's decision] has failed to provide the trial court with the evidence and documents by which the court could make a finding independent of the [decision], appellate review of the court's findings is limited to whether the trial court abused its discretion in adopting the [magistrate's decision].' " (Bracketed language sic.) *Moore v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 05AP-53, 2005-Ohio-3939, ¶12, quoting *State ex rel. Duncan v. Chippewa Twp. Trustees*, 73 Ohio St.3d 728, 730, 1995-Ohio-272. "Thus, our review of appellant's assignments of error is limited to whether the trial court abused its discretion in applying the law to the magistrate's findings of fact." Id.,

citing *H.L.S. Bonding Co. v. Fox*, 10th Dist. No. 03AP-150, 2004-Ohio-547. Abuse of discretion implies that the court's attitude is " 'unreasonable, arbitrary or unconscionable.' " *State v. Filiaggi*, 86 Ohio St.3d 230, 241, 1999-Ohio-99, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157. In this case, because the trial court adopted the magistrate's conclusions of law as its own, we must determine whether the magistrate committed an abuse of discretion in applying the law to reach those conclusions.

{¶19} "[I]t is well-established that an inmate who is injured while working in a prison shop or industry may assert a cause of action for negligence." *McElfresh v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 04AP-177, 2004-Ohio-5545, ¶15. To prevail on a negligence claim, the plaintiff must establish that: (1) defendant owed him a duty; (2) defendant breached that duty; and (3) the breach proximately caused his injuries. Id., citing *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565, 1998-Ohio-184.

{¶20} "In the context of a custodial relationship between the state and its inmates, the state owes a common-law duty of reasonable care and protection from unreasonable risks of physical harm." *McElfresh* at ¶16, citing *Woods v. Ohio Dept. of Rehab. & Corr.* (1998), 130 Ohio App.3d 742, 744-45. Reasonable care is the "degree of caution and foresight an ordinarily prudent person would employ in similar circumstances." Id. "Where an inmate also performs labor for the state, the state's duty must be defined in the context of those additional factors which characterize the particular work performed." Id., citing *McCoy v. Engle* (1987), 42 Ohio App.3d 204, 208. However, the state is not an insurer of inmate safety, and the special relationship between the state and its inmates does not expand the ordinary duty of reasonable care. Id. The inmate also bears a

responsibility "to use reasonable care to ensure his own safety." *Macklin v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 01AP-293, 2002-Ohio-5069, ¶21.

{¶21} Appellant testified that he received no formal training prior to beginning his oven-cleaning duties. Other current and former inmates similarly testified that, although they were given a brief orientation and instructed to sign certain forms, they received no training on the use of hazardous chemicals and relied on "on the job" training from other inmates. The magistrate noted that appellant signed a list of rules for inmates working in food service and an acknowledgment that he had completed food service training. The GCI food service manager who conducted the orientation that appellant allegedly attended could not recall whether appellant actually attended the training. The magistrate also noted that the institutional inspector for GCI conducted an investigation following the incident and concluded that the staff responsible for issuing chemicals needed additional training. Based on this evidence, the magistrate found that the training appellant received was inadequate—specifically because appellant was not properly trained in the use of caustic chemicals and the chemical used for cleaning the oven racks. Thus, appellee breached the duty of reasonable care owed to appellant.

{¶22} Further, the magistrate noted that appellant testified that, although this was the first time he had cleaned large oven racks that needed to be placed on the floor, he had previously cleaned small oven racks that could be cleaned in a sink. Appellant testified that he had been supplied vinyl gloves for those cleaning tasks and that the gloves would dissolve and rip when he was cleaning the small oven racks. Appellant testified that his hands were left raw, red, and sore after those cleaning jobs. From this evidence, the magistrate concluded that appellant had reason to know that the cleaning

chemical was caustic and that appellant failed to take precautions to ensure his safety when cleaning the large racks on the floor, such as requesting further instruction in the use of the chemical or additional safety equipment. The magistrate found that appellant had been negligent in failing to use reasonable care to ensure his own safety.

{¶23} "Whenever a plaintiff's own negligence may have contributed to an injury, the doctrine of comparative negligence will serve to reduce the defendant's liability for plaintiff's injuries. Ohio is a 'partial comparative negligence' jurisdiction, meaning that a defendant will not be liable to a plaintiff whose fault was 50 percent or more." *Ballinger v. Leaniz Roofing, Ltd.*, 10th Dist. No. 07AP-696, 2008-Ohio-1421, ¶20. In this case, the trial court adopted the magistrate's conclusion that appellant's negligence outweighed any negligence on the part of appellee and that, therefore, appellee was entitled to a judgment in its favor. Because appellant failed to properly support his objections to the magistrate's decision, we are limited to determining whether the magistrate abused his discretion in applying the law to the facts. In light of the factual findings in the magistrate's decision, concluding that appellant's negligence in disregarding the effect on his hands after prior cleaning jobs and failing to request additional protective gear outweighed appellee's negligence in failing to properly train appellant in the use of the chemicals was not "unreasonable, arbitrary or unconscionable." Although we note that the magistrate did not make a finding of the exact percentage of negligence of appellant and appellee, appellant was not prejudiced because, regardless of the exact percentages, the court clearly determined that appellant could not recover because he was more negligent than appellee. See *Knight v. Dept. of Rehab. & Corr.* (Mar. 30, 1999), 10th Dist. No. 98AP-734.

{¶24} Finally, we note that, in appellant's reply brief, he cites regulations from the federal Occupational Safety and Health Administration and the Ohio Uniform Food Safety Code, arguing that appellee failed to follow all lawful and reasonable regulations. We reject this argument for two reasons. First, the argument fails because appellant raised it for the first time in a reply brief. "Generally, appellate courts will not address arguments raised for the first time in a reply brief." *State v. Moore*, 10th Dist. No. 07AP-914, 2008-Ohio-4546, ¶20, citing *Stonehenge Condominium Assoc. v. Davis*, 10th Dist. No. 04AP-1103, 2005-Ohio-4637, ¶19. See also *Elyria v. Lorain Cty. Budget Comm.*, 128 Ohio St.3d 485, 2011-Ohio-1482, ¶24; *State ex rel. Grounds v. Hocking Cty. Bd. of Elections*, 117 Ohio St.3d 116, 2008-Ohio-566, ¶24. Second, even if the argument was properly before the court, "it is well-established that ordinary prison labor performed by an inmate in a state correctional institution facility is not predicated upon an employer-employee relationship and thus does not fall within the scope of worker-protection statutes." *McElfresh* at ¶14.

{¶25} Accordingly, the second and third assignments of error are without merit and are overruled.

{¶26} For the foregoing reasons, we overrule all three of appellant's assignments of error. The judgment of the Court of Claims of Ohio is hereby affirmed.

Judgment affirmed.

BROWN and SADLER, JJ., concur.

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