[Cite as *Peters v. Ohio Dept. of Rehab. & Corr.*, 2015-Ohio-2668.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

John E. Peters, Jr.,	:	
Plaintiff-Appellant,	:	
		No. 14AP-1048
v.	:	(Ct. of Cl. No. 2014-00094)
Department of Rehabilitation and Correction,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 30, 2015

Swope and Swope - Attorneys at Law, and *Richard F. Swope*, for appellant.

Michael DeWine, Attorney General, and *Amber Wootton Hertlein*, for appellee.

APPEAL from the Court of Claims of Ohio

BRUNNER, J.

{¶ 1} In his pro se complaint, plaintiff-appellant, John E. Peters, Jr., pleaded "defamation per se and harassment on the part of Defendant's agent, Officer Olah of the Grafton Reintegration Center, in contravention of Defendant's Policy 64-DCM-01 which forbids harassment." According to appellant, Officer Olah told other inmates that plaintiff is a "dick (penis) sucker." Appellant alleges that as a result of these defamatory statements, he "has suffered great pain of mind and body and extreme emotional distress."

{¶ 2} Defendant-appellee, Ohio Department of Rehabilitation and Correction, filed an answer and thereafter moved for judgment on the pleadings. The Court of Claims of Ohio granted judgment on the pleadings.

I. ASSIGNMENT OF ERROR

{¶ 3} Appellant appeals and brings the following assignment of error for our review:

> THE TRIAL COURT ERRED IN SUSTAINING THE DEFENDANT-APPELLEE'S MOTION FOR JUDGMENT ON THE PLEADINGS AND DENYING PLAINTIFF-APPELLANT THE RIGHT TO FILE AN AMENDED COMPLAINT.

II. DISCUSSION

A. Standard of Review

> A party may file a motion for judgment on the pleadings under Civ.R. 12(C), "[a]fter the pleadings are closed but within such time as not to delay the trial." *Franks v. Ohio Dept. of Rehab. & Corr.*, 195 Ohio App.3d 114, 2011-Ohio-2048, ¶ 5. In ruling on a motion for judgment on the pleadings, the court is permitted to consider both the complaint and answer. *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 570 (1996). When presented with such a motion, a trial court must construe all the material allegations of the complaint as true, and must draw all reasonable inferences in favor of the nonmoving party. *Id.*, citing *Peterson v. Teodosio*, 34 Ohio St.2d 161, 165 (1973); *Whaley v. Franklin Cty. Bd. of Commrs.*, 92 Ohio St.3d 574, 581 (2001). The court will grant the motion if it finds, beyond doubt, that the plaintiff can prove no set of facts in support of the claim(s) that would entitle him or her to relief. *Pontious* at 570. A judgment on the pleadings dismissing an action is subject to a de novo standard of review in the court of appeals. *RotoSolutions, Inc. v. Crane Plastics Siding, L.L.C.*, 10th Dist. No. 13AP-1, 2013-Ohio-4343, ¶ 13, citing *Franks* at ¶ 5.

Toledo City School Dist. Bd. of Edn. v. State Bd. of Edn., 10th Dist. No. 14AP-93, 2014-Ohio-3741, ¶ 18, *appeal allowed in part*, 142 Ohio St.3d 1447, 2015-Ohio-1591.

B. Allegations of Defamation

{¶ 4} We set forth the applicable law of defamation at length in *Woods v. Capital Univ.*, 10th Dist. No. 09AP-166, 2009-Ohio-5672, ¶ 27-28, including the four actionable classes of defamation per se:

> Defamation, which includes both slander and libel, is the publication of a false statement " 'made with some degree of fault, reflecting injuriously on a person's reputation, or exposing a person to public hatred, contempt, ridicule, shame or disgrace, or affecting a person adversely in his or her trade, business or profession.' " *Jackson v. Columbus*, 117 Ohio St.3d 328, 2008-Ohio-1041, ¶ 9 (quoting *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 7, 1995-Ohio-66). "Slander" refers to spoken defamatory words, while "libel" refers to written or printed defamatory words. *Matikas v. Univ. of Dayton*, 152 Ohio App.3d 514, 2003-Ohio-1852, ¶ 27.
>
> Under Ohio common law, actionable defamation falls into one of two categories: defamation per se or defamation per quod. In order to be actionable per se, the alleged defamatory statement must fit within one of four classes: (1) the words import a charge of an indictable offense involving moral turpitude or infamous punishment; (2) the words impute some offensive or contagious disease calculated to deprive a person of society; (3) the words tend to injure a person in his trade or occupation; and (4) in cases of libel only, the words tend to subject a person to public hatred, ridicule, or contempt. *Schoedler v. Motometer Gauge & Equip. Corp.* (1938), 134 Ohio St. 78, 84 (setting forth the three classes that constitute slander per se); *Bigelow v. Brumley* (1941), 138 Ohio St. 574, 592 (recognizing the last class and holding that "such words are actionable per se if written, though not if spoken orally").

{¶ 5} Insofar as appellant claimed defamation per se, we agree with the Court of Claims' determination that the statements alleged fit only one of the actionable classes, words tending to subject a person to public hatred, ridicule, or contempt. We also agree that because the statements were oral and not written, appellant was required to plead and prove special damages, as in cases of defamation per quod. *Id.* at ¶ 30. *See Wilson v. Harvey*, 164 Ohio App.3d 278, 2005-Ohio-5722, ¶ 23 (8th Dist.) ("falsely publicizing that someone is a homosexual may be libel per quod, but only if special damages are pleaded and proven"). The Court of Claims quoted *Woods*: "[W]hen the words of a statement are

not themselves, or per se, defamatory, but they are susceptible to a defamatory meaning, then they are defamatory per quod." *Id.* at ¶ 29.

{¶ 6} The Court of Claims applied this statement of the law to appellant's situation when it recognized that an incorrect sexual orientation that is falsely stated concerning an individual may be slander or libel per quod, but in such case damages must be pled and proved. *Compare Stokes v. Meimaris*, 111 Ohio App.3d 176, 185 (8th Dist.1996) (plaintiff alleged and proved special damages against ex-husband who had told police she was a lesbian and when resulting publication resulted in initiation of an investigation by Salvation Army of which plaintiff served as a local board member, resulting in mental anguish, humiliation, embarrassment, and discriminatory treatment by her colleagues). Appellant argues that in a prison setting, being called a "dick sucker" by a prison guard, when the statement is untrue, "certainly in the prison population holds the inmate in the eyes of the majority of the prison population to ridicule, hatred, and contempt." (Appellant's Brief, 5.) In reviewing appellant's assignment of error, we first focus on the alleged false statement and any damages arising therefrom.

{¶ 7} Under the standards required for the granting of a motion for judgment on the pleadings, we find that appellant sufficiently alleged a defamatory statement, that is, that defamation occurred in Officer Olah's use of the words "dick sucker" through its interpretation and innuendo. However, appellant's complaint does not sufficiently allege special damages, which are required in order to overcome a motion for judgment on the pleadings in an action for defamation per quod. "Special damages are damages of such a nature that they do not follow as a necessary consequence of the claimed injury. * * * Civ.R. 9(G) requires that if special damages are claimed, they must be specifically stated." *Mohican Ents., Inc. v. Aroma Design Group., Inc.*, 10th Dist. No. 96APE01-26 (Sept. 10, 1996), citing *Gennari v. Andres-Tucker Funeral Home, Inc.*, 21 Ohio St.3d 102 (1986), paragraph two of the syllabus.

> "Special damages" have been defined as those " 'of such a nature that they do not necessarily follow from a defamatory remark.' " *Stokes,* supra, 111 Ohio App.3d at 185, quoting *King v. Bogner* (1993), 88 Ohio App.3d 564, 568; *Gennari v. Andres-Tucker Funeral Home* (1986), 21 Ohio St.3d 102, 106. The Ohio Supreme Court has held that special damages are damages that " 'result from conduct of a person other than the

> defamer or the one defamed.' " *Id*., quoting *Bigelow v. Brumley* (1941), 138 Ohio St. 574, 594.

Wilson at ¶ 24. "Special damages are those direct financial losses resulting from the plaintiff's impaired reputation." *Hampton v. Dispatch Printing Co*., 10th Dist. No. 87AP-1084 (Sept. 13, 1988).

{¶ 8} We agree with the Court of Claims that appellant alleged no financial loss or other damages sufficient to overcome a motion for judgment on the pleadings. Damages may not be presumed, and appellant cannot maintain a defamation claim (per quod) without pleading and proving special damages. The complaint contains no description of loss or other events following the alleged statements by Officer Olah. No facts have been alleged to support actual harassment or intimidation resulting from the statements. Nor are there allegations of extraordinary circumstances akin to the investigation in *Stokes* that would begin to establish special damages required to sustain appellant's claim for defamation.

C. Inappropriate Supervision Claim

{¶ 9} Appellant further argues that his complaint incorporates paragraph IV of appellee's policy 64-DCM-01, defining inappropriate supervision:

> **Inappropriate Supervision** - Any continuous method of annoying or harassing an offender or group of offenders including, but not limited to, abusive language, racial slurs, and the writing of conduct/violation reports strictly as a means of harassment. A single incident may, due to its severity or egregiousness, be considered inappropriate supervision for purposes of this rule.

See Ohio Adm.Code 5120-9-04(B), which appellee's policy incorporates. Paragraphs three and four of appellant's complaint in the Court of Claims allege:

> Defendant's agent Olah communicated to third parties, including other inmates at GRC that Plaintiff is a "dick (penis) sucker." Whenever a staff member tells inmates these types of things, the inmate gives more credibility to what is stated wonder, "Why would a staff member say this if it weren't true?"
>
> While Defendant's agent Olah has continuously disrespected Plaintiff, Plaintiff realizes that without court intervention, no

> action will be taken against Defendant's agent Olah by Defendant's apex staff as any procedures to investigate Plaintiffs claims, or any other inmate for that matter, are typically pro forma.

{¶ 10} According to appellant, these alleged facts give rise "to a violation regarding improper supervision, harassment, and intimidation." (Appellant's Brief, 7.) Appellant relies on our decision in *Triplett v. Warren Corr. Inst.*, 10th Dist. No. 12AP-728, 2013-Ohio-2743, ¶ 10, citing *Horton v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 05AP-198, 2005-Ohio-4785, ¶ 29, that violations of such prison regulations "will not support a cause of action by themselves, even though violations of internal rule and policies may be used to support a claim of negligence." However, no allegation of negligence appears in the complaint. If appellant had alleged negligence, he would be required to demonstrate "the existence of a duty, a breach of that duty, and an injury proximately caused by the breach." *Franks v. Ohio Dept. of Rehab. & Corr.*, 195 Ohio App.3d 114, 2011-Ohio-2048, ¶ 12 (10th Dist.), citing *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77 (1984). Instead, appellant seeks to hold appellee liable for violating a regulation that, independently, does not supply him with a cause of action. The policy appellant claims was violated is " 'primarily designed to guide correctional officials in prison administration rather than to confer rights on inmates.' " *Triplett* at ¶ 10, quoting *State ex rel. Larkins v. Wilkinson*, 79 Ohio St.3d 477, 479 (1997).

{¶ 11} In *Triplett* this court affirmed partial judgment on the pleadings, including the dismissal of the inmate plaintiff's claims that the Warren Correctional Institution violated prison policy when officers mishandled and took some of his personal property when he was transferred to another correction institution. No facts have been alleged in appellant's complaint that could support a claim based solely on the alleged violation of policy. As in *Triplett*, the Court of Claims correctly concluded that the allegations of inappropriate supervision did not amount to claims entitling appellant to relief. Thus, judgment on the pleadings in favor of appellee was warranted.

{¶ 12} On appeal, appellant further asserts that Officer Olah violated R.C. 2921.44(C)(3), which provides that "[n]o officer, having charge of a detention facility, shall negligently * * * [f]ail to control an unruly prisoner, or to prevent intimidation of or

physical harm to a prisoner by another." Construing subdivision (C)(2) of this section, the Supreme Court of Ohio in *State ex rel. Carter v. Schotten*, 70 Ohio St.3d 89 (1994) found that R.C. 2921.44(C)(2) does not establish a civil cause of action for failure to provide adequate clothing. The Supreme Court recognized only that the inmate's complaint in mandamus, for enforcement of that duty, stated a claim for which relief may be granted. Mandamus would not have been permitted if the inmate had a plain and adequate remedy at law. Recently, this court held that the Court of Claims does not have jurisdiction to determine appellee's civil liability for violation of R.C. 2921.44, a second-degree misdemeanor, or of other constitutional and statutory rights. *Allen v. Dept. of Rehab. & Corr.*, 10th Dist. No. 14AP-619, 2015-Ohio-383, ¶ 15. We have summarized the applicable law as follows:

> R.C. 2307.60(A)(1) "is merely a codification of the common law that a civil action is not merged in a criminal prosecution." *Edwards v. Madison Twp.*, 10th Dist. No. 97APE06-819 (Nov. 25, 1997), *appeal not allowed*, 81 Ohio St.3d 1495 (1998). The statute does not create a separate civil action. *Id. See also Groves v. Groves*, 10th Dist. No. 09AP-1107, 2010-Ohio-4515, ¶ 25 ("A party must rely on a separate civil cause of action, existent either in the common law or through statute, to bring a civil claim based on a criminal act.").

Id. at ¶ 13.

{¶ 13} Appellant overstates the effect of the holding in *Eisenhuth v. Moneyhon*, 161 Ohio St. 367, 372 (1954): "where a legislative enactment imposes upon any person a specific duty for the protection of others, and his failure to perform that duty proximately results in injury to another, he is liable per se or as a matter of law to such other for the injury." The Supreme Court further pronounced:

> However, a legislative enactment which does not purport to define a civil liability but merely makes provision to secure the safety or welfare of the public is not to be construed as establishing such a liability. In such cases, no standard of care other than the common-law standard of due care under the circumstances is fixed by the enactment, and the standard of due care is that exercised by a reasonably prudent person under the circumstances of the particular case.

Id. at 372-73. Only violations of legislative commands or of prohibitions against performing a specific act may constitute negligence per se. Otherwise, "negligence per se has no application, and liability must be determined by the application of the test of due care as exercised by a reasonably prudent person under the circumstances of the case." *Id*. at 374. R.C. 2921.44(C) on its face requires a determination of negligence to establish dereliction of duty. Appellant did not allege a violation of R.C. 2921.44(C)(3), and more importantly, did not plead a cause of action for negligence, which, as the Court of Claims determined, could not be inferred simply from his assertion of inadequate supervision.

D. Denial of Motion to Amend Complaint

{¶ 14} Finally, appellant asserts that his motion for leave to file an amended complaint should have been granted in the event of dismissal under Civ.R. 12(C). The Court of Claims denied the motion because it could not be inferred from the pleadings or memoranda submitted on the motions that appellant could establish all required elements of a defamation claim or of a claim for negligent supervision.

> Civ.R. 15(A) provides that a party may amend its pleading by leave of court and that such leave "shall be freely given when justice so requires." The decision of whether to grant a motion for leave to amend a pleading is within the discretion of the trial court. *Turner v. Cent. Local School Dist.*, 85 Ohio St.3d 95, 99 (1999). While the rule allows for liberal amendment, motions to amend pleadings pursuant to Civ.R. 15(A) should be refused if there is a showing of bad faith, undue delay, or undue prejudice to the opposing party. *Id*. Time alone is generally an insufficient reason for the court to deny leave to amend; the primary consideration is whether there is actual prejudice to the defendants because of the delay. *Schweizer v. Riverside Methodist Hosp.*, 108 Ohio App.3d 539, 546 (10th Dist.1996). *If a plaintiff fails to make a prima facie showing of support for new matters sought to be pleaded, a trial court acts within its discretion to deny a motion to amend the pleading. Wilmington Steel Prods., Inc. v. Cleveland Elec. Illum. Co.*, 60 Ohio St.3d 120, 123 (1991).

(Emphasis added.) *Betz v. Penske Truck Leasing Co., L.P.*, 10th Dist. No. 11AP-982, 2012-Ohio-3472, ¶ 50. Our review of the Court of Claims' decision to deny appellant's motion to amend his complaint after the court's decision on appellee's motion for judgment on the pleadings is based on an abuse of discretion standard. "When reviewing

a trial court's determination whether to permit or deny amendment of a pleading beyond the time when such amendment is automatically allowed, an appellate court must determine whether the trial court's determination constitutes an abuse of discretion." *Bugh v. Grafton Corr. Inst.*, 10th Dist. No. 06AP-454, 2006-Ohio-6641, ¶ 18, citing *Wilmington Steel Prods., Inc., v. Cleveland Elec. Illuminating Co.*, 60 Ohio St.3d 120, 121-22 (1991). An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Id*. Our review of the law regarding negligent supervision and the record in the Court of Claims reveals no reveals no real prima facie factual support for the required elements of defamation or negligence, and appellant fails to describe the nature or substance of a proposed amendment to the complaint that could have the effect of curing the defective pleading.

{¶ 15} Appellant's single assignment of error is overruled.

III. CONCLUSION

{¶ 16} Accordingly, appellant's single assignment of error is overruled and we affirm the judgment of the Court of Claims of Ohio dismissing the complaint, pursuant to Civ.R. 12(C), and denying appellant's motion to amend his complaint.

Judgment affirmed.

SADLER and DORRIAN, JJ., concur.