[Cite as *Brown v. Balnius*, 2009-Ohio-2671.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

FRANK C. BROWN, JR., pro se	:	JUDGES:
	:	William B. Hoffman, P.J.
Plaintiff-Appellant	:	Sheila G. Farmer, J.
	:	Julie A. Edwards, J.
-vs-	:	
	:	Case No. 08 CA 47
JOSEPH BALNIUS, pro se	:	
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal From Richland County Court Of Common Pleas Case No. 2008 CV 0065
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	June 3, 2009
APPEARANCES:	
For Plaintiff-Appellant	For Defendant-Appellee
FRANK C. BROWN, JR. 1150 North Main Street P.O. Box 788 - #439-439 Mansfield, Ohio 44901-0788	JOSEPH BALNIUS 1150 North Main Street P.O. Box 788 - #492-588 Mansfield, Ohio 44901-0788

Edwards, J.

{¶1} Plaintiff-appellant, Frank C. Brown, Jr., appeals from the April 29, 2008, Order of the Richland County Court of Common Pleas.

STATEMENT OF THE FACTS AND CASE

{¶2} Both appellant, Frank C. Brown, Jr., and appellee, Joseph Balnius, are inmates at Mansfield Correctional Institution.

{¶3} On January 10, 2008, appellant filed a complaint against appellee. Appellant, in his complaint, alleged that, on November 20, 2007, appellee, while in the presence of third persons, stated as follows: "I have pictures of my nieces and nephews missing, and my celly [appellant] has been the only person alone in the cell, so he must have stolen them." Appellant also alleged that, on or about November 22, 2007, appellee, while in the presence of third persons, stated as follows: "The C.O.'s [Corrections Officers] caught him [appellant] jacking off to the pictures of my nieces and nephews." Appellant, in his complaint, alleged that the above statements were defamatory and that he suffered "great mental anguish" and injury to his personal and business reputations as a result of them.

{¶4} In response, appellee, on February 13, 2008, filed a "Motion to Dismiss and/or for Summary Judgment." Appellee, in his motion, admitted that he had informed the Corrections Officers of his suspicions that appellant was the thief, but denied stating that appellant had been caught masturbating to the photos. Pursuant to a Judgment Entry filed on March 7, 2008, the trial court set a non-oral hearing on such motion for April 4, 2008. Appellant did not file a response to appellee's motion.

{¶5} As memorialized in an Order filed on April 29, 2008, the trial court granted summary judgment in favor of appellee, finding that "[b]ecause the undisputed facts of this case demonstrate that there is no genuine issue of material fact precluding summary judgment, [appellant's] defamation claim fails as a matter of law."

{¶6} Appellant now raises the following assignments of error on appeal:

{¶7} "I. THE TRIAL COURT ERRED WHEN IT GRANTED A MOTION FOR SUMMARY JUDGMENT WHICH WAS NOT SUPPORTED BY SUFFICIENT DOCUMENTARY EVIDENCE IN THE RECORD TO DEMONSTRATE THE ABSENCE OF GENUINE ISSUES OF MATERIAL FACT.

{¶8} "II. THE TRIAL COURT ERRED WHEN IT GRANTED A MOTION FOR SUMMARY JUDGMENT PURSUANT TO CIVIL RULE 56 IN THE CASE WHICH HAD ALREADY BEEN SET FOR A PRETRIAL CONFERENCE PURSUANT TO CIVIL RULE 16 IN VIOLATION OF CIVIL RULE 56(B) AS DEFENDANT FAILED TO SEEK LEAVE OF COURT TO FILE THE MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT.

{¶9} "III. THE TRIAL COURT ERRED WHEN IT GRANTED A MOTION FOR SUMMARY JUDGMENT PRIOR TO THE COMPLETION OF DISCOVERY BY THE PARTY WHICH INITIATED THE COMPLAINT.

{¶10} "IV. THE TRIAL COURT ERRED WHEN IT FAILED TO GIVE NOTICE IT WAS CONVERTING THE MOTION TO DISMISS PURSUANT TO CIVIL RULE 12(B)."

I

{¶11} Appellant, in his first assignment of error, argues that the trial court erred in granting appellee's Motion for Summary Judgment because such motion was not supported by sufficient documentary evidence establishing the absence of genuine issues of material fact.

{¶12} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. As such, an appellate court conducts a de novo review of a trial court's summary judgment. See, e.g., *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241. Accordingly, appellate courts independently review the record to determine whether summary judgment is appropriate and need not defer to the trial court's decision. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711, 622 N.E.2d 1153; *Morehead v. Conley* (1991), 75 Ohio App.3d 409, 411-412, 599 N.E.2d 786. Thus, to determine whether a trial court properly granted summary judgment, an appellate court must review the Civ.R. 56 standard as well as the applicable law.

{¶13} Civ.R. 56(C) provides:

{¶14} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, 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."

{¶15} Thus, a trial court may not grant summary judgment unless the evidentiary materials demonstrate that: (1) no genuine issue as to any material fact remains to be litigated; (2) after the evidence is construed most strongly in the nonmoving party's favor, reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party; and (3) the moving party is entitled to judgment as a matter of law. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429-30, 674 N.E.2d 1164.

{¶16} Under Civ.R. 56, the moving party bears the initial burden to inform the trial court of the motion's basis and to identify those portions of the record that demonstrate the absence of a material fact. *Vahila,* supra; *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. A moving party cannot, however, discharge its initial burden with a conclusory assertion that the nonmoving party has no evidence to prove its case. See *Dresher,* supra. Rather, a moving party must specifically refer to the "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any," that affirmatively demonstrate that the nonmoving party has no evidence to support the nonmoving party's claims. Civ.R. 56(C); *Dresher,* supra.

{¶17} It is important to recognize that "[U]nless a movant meets its initial burden of establishing that the nonmovant has either a complete lack of evidence or has an insufficient showing of evidence to establish the existence of an essential element of its case upon which the nonmovant will have the burden of proof at trial, a trial court shall not grant a summary judgment." *Pennsylvania Lumbermans Ins. Corp. v. Landmark Elec., Inc.* (1996), 110 Ohio App.3d 732, 742, 675 N.E.2d 65. In other words, "If the moving party fails to meet its burden, summary judgment is inappropriate". *Dresher*, supra, at 294. Furthermore, "[u]nless and until the movant has properly supplied the court with evidentiary materials to meet the test of the rule, the nonmoving party has no burden to oppose the movant or supply contra evidence, in order to avoid an adverse ruling." *Pond v. Carey Corp.* (1988), 34 Ohio App.3d 109, 112, 517 N.E.2d 928, 931.

{¶18} Accordingly, under summary judgment procedure, for appellee to prevail on his unopposed motion for summary judgment, he must still meet his evidentiary burden under Civ.R. 56 of showing the absence of disputed material facts and that he is entitled to judgment as a matter of law.

{¶19} As is stated above, appellant, in his complaint, set forth claims of defamation. In *Akron-Canton Waste Oil, Inc. v. Safety-Kleen Oil Serv., Inc.,* (1992), 81 Ohio App.3d 591, 601, 611 N.E.2d 955, the court described the four elements of defamation as follows:

{¶20} "(a) a false and defamatory statement concerning another;

{¶21} "(b) an unprivileged publication to a third party;

{¶22} "(c) fault amounting at least to negligence on the part of the publisher; and

{¶23} "(d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.' 3 Restatement of the Law 2d, Torts (1977) 155, Section 558."

{¶24} As is stated above, appellant, in his complaint, alleged that appellee defamed him by informing the Corrections Officer of his suspicions that appellant had stolen the photos. The trial court, in its Order in the case sub judice, indicated that it was undisputed that the photos were found in appellant's possession and that such statement was, therefore, not false as required for it to be defamatory. However, while appellee, in his motion, stated that the photos were found in appellant's possession, appellee provided the trial court with no evidence that the photos were found in appellant's possession and/or stolen by appellant.

{¶25} While appellee cites to *Brooks v. Lady Foot Locker,* Summit App. No. 22297, 2005-Ohio-2394, in his brief, we find that such case is distinguishable. In such case, patrons of a store filed a complaint against the store and its employee, alleging, in part, defamation. The patrons alleged that the employee had defamed them by loudly accusing them of stealing merchandise from the store. The trial court granted a directed verdict to the store and its employee on such claim and the patrons appealed. In affirming, the court stated, in relevant part, as follows:

{¶26} "Trial testimony established that Jones [the employee] informed appellants that he had a suspicion that they had some of his merchandise. Jones did not feel that informing appellants of his suspicions was an accusation because he did not call appellants thieves or say they stole anything. As previously discussed, Jones did not tell anyone that appellants had in fact shoplifted; he only said he had a suspicion that they

had some of his merchandise. It is undisputed that Jones admitted to everyone that he did not see appellants steal anything.

{¶27} "Based on the evidence in the record, we find that appellants failed to establish that Jones made a false and defamatory statement. The record shows that Jones only stated his suspicion and that he admitted repeatedly that he did not see appellants take anything from the store. While appellants testified that Jones accused them of theft, they did not provide direct quotes to substantiate their testimony or explain if Jones' 'accusations' were verbalized or their interpretations of his actions. Rather, appellants admitted that Jones repeatedly informed them that he had a suspicion that they had some of his merchandise. Without appellants' presenting evidence of a false and defamatory statement, appellees were properly granted a directed verdict on appellants' claim of defamation." Id. at paragraph 49.

{¶28} Appellee, in the case sub juice, told the Corrections Officers that appellant must have stolen the photos. He did more than merely express his suspicions about appellant to appellant, but rather informed the Corrections Officers of the same.

{¶29} Moreover, with respect to the second statement allegedly made by appellee that, appellant had been caught masturbating to the photos, we find that there is a genuine issue of material fact as to whether or not such statement was made. While appellant contends that appellee made such statement, appellee denies doing so. The trial court, in its Order, stated that appellant's "only purported evidence of harm is the affidavit of an inmate professing that [appellant] had been subjected to ridicule, shame, and defamation of character" and that "such broad, unsupported and conclusory

statements cannot create a factual dispute sufficient to preclude summary judgment." We, however, disagree.

{¶30} Based on the foregoing, we find that the trial court erred in granting appellee's Motion for Summary Judgment.

II

{¶31} Appellant, in his second assignment of error, argues that the trial court erred in granting appellee's Motion for Summary Judgment because the case sub judice had already been set for pretrial conference and appellee had not obtained leave of court to file his motion.

{¶32} Civ.R. 56(B) states, in relevant part, as follows:, "[i]f the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court." In the case at bar, appellee's motion was filed without leave of court after the trial court set an initial scheduling conference. However, trial courts may implicitly grant leave of court by entertaining a motion for summary judgment. See *Stewart v. Cleveland Clinic Foundation* (1999), 136 Ohio App.3d 244, 254, 736 N.E.2d 491. By entertaining appellee's motion, the trial court implicitly granted him leave to file his Motion for Summary Judgment. *Sexton v. Conley,* Scioto App. No. 01CA2823, 2002-Ohio-6346; *Indermill v. United States* (1982), 5 Ohio App.3d 243, 451 N.E.2d 538. See also *State Farm Mut. Auto Ins. Co. v. Loken,* Fairfield App. No. 04-CA-40, 2004-Ohio-507.

{¶33} Appellant's second assignment of error is, therefore, overruled.

III

{¶34} Appellant, in his third assignment of error, argues that the trial court erred when it granted appellee's Motion for Summary Judgment prior to the completion of discovery. We disagree.

{¶35} Pursuant to Civ.R. 56(F), a party opposing a motion for summary judgment may obtain a continuance pursuant to Civ.R. 56(F) by submitting affidavits which state a factual basis and which provide sufficient reasons for the lack of supporting affidavits and the need for additional time to permit affidavits to be obtained or further discovery to be had. *Gates Mills Investment Co. v. Pepper Pike* (1978), 59 Ohio App.2d 155, 168-169, 392 N.E.2d 1316. A trial court has discretion to grant or deny a request for a continuance pursuant to Civ.R. 56(F), and its decision will not be overruled absent an abuse of discretion.

{¶36} Appellant, in the case sub judice, never requested a continuance pursuant to Civ.R. 56(F). We find, therefore, that the trial court did not err in considering and ruling on appellee's Motion for Summary Judgment prior to the completion of discovery.

{¶37} Appellant's third assignment of error is, therefore, overruled.

IV

{¶38} Appellant, in his fourth assignment of error, argues that the trial court erred when it failed to give appellant notice that it was converting appellee's Motion to Dismiss to a Motion for Summary Judgment. We disagree.

{¶39} In resolving a Civ.R. 12(B)(6) motion, the court is confined to the statements set forth in the pleading under attack. *Jackson v. Ohio Bur. of Workers' Comp.* (1994), 98 Ohio App.3d 579, 649 N.E.2d 30. Civ.R. 12(B) provides, in relevant

part, as follows: “When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided, however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.”

{¶40} Civ.R. 12(B)(6) requires the court to notify the parties when the court converts the motion to a Civ.R. 56(C) motion for summary judgment prior to ruling on the motion and failure to give the required notice is reversible error. *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.* (1995), 72 Ohio St.3d 94, 647 N.E.2d 788; *State ex rel. Baran v. Fuerst* (1990), 55 Ohio St.3d 94, 563 N.E.2d 713.

{¶41} While appellant contends that the trial court did not give him notice that it was converting appellee’s motion to a Motion for Summary Judgment, we note that appellee’s motion was captioned a “Motion to Dismiss and/or for Summary Judgment.” Appellant was, therefore, on notice that a Motion for Summary Judgment had been filed and there was no need for the trial court to advise him that it was considering appellee’s Motion as a Motion for Summary Judgment.

{¶42} Appellant's fourth assignment of error is, therefore, overruled.

{¶43} Accordingly, the judgment of the Richland County Court of Common Pleas is reversed and this matter is remanded to the trial court for further proceedings.

By: Edwards, J.

Hoffman, P.J. and

Farmer, J. concur

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JUDGES

JAE/1215

[Cite as *Brown v. Balnius*, 2009-Ohio-2671.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

FRANK C. BROWN, JR., pro se	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
JOSEPH BALNIUS, pro se	:	
Defendant-Appellee	:	CASE NO. 08 CA 47

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Richland County Court of Common Pleas is reversed and this matter is remanded to the trial court for further proceedings. Costs assessed to appellee.

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JUDGES