

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Christopher Jones,	:	
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	No. 11AP-1025
	:	(C.C. No. 2010-11765)
Ohio Department of Rehabilitation and	:	
Corrections,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	
	:	

D E C I S I O N

Rendered on August 14, 2012

Christopher Jones, pro se.

Michael DeWine, Attorney General, and Ashley L. Olikar, for appellee.

APPEAL from the Court of Claims of Ohio

CONNOR, J.

{¶ 1} Plaintiff-appellant, Christopher Jones ("appellant"), appeals from a judgment entered by the Court of Claims of Ohio granting summary judgment in favor of defendant-appellee, Ohio Department of Rehabilitation and Corrections ("ODRC"), on appellant's complaint alleging negligence. Because appellant has failed to demonstrate a breach of duty, and therefore he cannot prevail on a claim for negligence, we affirm.

{¶ 2} Appellant is an inmate in the custody and control of ODRC. At all times relevant to this action, appellant was incarcerated at the Southern Ohio Correctional Facility ("SOCF"), located in Lucasville, Ohio.

{¶ 3} On August 12, 2010, appellant left his cell to take a shower. The showers in his cellblock have a stainless steel floor and cell-door bars that open and close. There are

no anti-slip strips or shower mats on the shower floors. As appellant attempted to step into the shower, he slipped and fell backward, striking his right elbow on the bars to the shower door. Appellant suffered a broken elbow, which required surgery.

{¶ 4} On November 10, 2010, appellant filed a complaint in the Court of Claims against ODRC, asserting a cause of action for negligence. Appellant alleged ODRC was negligent for failing to use no-slip strips or non-slip pads in its stainless steel showers, and that said failure caused him to slip and fall and break his elbow.

{¶ 5} On September 6, 2011, ODRC filed a motion for summary judgment arguing: (1) ODRC did not owe a duty to use no-slip strips or non-slip pads in its showers because the shower was an open and obvious hazard; (2) ODRC exercised an appropriate level of care by making shower shoes available for purchase to help protect against slippage; and (3) appellant's own actions were the proximate cause of his injuries. In support of its motion, ODRC attached the following documentation: (1) the affidavit of the health and safety coordinator at SOCF; (2) authenticated photographs of the showers at SOCF and the shower shoes available for purchase; and (3) appellant's responses to interrogatories, which demonstrated his knowledge of and familiarity with the showers at SOCF.

{¶ 6} On September 26, 2011, appellant filed a response to ODRC's motion for summary judgment. In his response, appellant stated he looked down before stepping into the shower and did not see any objects on the shower floor. Appellant claimed other inmates have also slipped in the showers. He further stated that at the time of the incident, he had been wearing shower shoes sent to him by a relative. In addition, appellant claimed other institutions, unlike SOCF, utilized non-slip tape and shower mats to help prevent falls. However, appellant did not attach any affidavits or other evidence in support of his statements and assertions.

{¶ 7} On October 19, 2011, the Court of Claims granted summary judgment in favor of ODRC, finding that the condition of the showers at SOCF did not present an unreasonable hazard or an unreasonable risk of harm. This timely appeal now follows in which appellant asserts a single assignment of error for our review:

The magistrate of the court of claims [erred] in granting appellee's motion for summary judgment.

{¶ 8} Appellate review of summary judgment motions is de novo. *Helton v. Scioto Cty. Bd. Of Commrs.*, 123 Ohio App.3d 158, 162 (4th Dist.1997). "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Bank Corp.*, 122 Ohio App.3d 100, 103 (12th Dist.1997). We must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if the trial court failed to consider those grounds. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42 (9th Dist.1995).

{¶ 9} Summary judgment is proper only when the party moving for summary judgment demonstrates that: (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds could 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 most strongly construed in that party's favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183 (1997).

{¶ 10} When seeking summary judgment on the ground that the nonmoving party cannot prove its case, the moving party bares the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on an essential element of the nonmoving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). A moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the nonmoving party has no evidence to prove its case. *Id.* Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the nonmoving party has no evidence to support its claims. *Id.* If the moving party meets this initial burden, then the nonmoving party has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. *Id.*

{¶ 11} In order to prevail on a claim for negligence, the plaintiff must prove, by a preponderance of the evidence: (1) the existence of a duty; (2) a breach of that duty; and (3) an injury proximately caused by the breach. *Coffman v. Mansfield Corr. Inst.*, 10th

Dist. No. 09AP-447, 2009-Ohio-5859, ¶ 9, citing *Strother v. Hutchinson*, 67 Ohio St.2d 282, 285 (1981); *Rose v. Ohio Dept. of Rehab. and Corr.*, 10th Dist. No. 04AP-1360, 2005-Ohio-3935, ¶ 6, citing *Menifee v. Ohio Welding Products, Inc.*, 15 Ohio St.3d 75, 77 (1984).

{¶ 12} "In the context of a custodial relationship between the state and its prisoners, the state owes a common law duty of reasonable care and protection from unreasonable risks." *Rose* at ¶ 9, citing *McCoy v. Engle*, 42 Ohio App.3d 204, 207 (10th Dist.1987). "[T]he state is not an insurer of the safety of its prisoners, once it becomes aware of a dangerous condition in the prison it is required to take the reasonable care necessary to make certain that the prisoner is not injured." *Macklin v. Ohio Dept. of Rehab. and Corr.*, 10th Dist. No. 01AP-293, 2002-Ohio-5069, ¶ 21, citing *Clemets v. Heston*, 20 Ohio App.3d 132, 136 (6th Dist.1985). *See also Williams v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 04AP-1193, 2005-Ohio-2660, ¶ 8 (even though prison officials are not insurers of an inmate's safety, they generally owe the inmate a duty of reasonable care and protection from harm). "Reasonable care" is the degree of caution and foresight an ordinarily prudent person would employ in similar circumstances. *Woods v. Ohio Dept. of Rehab. & Corr.*, 130 Ohio App.3d 742, 745 (10th Dist.1998); *Macklin* at ¶ 21; *Rose* at ¶ 9. Additionally, prisoners are also required to use reasonable care to ensure their own safety. *Rose* at ¶ 9, citing *Macklin* at ¶ 21.

{¶ 13} Here, ODRC owed appellant, as an inmate in the custody and control of ODRC, a duty of reasonable care and protection from unreasonable risks. ODRC demonstrated that it performed its duty using evidence attached to its motion for summary judgment. Specifically, ODRC attached the affidavit of Greg Holdren, the health and safety coordinator at SOCF, a photograph of the shower in question and of the shower shoes available for purchase, and appellant's responses to interrogatories.

{¶ 14} In his affidavit, Mr. Holdren averred SOCF does not use shower mats due to the potential health and safety issues they create, such as a breeding ground for mildew and other germs. Mr. Holdren also averred that shower mats were not used at SOCF due to the size of the showers, as a shower mat would likely cover the shower drain, thereby leading to standing water and additional safety issues. The photograph of the shower provided additional context for that statement. Furthermore, Mr. Holdren affirmed that,

rather than using shower mats, ODRC had shower shoes with a non-slip sole available for purchase at the commissary for \$3.01, but that appellant had not purchased those shoes. Additionally, ODRC established appellant's familiarity with the showers at the facility, noting that appellant admitted in his responses to interrogatories that, prior to the incident, he had been housed in that cellblock for over 45 months (more than three and one-half years), he had showered there at least once daily and some times twice a day, and he was very familiar with the showers.

{¶ 15} Once ODRC produced evidence establishing that it had met its duty of care and protection, appellant, as the non-moving party, had the burden of setting forth specific facts showing there was a genuine issue for trial. Pursuant to Civ.R. 56(F), appellant was not permitted to rest simply upon mere allegations or denials of ODRC's pleadings. Instead, in order to successfully refute ODRC's motion, appellant had to respond with affidavits or other admissible evidence as provided for by the rule, such as pleadings, depositions, answers to interrogatories, written admissions, transcripts of evidence, or written stipulations of fact, which demonstrated a material issue of fact for trial. The relevant portions of Civ.R. 56 reads as follows:

(C) Motion and proceedings.

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.

(E) Form of affidavits; further testimony; defense required.

Supporting and opposing affidavits * * * shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the

matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. * * * When 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.

(Emphasis added.)

{¶ 16} Here, appellant simply responded to ODRC's motion for summary judgment with only his own unsworn response and he did not meet his burden in refuting ODRC's motion.

{¶ 17} In his response, appellant claimed he was wearing shower shoes sent to him by a relative. However, he did not provide a sworn statement to this effect, nor any other proof of this. And, contrary to his contention, this assertion is not alleged in his complaint. Thus, based on the Holdren affidavit, there is evidence appellant's fall was caused by his failure to exercise reasonable care for his own safety by failing to wear shower shoes.

{¶ 18} In addition, appellant claimed he had previously slipped in the shower, but caught himself before falling, and that other inmates had also fallen in the showers, but not reported the incidents. Again, appellant failed to provide sworn statements or other admissible proof of either of these claims. Furthermore, appellant asserted other prison facilities in Ohio use non-slip tape and shower mats to prevent falls and injuries. However, appellant did not provide admissible evidence to support his assertion about the methods used by other facilities. None of these bare assertions support a claim that ODRC breached its duty by failing to provide reasonable care or by failing to provide protection from an unreasonable risk of harm (i.e., slippery prison showers).

{¶ 19} In fact, appellant failed to point to any evidence in the record which would refute the evidence introduced by ODRC showing it had fulfilled its duty of providing reasonable care and protection from unreasonable risks. Or, stated differently, appellant failed to point to any evidence showing that ODRC had breached a duty it owed to

appellant. Appellant produced no evidence to demonstrate that ODRC owed a duty to appellant to use non-slip tape, or shower mats in its showers, or any other anti-slipping measure beyond the non-slip shower shoes it had made available, or that the showers presented an unreasonable risk of harm. "[O]nce the moving party has properly carried its burden of production, the nonmoving party then has a burden of rebuttal to supply evidentiary materials supporting the contrary position." *Trout v. Parker*, 72 Ohio App.3d 720, 723 (4th Dist.1991).

{¶ 20} All of appellant's unsupported and unsworn statements in his response to ODRC's motion for summary judgment seem to imply ODRC failed to provide reasonable care and/or failed to protect him from the purportedly unreasonable risk presented by the showers. Yet, appellant has failed to point to evidence demonstrating there was a duty or act that ODRC was responsible for performing but which it failed to perform (i.e., something beyond the actions it had already taken demonstrating reasonable care). In short, appellant failed to show there was a duty owed by ODRC to appellant which ODRC breached. The record in this matter contains no evidence of a breach of duty. *See Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 65 (1978) (unsupported allegations in the pleadings do not suffice to require the denial of summary judgment; the primary function of Civ.R. 56(E) is to move beyond allegations in the pleadings, and to analyze the evidence to determine whether there exists an actual need for a trial).

{¶ 21} Because appellant failed to meet its reciprocal burden after ODRC demonstrated it acted with reasonable care, and because appellant failed to show ODRC breached a duty of care owed to him, we find the trial court properly granted summary judgment in favor of ODRC. Accordingly, we overrule appellant's single assignment of error. The judgment of the Court of Claims of Ohio is affirmed.

Judgment affirmed.

BRYANT and KLATT, JJ., concur.
