

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Horace Brown, III,	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-790 (C.C. No. 2009-05226)
Department of Rehabilitation and Correction,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

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D E C I S I O N

Rendered on July 26, 2011

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

*Michael DeWine, Attorney General, Amy S. Brown, and  
Emily M. Simmons* for appellee.

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APPEAL from the Ohio Court of Claims.

BROWN, J.

{¶1} Horace Brown, III, plaintiff-appellant, appeals from two judgments of the Ohio Court of Claims, in which the court granted the motion to dismiss and motion for summary judgment filed by the Department of Rehabilitation and Correction ("DRC"), defendant-appellee.

{¶2} At all times relevant, appellant was an inmate at Ross Correctional Institution ("RCI"). Appellant had an inguinal hernia that was diagnosed in late 2006, and he had been taking Ibuprofen for it. He had also been subject to a lower bunk restriction since January 2007, due to his hernia, but the restriction had expired in December 2008 and he had been forced to sleep in a top bunk thereafter.

{¶3} On April 4, 2009, appellant fell off his top bunk, and his forehead struck a sink. As a result of the fall, appellant received stitches on his forehead and under his eye, broke a vertebra, and shattered a bone in his neck. Furthermore, after appellant's fall, prison officials made him walk from his cell to a cart and change his own clothing, placed him in arm and leg shackles, and then made him walk outside to a van, which transported him to a hospital.

{¶4} On May 29, 2009, appellant filed a complaint in the Court of Claims, generally alleging two claims: (1) DRC was liable for the injuries he sustained when he fell out of his bunk because DRC wrongly rescinded his lower bunk restriction; and (2) DRC was negligent in their movement of him from his cell to the transport van, and DRC should have used a stretcher to transport him because he was in pain and injured.

{¶5} On July 2, 2009, DRC filed a motion to dismiss appellant's complaint. On September 1, 2009, the trial court granted the motion to dismiss regarding his bunk restriction based upon DRC's statutory immunity, insomuch as DRC's decision regarding his bunk restriction was characterized by a high degree of official judgment or discretion. On May 19, 2010, DRC filed a motion for summary judgment with regard to DRC's movement of appellant from his cell to the cart and then to the van. On July 27, 2010, the trial court granted the motion for summary judgment, finding DRC acted according to the

accepted standard of care at all times when transporting appellant. Appellant appeals the judgments of the trial court, asserting the following assignments of error:

[I.] THE TRIAL COURT ERRED IN SUSTAINING DEFENDANT-APPELLEE'S MOTION TO DISMISS THE CLAIM RELATING TO PLAINTIFF-APPELLANT'S BOTTOM BUNK CLAIM.

[II.] THE TRIAL COURT ERRED IN SUSTAINING DEFENDANT-APPELLEE'S MOTION FOR SUMMARY JUDGMENT AS TO MOVEMENT OF PLAINTIFF-APPELLANT WHILE DISABLED, WITHOUT EXERCISING ORDINARY CARE TO PROTECT AN INJURED DISABLED INMATE FROM UNDUE PAIN AND SUFFERING.

{¶6} Appellant argues in his first assignment of error that the Court of Claims erred when it dismissed his claim, pursuant to Civ.R. 12(B)(6), relating to his lower bunk restriction. A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 1992-Ohio-73, citing *Assn. for the Defense of the Washington Local School Dist. v. Kiger* (1989), 42 Ohio St.3d 116, 117. For that reason, a trial court may not rely upon evidence or allegations outside the complaint when ruling on a Civ.R. 12(B)(6) motion. *State ex rel. Fuqua v. Alexander*, 79 Ohio St.3d 206, 207, 1997-Ohio-169. To sustain a Civ.R. 12(B)(6) dismissal, it must appear beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief. *LeRoy v. Allen, Yurasek, & Merklin*, 114 Ohio St.3d 323, 2007-Ohio-3608, ¶14, citing *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, ¶11. Additionally, the complaint's allegations must be construed as true, and any reasonable inferences must be construed in the non-moving party's favor. *Id.*, citing

*Maitland v. Ford Motor Co.*, 103 Ohio St.3d 463, 2004-Ohio-5717, ¶111; *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, 418, 1995-Ohio-61.

{¶7} In the present case, appellant argues that DRC ignored his disability that it had before recognized, and DRC knew he was suffering from pain associated with the hernia. Appellant contends that it was negligent for staff members to allow his lower bunk restriction to expire knowing he was still chronically disabled. The sum of appellant's allegations on this issue included in appellant's complaint was the following:

1. Defendant is held liable because plaintiff should not have been on a top bunk because he was having pains from his hernia and was still receiving his pain medication (Ibuprofen) for his hernia. Plaintiff's bottom bunk restriction should not have been taken away. When plaintiff's bottom bunk was taken away, that made defendant liable for plaintiff's injuries.

{¶8} However, based upon these allegations in the complaint, we find appellant can prove no set of facts in support of the claim that would entitle him to relief. For a plaintiff to prevail in a negligence claim, the plaintiff must prove by a preponderance of the evidence that: (1) a defendant owed plaintiff a duty of reasonable care; (2) a defendant breached that duty; and (3) a defendant's breach of duty proximately caused plaintiff's injury. *Ford v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 05AP-357, 2006-Ohio-2531, ¶10.

{¶9} In *Reynolds v. State* (1984), 14 Ohio St.3d 68, paragraph one of the syllabus, the Supreme Court of Ohio held:

The language in R.C. 2743.02 that "the state" shall "have its liability determined \* \* \* in accordance with the same rules of law applicable to suits between private parties \* \* \*" means that the state cannot be sued for its legislative or judicial functions or the exercise of an executive or planning function involving the making of a basic policy decision which is

characterized by the exercise of a high degree of official judgment or discretion. However, once the decision has been made to engage in a certain activity or function, the state may be held liable, in the same manner as private parties, for the negligence of the actions of its employees and agents in the performance of such activities.

{¶10} The court's decision in *Bell v. Ohio Dept. of Rehab. & Corr.*, 128 Ohio Misc.2d 4, 2004-Ohio-2627, is helpful to our analysis here. In *Bell*, an inmate, Bell, was injured when he fell from his top bunk. Bell claimed he had repeatedly attempted to obtain a lower bunk assignment from the prison doctor due to a foot injury, just as he had previously been granted lower bunk assignments at two other institutions, but the doctor refused to order such a restriction. The Court of Claims determined that, at the time of his fall, Bell had not been issued a valid lower bunk restriction, despite the fact that he had been issued lower bunk restrictions at other institutions, and the decision of the current prison's medical personnel not to issue a lower bunk restriction was discretionary in nature. *Id.* at ¶11.

{¶11} Likewise, in the present case, the decision of the prison's medical personnel to allow appellant's restriction to lapse without renewal was one that is characterized by the exercise of a high degree of discretion. A decision whether to restrict an inmate to a lower bunk is necessarily one involving a substantial amount of official judgment. This is not a situation in which the state entity made a discretionary decision and then acted negligently in carrying out the decision. Thus, because DRC's determination as to whether appellant was entitled to a lower bunk restriction was a function involving a high degree of discretion, we find it was entitled to immunity under R.C. 2743.02.

{¶12} Appellant cites a magistrate's decision from the Court of Claims, *Stewart v. Ohio Dept. of Rehab. & Corr.*, Ct. Cl. No. 2000-12351, 2002-Ohio-5495, to support his argument. However, *Stewart* is distinguishable from the facts in the present case. In *Stewart*, an inmate, Stewart, was issued lower bunk restrictions for approximately two years, based upon his seizures and a deformity of his foot and arm, until his final restriction expired, although he continued to sleep in a lower bunk. About one and one-half years after his final restriction expired, he was temporarily moved to a new dorm, and he was assigned an upper bunk. He informally requested that he be moved to a lower bunk but was told one was not available. A few days later, Stewart sought medical care and formally requested a lower bunk. A lower bunk restriction was denied, but he was scheduled to have a medical evaluation two weeks later. Before the medical evaluation was conducted, Stewart had a seizure, fell off his top bunk, and was injured. The next day, Stewart was issued a lower bunk restriction. Stewart filed a negligence action against DRC, and the magistrate for the Court of Claims rendered judgment in favor of Stewart. The magistrate concluded that Stewart's medical file, dating back ten years, documented a history of epilepsy, seizures, and paralysis; he had been issued numerous lower bunk restrictions based upon these conditions; and his appearance at the hearing demonstrated obvious deformity/paralysis.

{¶13} However, in the present case, appellant does not allege the same type of interminable, permanent disability like the inmate in *Stewart* demonstrated. Appellant suffered from a hernia that was being treated with Ibuprofen, while Stewart suffered from paralysis due to spinal meningitis, which he contracted during childhood; leg and arm deformities; and seizures. Appellant also does not present any allegations in his

complaint detailing a similar ten-year documented medical history of his disabilities. Further, appellant does not allege the type of visually obvious deformity and paralysis by which the magistrate in *Stewart* was clearly persuaded to find DRC was on notice of Stewart's need for a bunk restriction. The magistrate specifically noted that at trial Stewart's leg and arm appeared small and deformed, and he had obvious paralysis. In addition, in the present case, appellant does not allege he was actively denied a lower bunk restriction prior to his fall, as Stewart was prior to his injury. Therefore, we find *Stewart* unpersuasive.

{¶14} We also note appellant points to DRC's own written prison policy number B-19 to prove DRC was negligent in failing to allow him to remain on a lower bunk. However, in determining a motion to dismiss, a court cannot look beyond the allegations in the complaint. Appellant did not allege any violation of the prison's internal policies in his complaint and did not even mention any prison policies. Therefore, for the foregoing reasons, we find the trial court did not err when it found DRC was entitled to immunity. Appellant's first assignment of error is overruled.

{¶15} Appellant argues in his second assignment of error that the trial court erred when it granted DRC's motion for summary judgment as to the movement of appellant while he was disabled. When reviewing a motion for summary judgment, courts must proceed cautiously and award summary judgment only when appropriate. *Franks v. The Lima News* (1996), 109 Ohio App.3d 408. Civ.R. 56(C) provides that, before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to

but one conclusion, and viewing the evidence most strongly in favor of the non-moving party, that conclusion is adverse to the non-moving party. *State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 589, 1994-Ohio-130. When reviewing the judgment of the trial court, an appellate court reviews the case de novo. *Franks*.

{¶16} The party seeking summary judgment bears the burden of informing the trial court of the basis for the motion and identifying portions of the record demonstrating an absence of genuine issues of material fact as to the essential elements of the non-moving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. Thereafter, the burden shifts to the non-moving party to show why summary judgment is inappropriate. Civ.R. 56(E). If the non-movant fails to respond, or fails to support its response with evidence of the kind required by Civ.R. 56(C), the court may enter summary judgment in favor of the moving party. *Snyder v. Ford Motor Co.*, 3d Dist. No. 1-05-41, 2005-Ohio-6415, ¶11; Civ.R. 56(E).

{¶17} Here, appellant contends that he had a severe visible injury to his forehead, had a visible cut under his eye, had an inguinal hernia, and was in pain when DRC employees forced him to walk from his cell to a cart and change his own clothing, placed him in arm and leg shackles, and then made him walk outside to a transport van. Appellant asserts that DRC was negligent in disregarding his injuries and causing additional pain by forcing him to do these things. In granting summary judgment, the trial court found that appellant submitted insufficient evidence to rebut the evidence submitted by DRC in support of summary judgment.

{¶18} We agree with the trial court's assessment of the evidence submitted by the parties. In support of summary judgment, DRC submitted the affidavit of Richard Krauser, R.N., a nurse at RCI, who averred the following:

3. Through my employment at DRC, I have personal knowledge of DRC policies and procedures regarding inmate medical treatment and care.

4. As a policy and procedure at DRC, when an inmate allegedly falls from his/her bed, medical staff is summoned to begin administering medical care. The responding registered nurse and/or other certified medical professional assesses the condition of the inmate. As a part of providing treatment to the inmate, the responding medical professional determines how the inmate should be moved and/or transported from his/her cell if necessary or indicated.

5. Horace Brown, III, #508-733, is an inmate in the custody of DRC at RCI.

6. On April 4, 2009, I was working in the infirmary and received notification that Mr. Brown allegedly fell out of his bed and cut his head.

7. Pursuant to DRC policy and procedure, I, as the registered nurse assigned to respond to medical emergencies, reported to Mr. Brown's cell in Unit 2A to assess his condition. As a part of my treatment and care of Mr. Brown, I decided how to appropriately move him from his cell to the infirmary and ultimately to the transport van for further medical evaluation, treatment and care.

8. Based on my training, education and experience, it is my opinion, to a reasonable degree of medical certainty, that the medical decisions regarding Mr. Brown's care, transport and treatment met the generally accepted standards of medical care.

{¶19} In opposition to summary judgment, appellant submitted his own affidavit, most of which, as noted by the trial court, related to the claim regarding his lower bunk

restriction. The only portion relating to his claim regarding his transport after his injury was the following:

E.) He had a severe visible injury to his forehead and a visible cut under his eye and was in pain which was aggravated when correctional officers forced him to walk from his cell to the cart, change his clothes and walk to the van.

{¶20} After reviewing this evidence submitted by appellant and DRC, we agree with the trial court that appellant's averments were insufficient to rebut DRC's evidence demonstrating that there exist no genuine issues of material fact. Krauser offered affidavit testimony about the policies and procedures for transporting inmates when they are injured. Krauser averred to a reasonable degree of medical certainty that the decisions DRC made regarding how appellant was transported to receive medical treatment for his fall fell within the appropriate standards of medical care. Appellant's affidavit was devoid of any evidence to rebut this testimony. Appellant also presented no further evidence that DRC transported him in an unreasonable or negligent manner based upon the total circumstances. Thus, we find there were no genuine issues of material fact related to this claim, and the trial court did not err when it granted summary judgment on this claim. Therefore, appellant's second assignment of error is overruled.

{¶21} Accordingly, appellant's two assignments of error are overruled, and the judgments of the Ohio Court of Claims are affirmed.

*Judgments affirmed.*

SADLER and DORRIAN, JJ., concur.

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