

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Rafiq Jones,	:	
Plaintiff-Appellant,	:	
v.	:	No. 18AP-757 (Ct. of Cl. No. 2017-00798JD)
Ohio Department of Rehabilitation and Correction,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on March 12, 2019

On brief: *Rafiq Jones*, pro se.

On brief: [*Dave Yost*], Attorney General, and *Howard H. Harcha, IV*, for appellee.

APPEAL from the Court of Claims of Ohio

BRUNNER, J.

{¶ 1} Plaintiff-appellant, Rafiq Jones, appeals a decision of the Court of Claims of Ohio issued on September 12, 2018, granting summary judgment to defendant-appellee, Ohio Department of Rehabilitation and Correction ("ODRC"). Even though Jones responded to ODRC's motion for summary judgment by disputing factual matters, he did not meet his reciprocal burden to present evidence showing at least a genuine issue of fact on one of the essential elements of his claims. Thus, we affirm.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On October 2, 2017, Jones filed a complaint against ODRC alleging that when a guard threw him a roll of toilet paper, it struck him in the face causing permanent blindness to his left eye. (Oct. 2, 2017 Compl.) ODRC answered on November 9, 2017 and denied all of the allegations in the complaint. (Nov. 9, 2017 Answer.)

{¶ 3} Following discovery, on June 1, 2018 ODRC moved for summary judgment. (June 1, 2018 Mot. for Summ. Jgmt.) In support of its motion, ODRC attached the affidavits of the officer who threw the toilet paper, an officer who witnessed the throw, their commanding officer, and a nurse who examined Jones. (Exs. A-D, attached to Mot. for Summ. Jgmt.) ODRC's submission also included a signed handwritten recounting of the incident by Jones, incident reports by the affiant-officers, some medical records, and a video showing the incident from two angles. (Exs. A-1, B-1, C-1, D-1, & E, attached to Mot. for Summ. Jgmt.)

{¶ 4} All parties, records, and affidavits agree that Jones asked a guard, Taylor Graves, for toilet paper and that Graves threw it to him. It is also undisputed that Jones failed to catch it and that it struck him in the face. The affidavits of the two officers who saw the throw characterize it as a toss. (Graves Aff. at ¶ 4, Ex. A, attached to Mot. for Summ. Jgmt.; Eitner Aff. at ¶ 4, Ex. B, attached to Mot. for Summ. Jgmt.) These officers explain that Jones turned his attention to another inmate who was talking to him as the roll was tossed and, as a result, was struck lightly in the side of the face by the roll. (Graves Aff. at ¶ 4; Eitner Aff. at ¶ 4.) Both officers agree that Jones did not appear injured at the time and instead simply bent over, picked up the roll, and walked away. (Graves Aff. at ¶ 5; Eitner Aff. at ¶ 6.) Graves' affidavit further avers that Jones said he was fine. (Graves Aff. at ¶ 5.) The video recording shows two angles of the throw and impact, and in neither does Jones appear distressed nor does the impact appear substantial. (Ex. E, Video at 11:15:54-11:16:04.)

{¶ 5} More than one hour later, at what Graves' affidavit estimates to have been 1:00 p.m., Jones reported that his eye hurt and Graves gave him permission to visit the prison trauma room. (Graves Aff. at ¶ 5.) The registered nurse who examined Jones testified that Jones described the incident as follows, "I was turning my head, and I was struck in the face by a roll of toilet paper that the C.O. threw." (Broadus Aff. at ¶ 4, Ex. C, attached to Mot. for Summ. Jgmt.) The nurse's affidavit concludes that "Jones' left eye had no edema, discoloration, and no apparent injury." *Id.* at ¶ 5. Her affidavit mirrors the medical record of Jones' examination, prepared contemporaneously with the examination. (Medical Records, Ex. C-1, attached to Mot. for Summ. Jgmt.)

{¶ 6} Jones filed a response in opposition to summary judgment on July 2, 2018. (July 2, 2018 Resp. in Opp. to Summ. Jgmt.) Though Jones argued that his eye was injured, despite no medical finding of injury just subsequent to the alleged injury, and though he took issue with the guards' characterization of the throw as a toss, he submitted no evidentiary materials of any kind in connection with his response. *Id.* at 2-5.

{¶ 7} Based on the uncontroverted evidence presented by ODRC and Jones' failure to satisfy his reciprocal burden to present evidence pursuant to Ohio Rule of Civil Procedure 56(E), the Court of Claims granted summary judgment to ODRC. (Sept. 12, 2018 Decision at 4.) Jones now appeals.

II. ASSIGNMENTS OF ERROR

{¶ 8} Jones presents three assignments of error for review:

[1.] THE COURT OF CLAIMS ERRED WHEN IT GRANTED THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

[2.] THE COURT OF CLAIMS ERRED WHEN IT ARBITRARILY STATED THAT PLAINTIFF WAS NOT INJURED AND THAT THIS EVIDENCE IS UNCONTROVERTED.

[3.] THE COURT OF CLAIMS ERRED WHEN IT GRANTED SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANT, DESPITE THE FACT THAT THERE WAS A GENUINE ISSUE FOR TRIAL AS TO THE POLICIES THE DEFENDANT EMPLOYED AND HAS NOT REFORMED.

III. DISCUSSION

A. Standard of Review

{¶ 9} Civ.R. 56(C) provides that:

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.

Civ.R. 56(C). The Supreme Court of Ohio has explained:

Summary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party,

reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 Ohio Op. 3d 466, 364 N.E.2d 267. The burden of showing that no genuine issue of material fact exists falls upon the party who files for summary judgment. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 294, 1996 Ohio 107, 662 N.E.2d 264.

Byrd v. Smith, 110 Ohio St.3d 24, 2006-Ohio-3455, ¶ 10; see also, e.g., *Esber Beverage Co. v. Labatt United States Operating Co., L.L.C.*, 138 Ohio St.3d 71, 2013-Ohio-4544, ¶ 9.

{¶ 10} The Supreme Court has also discussed in detail the relative burdens of movant and nonmovant in a summary judgment context:

[A] party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then 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 nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.

Dresher v. Burt, 75 Ohio St.3d 280, 293 (1996). In deciding summary judgment, the trial court must give the nonmoving party "the benefit of all favorable inferences when evidence is reviewed for the existence of genuine issues of material facts." *Byrd* at ¶ 25. When reviewing a trial court's decision on summary judgment, our review is de novo and we therefore apply the same standards as the trial court. *Bonacorsi v. Wheeling & Lake Erie Ry.*, 95 Ohio St.3d 314, 2002-Ohio-2220, ¶ 24.

B. First Assignment of Error – Whether the Trial Court Erred in Ruling Against Jones when Jones Failed to Meet his Reciprocal Burden

{¶ 11} Jones argues that his failure to present an affidavit with which to resist ODRC's motion for summary judgment should not have resulted in an adverse ruling because Civ.R. 56 does not expressly require him to present an affidavit. (Jones' Brief at 8-18.) Civ.R. 56 does not limit parties litigating summary judgment to affidavits or require affidavits as a particular form of evidence, nor does it in every case require parties to submit additional evidence where the evidence in the record may already be sufficient to satisfy division (C) of the rule. *See, e.g.*, Civ.R. 56(A) (noting that a party may move "with or without supporting affidavits"). However, that does not mean that Jones did not have an evidentiary burden.

{¶ 12} It is well-established both by the plain text of the rule and the thousands of cases that have relied on it, that summary judgment is decided when "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." Civ.R. 56(C); *Byrd* at ¶ 10. It is also well-settled that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party [in this case, Jones] 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." Civ.R. 56(E). The sum result of those two sections is that, when a motion for summary judgment is made and supported with evidence of the types contemplated in Civ.R. 56, the nonmoving party has a reciprocal burden to respond with evidence of some type contemplated in Civ.R. 56 in order to demonstrate that there is a genuine question as to some material fact. *Dresher* at 293.

{¶ 13} Where, as here, a movant does not submit any evidence to meet that reciprocal burden, the nonmovant may still argue, even under the undisputed facts as shown by the moving party's evidence, the moving party is not entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 14} However, that is not what Jones attempted in this case. Jones responded to ODRC'S motion for summary judgment by disagreeing in his filings (but without evidentiary support) with the facts shown by the various items of evidence submitted by

ODRC's witnesses. *See* July 2, 2018 Resp. in Opp. to Summ. Jgmt. at 2-3 (arguing that the registered nurse did not accurately diagnose his eye injury and arguing that the evidence that the roll "lightly" struck him was "merely the Defendant's version of the events"). In short, Jones sought to show a genuine factual dispute, but did not present evidence to support his showing. In circumstances such as this, where the nonmoving party has failed to meet his reciprocal burden, "summary judgment, if appropriate, shall be entered against the nonmoving party." *Dresher* at 293.

{¶ 15} Jones' first assignment of error is overruled.

C. Second Assignment of Error – Whether the Trial Court Erred in Failing to Consider the Change in his Vision Status as an Injury

{¶ 16} Jones argues that institutional records show that he had fine vision when he entered the prison system and that his change of status is therefore evidence that he was injured by the toilet paper roll. (Jones' Brief at 18-19.) We do not see the evidence supporting such an argument.

{¶ 17} ODRC presented evidence in the form of affidavits from witnesses to the incident and a nurse who examined Jones within hours of the incident to show that Jones was not struck blind by the toilet paper roll. (Graves Aff. at ¶ 4-6; Eitner Aff. at ¶ 4-6; Broadus Aff. at ¶ 4-5.) Although it is clear from his filings that Jones alleges he was injured, he presented no evidence to support that contention. (Resp. in Opp. to Summ. Jgmt., in *passim*.) His brief, for example refers to "medical records" by an "optometrist," but Jones did not submit any such records to the trial court and they are also not before this Court on appeal. (Jones' Brief at 18-19.)

{¶ 18} Jones' second assignment of error is overruled.

D. Third Assignment of Error – Whether the Trial Court Erred in Failing to Consider the Alleged Failure of ODRC to Reform its Policies

{¶ 19} Jones argues that the trial court erred in refusing to consider the allegation that ODRC did not reform its policies regarding how objects are passed to inmates. (Jones' Brief at 19-20.) Jones has not submitted information regarding any such policies and does not explain why such material would alter the result in this case (where the major defect is the lack of evidence that he is injured or that the toilet paper roll caused his injury). Moreover, subsequent remedial measures (such as policy reform) are specifically excluded

by Evid.R. 407, as evidence to prove negligence or culpable conduct. That is, the rule provides:

When, after an injury or harm allegedly caused by an event, measures are taken which, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.

Id.

{¶ 20} Jones' third assignment of error is overruled.

IV. CONCLUSION

{¶ 21} ODRC substantiated its motion for summary judgment with evidence of the type contemplated by Civ.R. 56. Jones' response to that motion argued that his version of the toilet paper incident was the truth but failed to present any evidence of the type contemplated by Civ.R. 56 to support his factual assertions. As such, he failed to show a genuine issue of material fact and, under the facts as shown by ODRC's evidence, ODRC was entitled to judgment as a matter of law. We therefore overrule all three of Jones' assignments of error and affirm the judgment of the Court of Claims of Ohio.

Judgment affirmed.

BEATTY BLUNT and HANDWORK, JJ., concur.

HANDWORK, J., retired, formerly of the Sixth Appellate
District, assigned to active duty under authority of
Ohio Constitution, Article IV, Section 6(C).
