[Cite as *Jones v. Lucas Cty. Sheriff's Med. Dept.*, 2012-Ohio-1398.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Charles Jones

Appellant

v.

Lucas County Sheriff's Medical Department, et al.

Appellees

Court of Appeals No. L-11-1196

Trial Court No. CI0200801010

DECISION AND JUDGMENT

Decided: March 30, 2012

* * * * *

Charles Jones, pro se.

Julia R. Bates, Lucas County Prosecuting Attorney, and
Andrew K. Ranazzi, Assistant Prosecuting Attorney, for appellees.

* * * * *

SINGER, P.J.

{¶ 1} Appellant, Charles Jones, appeals a decision from the Lucas County Court of Common Pleas granting summary judgment to appellees, Karen Zoliak, Valerie Sylvester, and the Lucas County Sheriff's medical department.

{¶ 2} The facts giving rise to this appeal are as follows. On January 2, 2008, appellant filed a pro se complaint against appellees. Appellant alleged that while in custody on October 2, 2007, nurse Zoliak administered the wrong medication, causing him to fall and injure his shoulder. He further alleged that the medical department staff denied him treatment for his shoulder, and either gave him no medication or incorrect medication on six different dates between October 22, 2007, and December 12, 2007. Appellant alleged that he reported these failures to the jail, but medical director Sylvester failed to adequately respond to his reports.

{¶ 3} Appellees filed an answer, asserting immunity as an affirmative defense to all claims. On July 22, 2008, appellees filed a Civ.R. 12(C) motion based upon the defense of R.C. 2744.03 immunity. The trial court denied the motion on October 28, 2008, and appellees appealed. This court affirmed the judgment, noting that the allegation of "cover up," if proven, states a claim as an exception to immunity under R.C. 2744.03(A)(6)(b).

{¶ 4} On August 18, 2009, appellant filed a motion for summary judgment. Appellees filed no response. On July 12, 2010, the trial court denied the motion.

{¶ 5} On February 24, 2011, appellees filed a motion for summary judgment. Appellant filed his motion in opposition and appellees filed a reply. On July 5, 2011, the trial court granted the motion and dismissed the claim with prejudice. The trial court noted that while the general allegations barred judgment on the pleadings, appellant argued no facts to demonstrate the R.C. 2744.03(A)(6) exception to the immunity.

{¶ 6} Appellant now appeals arguing that the trial court erred in granting summary judgment to appellees.

{¶ 7} On review, appellate courts examine a grant of summary judgment de novo, *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996), applying the same standard as trial courts. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (1989). The motion may be granted only when it is demonstrated:

> (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) 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, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978), Civ.R. 56(C).

{¶ 8} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact.

Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984). A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (1999); *Needham v. Provident Bank*, 110 Ohio App.3d 817, 826, 675 N.E.2d 514 (1996), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

{¶ 9} Appellant's complaint alleged negligent administering of medication, denial of treatment, and a "cover up." Appellees sought summary judgment pursuant to R.C. 2744.03 immunity. The employees of a political subdivision enjoy immunity, unless the acts or omissions were "outside the scope of employment" or "with malicious purpose, in bad faith, or in a wanton or reckless manner." R.C. 2744.03(A)(6)(a)-(b). Appellees demonstrated that immunity applies, shifting the burden to appellant to demonstrate the exceptions.

{¶ 10} For summary judgment, appellees "need only identify, by specific reference to the record and not in conclusory terms, those aspects of the non-moving party's claim that are unsupported by the evidence or supported by insufficient evidence." *Paul v. Uniroyal Plastics Co.*, 62 Ohio App.3d 277, 281-282, 575 N.E.2d 484 (6th Dist.1988). The moving party need not introduce affirmative evidence to refute the non-moving party's claims. *Id.* The statute provides appellees a full defense unless appellant can demonstrate such conduct pursuant to the statute. *See Hawk v. Am. Elec. Power Co.*, 3d Dist. No. 1-04-65, 2004-Ohio-7042, ¶ 10.

{¶ 11} However, a 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. *Dresher* at 274. 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 non-moving party has no evidence to support the nonmoving party's claims. *Id.*

{¶ 12} Appellees argue that since the complaint in 2008, appellant has not provided any evidence in support of his claims sufficient to defeat a motion for summary judgment against him. A complaint must contain direct or inferential allegations respecting all of the material elements necessary to sustain a recovery under some viable legal theory. *Lewis v. ACB Business Servs., Inc.*, 135 F.3d 389, 406 (6th Cir.1998). Notice pleading requires more than bare assertions of legal conclusions. *Sogevalor v. Penn Cent. Corp.*, 771 F.Supp. 890, 893 (S.D.Ohio 1991). Only well-pleaded facts must be taken as true, not legal conclusions or unwarranted factual inferences. *Lewis* at 405. Although all the factual allegations in the complaint must be taken as true for the purposes of a motion to dismiss, legal conclusions couched as factual allegations do not need to be accepted as true. *Papasan v. Allian*, 478 U.S. 265, 106 S.Ct. 2932 (1986). Appellees also point to the answer and all pleadings, in addition to the complaint, supporting their motion for summary judgment.

{¶ 13} Appellant must prove more than negligence. The statutory standard of "malicious purpose, bad faith, or wanton or reckless manner" is a more rigorous standard

of care than is required under a negligence theory of liability. *Poe v. Hamilton*, 56 Ohio App.3d 137, 138, 565 N.E.2d 887 (12th Dist.1990). In R.C. 2744.03(A)(6)(b), the word "reckless" is associated with the words "malicious purpose," "bad faith," and "wanton," all of which suggest conduct more egregious than simple carelessness. *Id.* Reckless manner means perversely disregarding a known risk. *Id*. Wanton misconduct is the failure to exercise any care whatsoever. *Browning v. City of Fostoria*, 3d Dist. No. 13-09-28, 2010-Ohio-2163, ¶ 22.

{¶ 14} The only part of the record in appellant's favor is five signed unsworn statements. Four are handwritten by individuals, stating that they saw appellant receiving "wrong" medication on October 2, 2007, and that appellant later fell and injured his shoulder. One is handwritten by appellant and signed by a nurse, acknowledging that a wrong medication was given on December 12, 2007. However, the four statements generally allege that the medication given to appellant was "wrong" on October 2, 2007, without citing how or why they believe it is "wrong." The unsworn statement signed by a nurse indicates neither what medication should have been given nor what was in fact given. A non-moving party such as appellant "may not avoid summary judgment solely by submitting a self-serving affidavit." *Belknap v. Vigorito*, 11th Dist. No. 2003-T-0147, 2004-Ohio-7232, ¶ 27. "[U]nsworn letter * * * is not the type of evidence that a trial court is permitted to consider in a summary judgment exercise." *Diakakis v. W. Res. Veterinary Hosp.*, 11th Dist. No. 2004-T-0151, 2006-Ohio-201, ¶ 22.

{¶ 15} Appellant incorporated in the complaint the statutory buzz words such as "malicious" purpose, "bad faith," or "wanton or reckless" manner, but the record demonstrates, at best, an incident of receiving wrong medication.

{¶ 16} Appellant failed to respond with specific facts showing that there is a genuine issue of material fact. Appellant's argument is unsupported by evidence and without merit, and the trial court did not err in granting summary judgment to appellees. The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A)(2).

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE