

[Cite as *Miller v. Ohio Dept. of Rehab. & Corr.*, 2012-Ohio-3382.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Elliot Miller,	:	
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	No. 12AP-12
	:	(Ct. of Cl. No. 2011-09667)
Ohio 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, 2012

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*Elliot Miller, pro se.*

*Michael DeWine, Attorney General, Craig S. Rapp, and  
Ashley L. Oliker, for appellee.*

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APPEAL from the Court of Claims of Ohio.

FRENCH, J.

{¶ 1} Plaintiff-appellant, Elliot Miller ("appellant"), appeals the judgment of the Court of Claims of Ohio, which granted summary judgment in favor of defendant-appellee, Ohio Department of Rehabilitation and Correction ("DRC"). For the following reasons, we affirm.

**I. BACKGROUND**

{¶ 2} On July 21, 2011, appellant, an inmate at the Mansfield Correctional Institution, filed a complaint in which he alleged that two corrections officers assaulted him on March 24, 2011. He alleged claims of assault and battery, negligence, and breach of common law duty. DRC filed an answer that denied the allegations.

{¶ 3} On October 31, 2011, DRC filed a motion for summary judgment. DRC contended that appellant's allegations amounted to an allegation of excessive force by the two named corrections officers. DRC further contended, however, that the officers did not use excessive force against appellant when they responded to a call that appellant was fighting with other inmates, found that he was intoxicated, and attempted to remove him from the cell block. In support, DRC submitted affidavits from the two officers.

{¶ 4} On November 8, 2011, appellant filed a response to DRC's motion. In his motion, he stated, and provided letters to the effect, that Mark Griffin, Sr., a fellow inmate, had complained of excessive force by corrections officers to the Correctional Institution Inspection Committee of the Ohio General Assembly. Appellant also submitted Griffin's affidavit.

{¶ 5} On December 20, 2011, the trial court issued an entry granting DRC's motion for summary judgment. The court found that appellant had not submitted evidence to oppose the affidavits submitted by DRC. Rather, the evidence appellant submitted did not relate specifically to the incident at issue in appellant's complaint.

## **II. ASSIGNMENTS OF ERROR**

{¶ 6} Appellant filed a timely notice of appeal. In his brief, he does not identify specific assignments of error, in violation of App.R. 16(A)(3). In the interest of justice, we will interpret appellant's "Statement Of Issues Presented For Review" as assignments of error, as follows:

[I] Whether Corrections officers M. Lewis and J. Wojcie[c]howski breached a common law duty owed to [appellant] by depriving him to be free from personal injuries and abuse from staff.

[II] Whether the foregoing claims against defendants were intentional and/or negligently applied to cause personal injury(ies) to [appellant].

[III] Whether correction[s] officers M. Lewis and J. Wojciechowski, defendants exerted unnecessary Use of Force, (Assault and Battery) on [appellant], "after he clearly surrendered, showing absolutely no resistance and doing so by exiting his cell with his hands raised and then, immediately lying face down on the floor[.]"

[IV] Whether the Mansfield Correctional Institution violated [appellant's] Fourteenth Amendment Right of "Due Process" By not initiating a use of force hearing "after [appellant's fiancé] called state highway patrol and the institution as well as [appellant] requesting a use of force hearing via institution kite and grievance procedure.

[V] Whether the use of force hearing was an "advers[ar]ial administrative matter[.]"

[VI] Whether defendant's actions/conduct constitutes a violation of the [appellant's] constitutional right.

[VII] Whether [appellant], is entitled to relief due to the obvious violation(s) of rule, policy and law.

### III. DISCUSSION

{¶ 7} We will address appellant's first, second, third, and seventh assignments together, as they all appear to contend that the trial court erred by granting summary judgment in favor of DRC. We review a summary judgment de novo by independently reviewing the judgment, without deference to the trial court's determination. *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994), citing *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711 (4th Dist.1993). We apply the same standard as the trial court and must affirm the judgment if any grounds the movant raised in the trial court support it. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42 (9th Dist.1995).

{¶ 8} Pursuant to Civ.R. 56(C), 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." Accordingly, summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1978). Because summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving all doubts in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59 (1992), quoting *Norris v. Ohio Std. Oil Co.*, 70 Ohio St.2d 1, 2 (1982).

{¶ 9} When a party moves for summary judgment on the ground that the nonmoving party cannot prove its case, the movant bears the initial responsibility 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 an essential element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). If the moving party meets its initial burden, the non-movant must set forth specific facts demonstrating a genuine issue for trial. *Id.* at 293.

{¶ 10} In his complaint, appellant alleged assault and battery, negligence, and breach of duty, all arising from the use of force against him by corrections officers. Before this court, appellant contends that the trial court rushed to judgment on his claims and failed to consider evidence in his favor. We disagree.

{¶ 11} To prove assault under Ohio law, plaintiff must show that the defendant willfully threatened or attempted to harm or touch the plaintiff offensively in a manner that reasonably placed the plaintiff in fear of the contact. *Stafford v. Columbus Bonding Ctr.*, 177 Ohio App.3d 799, 2008-Ohio-3948, ¶ 17 (10th Dist.). To prove battery, the plaintiff must prove that the intentional contact by the defendant was harmful or offensive. *Id.* Ohio courts have held that, in a civil action for assault and battery, the

defendant has the burden of proving a defense of justification, such as the exercise of lawful authority. See *White v. Amon*, 7th Dist. No. 79 C.A. 48 (Mar. 25, 1980).

{¶ 12} For a claim based on negligence, a plaintiff must prove by a preponderance of the evidence that the defendant breached a duty owed to him and that he sustained an injury proximately caused by the breach. *Ensmann v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 06AP-592, 2006-Ohio-6788, ¶ 5, citing *Strother v. Hutchinson*, 67 Ohio St.2d 282, 285 (1981). As to prison inmates, Ohio law imposes a duty of reasonable care upon the state to provide for its prisoners' health, care, and well-being. *Ensmann* at ¶ 5, citing *Clemets v. Heston*, 20 Ohio App.3d 132, 136 (6th Dist.1985).

{¶ 13} This court has recognized "that the use of force is an obvious reality of prison life, and the precise degree of force required to respond to a given situation requires an exercise of discretion by the corrections officer." *Ensmann* at ¶ 23. Ohio Adm.Code 5120-9-01, which appellant cites, identifies the circumstances under which an officer may use force and what force he or she may use. More specifically, Ohio Adm.Code 5120-9-01(C)(2) identifies six circumstances under which an officer may use less-than-deadly force against an inmate, including "[w]hen necessary to control or subdue an inmate who refuses to obey prison rules, regulations or orders." Ohio Adm.Code 5120-9-01(C)(2)(c). The rule defines "excessive force" as force that exceeds what reasonably appears to be necessary under all the surrounding circumstances. See Ohio Adm.Code 5120-9-01(B)(3).

{¶ 14} In their affidavits, the officers stated that they responded to a call that appellant was fighting with other inmates. When they arrived at the scene, appellant was intoxicated. They attempted to escort appellant out of the cell block, but he resisted. After appellant became combative, refused to walk, and refused to obey direct orders, the officers gave appellant "a short burst of o.c."<sup>1</sup> According to the officers, they used no other force. They each stated: "The force used was necessary to control or subdue [appellant] who refused to obey prison rules, regulations, or orders." The affidavits, then, provided evidence that the use of force was justified and lawful pursuant

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<sup>1</sup>This appears to be a reference to Oleoresin Capsicum, also known as pepper spray. See [www.Reference.com](http://www.Reference.com).

to Ohio Adm.Code 5120-9-01(C)(2)(c) and, therefore, that was sufficient to defeat appellant's claims of assault and battery, negligence, and breach of duty.

{¶ 15} While appellant alleged in his complaint, and argues here, that the officers used excessive force upon him even though he cooperated with them and obeyed their demands, there was no evidence before the trial court to support appellant's allegations, and DRC's evidence remained undisputed. Therefore, the trial court did not err in granting summary judgment in favor of DRC on appellant's claims. Accordingly, we overrule appellant's first, second, third, and seventh assignments of error.

{¶ 16} In his fourth, fifth, and sixth assignments of error, appellant contends that DRC violated his constitutional rights to due process by failing to conduct a use-of-force hearing, which he contends is an "'advers[ar]ial administrative matter.'" In his complaint, appellant alleged that he was never interviewed concerning the officers' use of force and that the institution did not allow an investigation because it would prove the assaults by the staff. Appellant's complaint did not, however, raise a constitutional issue regarding this alleged lack of investigation, nor could it have done so properly because the trial court would have lacked jurisdiction to consider the issue. *See Baker v. Dept. of Rehab. & Corr.*, 10th Dist. No. 11AP-987, 2012-Ohio-1921, ¶ 9. Therefore, appellant could not have succeeded on these claims. Accordingly, we overrule appellant's fourth, fifth, and sixth assignments of error.

#### **IV. CONCLUSION**

{¶ 17} For all these reasons, we overrule appellant's assignments of error. We affirm the judgment of the Court of Claims of Ohio.

*Judgment affirmed.*

BRYANT and KLATT, JJ., concur.

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