

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Jerry Franks,	:	
Plaintiff-Appellant,	:	
v.	:	No. 12AP-442
Ohio Department of Rehabilitation and Correction,	:	(Ct. of Cl. No. 2009-07415)
Defendant-Appellee.	:	(REGULAR CALENDAR)
	:	

D E C I S I O N

Rendered on April 16, 2013

Swope and Swope - Attorneys at Law, and Richard F. Swope,
for appellant.

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

APPEAL from the Court of Claims of Ohio

CONNOR, J.

{¶ 1} Plaintiff-appellant, Jerry Franks ("appellant"), appeals from a judgment of the Court of Claims of Ohio granting summary judgment for defendant-appellee, Ohio Department of Rehabilitation and Correction ("ODRC").

{¶ 2} Appellant, an inmate at the London Correctional Institution ("LCI"), filed a complaint in the Court of Claims alleging that ODRC was liable for injuries he suffered in a fall as a result of the prison medical staff's failure or refusal to grant him a medically necessary restriction in the form of a "bottom bunk/bottom range" housing assignment.

{¶ 3} The Court of Claims initially granted judgment on the pleadings in the case, and we reversed. *Franks v. Ohio Dept. of Rehab. & Corr.*, 195 Ohio App.3d 114, 2011-Ohio-2048 (10th Dist.) ("*Franks I*"). ODRC then applied for reconsideration of our decision or en banc review, which we denied. *Franks v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 10AP-770 (July 14, 2011) (memorandum decision).

{¶ 4} Upon remand, the Court of Claims has now entered summary judgment in favor of ODRC, and appellant brings the following two assignments of error:

[I.] THE TRIAL COURT ERRED IN GRANTING DEFENDANT-APPELLEE'S OHIO DEPARTMENT OF REHABILITATION AND CORRECTION'S MOTION FOR SUMMARY JUDGMENT.

[II.] THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN THE FACTS CLEARLY ESTABLISH THAT THERE IS AN ISSUE AS TO PLAINTIFF-APPELLANT'S REQUEST FOR AN ACCOMMODATION AVAILABLE TO ALL SUFFERING FROM CHRONIC CONDITIONS DOCUMENTED IN DEFENDANT-APPELLEE'S RECORDS.

{¶ 5} We initially note that this matter was decided in the trial court by summary judgment, which under Civ.R. 56(C) may be granted only when there remains no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, that conclusion being adverse to the party opposing the motion. *Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 629 (1992), citing *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64 (1978). Additionally, a moving party cannot discharge its burden under Civ.R. 56 simply by making conclusory assertions that the non-moving party has no evidence to prove its case. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). Rather, the moving party must point to some evidence that affirmatively demonstrates that the non-moving party has no evidence to support each element of the stated claims. *Id.* An appellate court's review of summary judgment is de novo. *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994); *Bard v. Soc. Natl. Bank, nka KeyBank*, 10th Dist. No. 97APE11-1497 (Sept. 10, 1998). Thus, we conduct an independent review of the record and stand in the shoes of

the trial court. *Jones v. Shelly Co.*, 106 Ohio App.3d 440, 445 (5th Dist.1995). As such, we have the authority to overrule a trial court's judgment if the record does not support any of the grounds raised by the movant, even if the trial court failed to consider those grounds. *Bard*.

{¶ 6} The available facts of the case have not significantly evolved since it was last before us. Appellant asserts that he suffers from various medical conditions, including Crohn's disease, severe muscle spasms, neurological weakness in his legs, and a bad knee. He alleges that at the time of injury he was undergoing chemotherapy and that this treatment impaired his ability to walk and maintain his balance. Over the course of his incarceration, appellant has benefited from various accommodations for these conditions, including bottom bunk/bottom range restrictions, no-standing orders, and authorization to use a cane.

{¶ 7} Appellant specifically alleges that, in May 2009, he was moved from lower-level housing to a cell on the third floor of LCI. He claims that he visited the infirmary on May 6, 2009, the day after his transfer, seeking a medical restriction to return to a cell or dorm where he would not be forced to use stairs. Rather than issue the requested temporary medical restriction, the nurse who examined him scheduled appellant to see a doctor on May 9, 2009. Appellant alleges that before the date of that appointment he fell down the stairs due to his illnesses and weakened condition and was severely injured.

{¶ 8} Appellant's first assignment of error asserts that the trial court erred in granting summary judgment because there remained a genuine issue of material fact on the elements of his negligence claim. Appellant's brief on appeal makes clear that he intends to frame this claim not as a medical malpractice action, but presents it as a simple negligence action pursuant to the "common knowledge" exception for medically related claims set forth in *Jones v. Hawkes Hosp. of Mt. Carmel*, 175 Ohio St. 503 (1964). Such cases involve claimed negligence in a medical context that does not rely upon a lapse in the professional skills and judgment of medical personnel, but relates to actionable conduct that would lie within the common knowledge of and experience of a layperson. *Id.* Examples of such conduct would include gross inattention or miscommunication with a patient. *Cunningham v. Children's Hosp.*, 10th Dist. No. 05AP-69, 2005-Ohio-4284,

¶ 1. A "common knowledge" claim sounds in ordinary negligence and does not invoke the specialized elements of a professional malpractice claim. *Hawkes* at 506. As a result such claims do not require the plaintiff to establish by expert testimony the appropriate standard of care and proximate cause as elements of the case, nor to attach to the complaint an affidavit of merit pursuant to Civ.R. 10(D).

{¶ 9} We therefore consider first whether appellant's claim is in fact one for professional malpractice, or whether it is an ordinary negligence claim under the common knowledge exception or any other theory. If the claim is one for professional malpractice, it fails for lack of the required affidavit of merit and expert evidence. Only if the complaint and subsequent evidence define an ordinary negligence claim will we proceed to examine whether there remains a genuine issue of material fact on all the elements of such a claim.

{¶ 10} We begin by noting that ODRC has argued that, regardless of the nature of the claim, the discretionary immunity doctrine under *Reynolds v. State Div. of Parole & Community Servs.*, 14 Ohio St.3d 68 (1984), applies to preclude liability. ODRC cites *Brown v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 10AP-790, 2011-Ohio-3652, for the proposition that an institution's failure to assign an inmate to a lower bunk/lower range assignment represents a basic policy decision characterized by the exercise of a high degree of official judgment or discretion. *Brown*, in fact, directly conflicts with our previous decision in the present case on this point. *Franks I* at ¶ 14-16. Fortunately, however, this court recently resolved this internal conflict when we decided the case of *Foster v. Ohio Dept. of Rehab. & Corr.*, _____ Ohio St.3d _____, 2013-Ohio-912, in which we examined both *Brown* and *Franks I* and determined that *Brown* was decided in error on this point. Based upon the law of the case in the present matter set forth in our previous decision in *Franks I*, and our recent precedential decision in *Foster*, we find that ODRC is not entitled to discretionary immunity in the present case.

{¶ 11} ODRC alleged that appellant's claim is a "medical claim" as defined by R.C. 2305.113(E)(3), that is, a claim "asserted in any civil action against a physician, podiatrist, hospital, home, or residential facility, against any employee or agent of a physician, podiatrist, hospital, home, or residential facility, or against a licensed practical nurse,

registered nurse, advanced practice nurse, physical therapist, physician assistant, emergency medical technician-basic, * * * and that arises out of the medical diagnosis, care, or treatment of any person." In our initial decision in this case, we reversed judgment on the pleadings in favor of ODRC primarily because appellant's complaint did not explicitly state that it sought to bring a malpractice claim, and ODRC's answer did not correspondingly assert that it was a "medical provider" as defined in R.C. 2305.113. Concomitantly, we specifically held that ODRC could, if appropriate evidence were introduced, be defined as a medical provider under R.C. 2305.113(E) defending a malpractice claim. *Franks I* at ¶ 10.

{¶ 12} In later support of summary judgment on this point, ODRC presented the affidavit of its employee Kristine Rumer, a registered nurse, who set forth averments made pursuant to her personal knowledge of institution practices and rules. These included her review of medical records and her familiarity with an institutional directive known as Protocol B-19, establishing guidelines for determination of inmate medical restrictions. Rumer averred that all medical services in the prison infirmary, including nurses and doctors, are furnished by ODRC employees or persons working under a personal services contract with ODRC.

{¶ 13} Rumer further avers that, at the time of the fall, appellant had no active medical restrictions. Furthermore, appellant's records did not reflect a visit to the medical center, as he claimed, on May 6, 2009, but showed a last visit on April 28, 2009.

{¶ 14} The essence of appellant's claim is that a nurse failed to properly assess his physical condition and assign him the appropriate institutional restriction. On the face of the evidence, given the affidavits submitted in support of and in opposition to summary judgment, the medical determination of appellant's condition and the appropriate restrictions would not fall within the common knowledge exception. The provisions of Protocol B-19, issued by ODRC's Office of Correctional Health Care, call for medical restrictions to be issued in cases of "health problems that are likely to cause severe or life threatening consequences." Protocol B-19 at IV(A)(1). Restrictions are to be ordered by "the institution physician or other advanced medical personnel." Protocol B-19 at IV(A)(2). "Nurses may order *temporary* medical restrictions for inmates with short term,

acute illnesses * * * for no more than three days." (Emphasis added.) Protocol B-19 at IV(A)(4). Appellant does not allege that the applicable ODRC standards and rules are negligently formulated. He alleges that they were negligently applied by a nurse in the prison infirmary.

{¶ 15} In *Foster*, we addressed similar issues regarding the status of a claim based on prison medical personnel's refusal to order a bottom bunk/bottom range restriction. While we did not base our decision on the common knowledge exception, we did find an inmate's claim on such facts was one for ordinary negligence:

In the case at bar, ODRC failed to provide evidence, through affidavit or otherwise, that [the prison infirmary physician] had provided appellant with medical diagnosis, care, or treatment. Rather, ODRC's affidavit established only that [the physician] had (1) issued a short-term lower-bunk restriction that had lapsed, (2) had re-evaluated appellant at the time the restriction expired, and (3) had refused to renew the lower-bunk restriction. Where a medical examination is conducted as a precondition to obtaining a benefit or to obtain information concerning a person's eligibility for a benefit, that examination is distinguishable from one occurring in the diagnosis, care or treatment of a person, as requisite to a medical claim. *Smith v. Katzman*, 81 Ohio App.3d 682, 686 (8th Dist.1992) (alleged negligence in conducting a medical examination for purpose of application for Social Security benefits was not a medical claim, citing *New York Cent. RR. Co. v. Wiler*, 124 Ohio St. 118 (1931) (alleged negligence in conducting a medical examination at direction of employer was not a medical malpractice claim)).

Foster at ¶ 34.

{¶ 16} Based upon our holding in *Foster*, we conclude that the trial court here erred in granting summary judgment for ODRC to the extent that summary judgment is based on the Court of Claims' conclusion that appellant is attempting to bring a medical malpractice claim and has failed to meet the special pleading requirements and evidentiary burdens associated with such an action. We therefore proceed to examine the elements of an ordinary negligence claim to determine whether appellant has maintained a genuine issue of material fact on each contested element and precluded summary judgment.

{¶ 17} To maintain his ordinary negligence claim, appellant must show (1) the existence of a duty owed to him by the defendant, (2) a breach of that duty, and (3) injury proximately resulting from that breach. *Strother v. Hutchinson*, 67 Ohio St.2d 282, 285 (1981). "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." *Woods v. Ohio Dept. of Rehab. & Corr.*, 130 Ohio App.3d 742, 745 (10th Dist.1998), citing *McCoy v. Engle*, 42 Ohio App.3d 204, 207 (1987). The state, however, is not an insurer of inmate safety and owes the duty of ordinary care only to inmates who are foreseeably at risk. *Id.* at 745, citing *McAfee v. Overberg*, 51 Ohio Misc. 86 (Ct. of Cl.1977). Because the state's compliance with its duty of care owed to prisoners will turn on the foreseeability of the eventual injuries, *Jeffers v. Olexo*, 43 Ohio St.3d 140 (1989), breach must be assessed in light of the individual factual circumstances. *Clemets v. Heston*, 20 Ohio App.3d 132 (6th Dist.1985). "Reasonable or ordinary care is that degree of caution and foresight that an ordinarily prudent person would employ in similar circumstances." *Woods* at 745, citing *Smith v. United Properties, Inc.*, 2 Ohio St.2d 310 (1965).

{¶ 18} ODRC primarily supported its motion for summary judgment in the Court of Claims with arguments casting the present action as one for medical malpractice, with complementary arguments raising the defense of discretionary immunity. While ODRC did briefly argue in the alternative, that even an ordinary negligence action would fail, it supported this line of defense only by asserting that appellant had failed to point out any inherently dangerous condition on the prison premises. (Jan. 23, 2012 Motion for Summary Judgment, 6.) The facts alleged in appellant's negligence claim, however, do not assert nor rely on any defect in the stairway in which he allegedly fell. The gist of his claim is that it was unreasonably dangerous to require an inmate in appellant's medical condition to negotiate *any* stairs, even those that might be deemed perfectly suitable for an unimpaired inmate. ODRC's motion for summary judgment, therefore, does not point to some evidence that affirmatively demonstrates that the nonmoving party has no evidence to support each element of the stated claims as required by *Dresher*. In the

absence of any such evidence, appellant has preserved a genuine issue of material fact on each element of his negligence claim, and summary judgment was granted in error.

{¶ 19} In summary, we find that the pleadings and evidence establish that appellant's claim is one for ordinary negligence on the part of prison medical staff, not medical malpractice, and that the trial court erred in granting summary judgment for ODRC on this claim. Appellant's first assignment of error is sustained.

{¶ 20} Appellant's second assignment of error asserts that the trial court erred in granting summary judgment on his claim under the Americans with Disabilities Act ("ADA"). To sustain such a claim, appellant must establish that he was a qualified individual with a disability, that ODRC is subject to the ADA, and that he was denied the opportunity to participate in or benefit from ODRC's services, programs, or activities or was otherwise discriminated against by the department by reason of his disability. *Franks I* at ¶ 17. In order to demonstrate discrimination based on disability, appellant must demonstrate that ODRC denied him a reasonable accommodation and that he requested such an accommodation. *Thomson v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 09AP-782, 2010-Ohio-416, ¶ 26.

{¶ 21} Based upon the evidence submitted in support of and opposition to summary judgment, there does not remain a genuine issue of material fact on this claim. ODRC presented an affidavit from J. Noble stating that he or she is the deputy warden at LCI. The affidavit avers that the institution has an ADA coordinator pursuant to internal policy section 64-DCM-02. The policy is available for inmate review, and provides a procedure for inmate requests, for disability accommodation. Institutional records do not reflect formal requests pursuant to policy and procedures by appellant, for such an ADA accommodation. Furthermore, appellant's own affidavit does not aver that he requested such an accommodation in the context of the ADA. In the absence of such a request, appellant cannot establish that he was denied accommodation, and cannot maintain a genuine issue of material fact on this element of his claim. The Court of Claims therefore properly granted summary judgment on appellant's ADA claim, and appellant's second assignment of error is overruled.

{¶ 22} In conclusion, appellant's first assignment of error is sustained, and appellant's second assignment of error is overruled. The judgment of the Court of Claims of Ohio granting summary judgment in favor of appellee, Ohio Department of Rehabilitation and Correction, is affirmed as to appellant's ADA claim and reversed as to his claim for simple negligence. The matter is remanded to the Court of Claims of Ohio for further proceedings.

*Judgment affirmed in part
and reversed in part;
cause remanded.*

KLATT, P.J. and DORRIAN, J., concur.
