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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000302-MR

MILTON KENNEY — APPELLANT

v.

APPEAL FROM LEE CIRCUIT COURT
HONORABLE WILLIAM W. TRUDE, JR., JUDGE
ACTION NO. 05-CI-00104

MARSHA ARNOLD — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DIXON AND VANMETER, JUDGES.

VANMETER, JUDGE: Milton Kenney appeals *pro se* from the Lee Circuit Court's order granting Marsha Arnold's motion to dismiss Kenney's claim against her. Kenney argues on appeal that the circuit court erred by failing to treat Arnold's motion as one for summary judgment, by ruling on the motion before receiving Kenney's response, and by granting the motion. For the following reasons, we affirm.

While Kenney was incarcerated at the Lee Adjustment Center, he became acquainted with Arnold, a correctional officer. Arnold alleged that when she was

working on October 16, 2004, Kenney asked if he could get a mop. Arnold unlocked a closet door and turned on the light, and Kenney walked into the closet. While Arnold was standing in the doorway, Kenney grabbed her hand and tried to pull her into the closet. Kenney said, "Let me kiss you. All I want is to kiss you, Miss Arnold." Arnold asked Kenney what he thought he was doing, and then got away from him and went into an office. Kenney denied the allegations.

Because of Arnold's allegations, Kenney was assigned to disciplinary segregation pending a disciplinary hearing. Although Kenney was found guilty after the hearing, this outcome was later vacated as Kenney had been unable to call witnesses at the hearing. Subsequently, the charges against Kenney were dismissed after evidence in a second hearing revealed both that Arnold was on personal leave on the day of the alleged incident, and that she had given conflicting accounts of the incident.

Kenney filed a civil complaint and petition for declaration of his rights on July 1, 2005, alleging that after he refused Arnold's request for "emotional comfort," she became angry and submitted the false disciplinary allegation against him, resulting in his spending thirty-three days in segregation. Kenney sought $130 per day in damages, as well as $10,000 in punitive damages, and he requested a declaratory judgment detailing the ways in which Arnold had violated his rights.

On November 28, Arnold moved the circuit court to dismiss Kenney's action. The court orally granted Arnold's motion at a December 7 hearing on the matter because it had not received a response from Kenney. The court entered a written order

dismissing Kenney's action on December 15. Thereafter, Kenney moved the court to alter, amend, or vacate its judgment because it had not considered his response to Arnold's motion, which was filed with the court on December 12. The circuit court denied Kenney's motion, and this appeal followed.

First, Kenney argues that the circuit court erred by failing to consider Arnold's motion as one for summary judgment rather than one for dismissal, and by ruling on the matter before receiving a response from him. We agree that Arnold's motion should have been considered as one for summary judgment, as Arnold attached to the motion evidence which was outside of the pleadings, including her sworn affidavit. *See Kreate v. Disabled American Veterans*, 33 S.W.3d 176, 178 (Ky.App. 2000) (a motion to dismiss supplemented with affidavits and other matters outside the pleadings is effectively a motion for summary judgment).

Because Arnold's motion in effect was one for summary judgment, it should have been treated as such, and we shall review it as one hereafter. CR[1] 56.03 requires a summary judgment motion to be served at least ten days before the time fixed for the hearing. The rule further provides that the party opposing the summary judgment motion may serve opposing affidavits prior to the day of the hearing. As such, a trial court typically does not err when it declines to consider affidavits filed after the hearing date. *Skaggs v. Vaughn*, 550 S.W.2d 574, 578 (Ky.App. 1977). However, the party opposing the motion is not required to file affidavits or any other response in order to prevail. *Davis v. Dever*, 617 S.W.2d 56, 57 (Ky.App. 1981).

[1]Kentucky Rules of Civil Procedure.

Here, we recognize that Kenney's late response to Arnold's motion probably resulted, at least in part, from the fact that Arnold originally served her motion on Kenney via mail at his prior address. However, we believe that any error in the court's ruling on Arnold's motion prior to receiving Kenney's response was harmless[2] since when the circuit court subsequently considered and overruled Kenney's motion to alter, amend, or vacate it had before it, as an attachment to the motion, Kenney's response to Arnold's motion and evidence of his untimely receipt thereof.

Next, Kenney argues that the circuit court erred by granting Arnold's summary judgment motion. While Kenney's claim clearly sets forth the underlying facts as well as the relief sought, the legal basis for the claim is not as obvious. However, our review of the parties' arguments below shows that Arnold discussed issues of negligent infliction of emotional distress, intentional infliction of emotional distress, the Prison Litigation Reform Act (PLRA), the Eighth Amendment, and the Fourteenth Amendment. On appeal, Kenney argues that the circuit court erred by granting summary judgment with regard to his claims of negligent and intentional infliction of emotional distress, as well as his Eighth Amendment argument. Accordingly, we will address those issues.

When ruling upon a summary judgment motion, a trial court must determine whether there is a genuine issue as to any material fact, and whether the moving party is entitled to a judgment as a matter of law. CR 56.03; *Bell v. Louisville Motors, Inc*., 573 S.W.2d 351, 352 (Ky.App. 1978). In doing so, the trial court must view the record "in a light most favorable to the party opposing the motion for summary

[2]*See* CR 61.01.

judgment[.]" *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is proper "where the movant shows that the adverse party could not prevail under any circumstances." *Id*. (citing *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985)). On appeal we review the trial court's order granting summary judgment "de novo because only legal questions and no factual findings are involved." *Hallahan v. The Courier Journal*, 138 S.W.3d 699, 705 (Ky.App. 2004).

Negligent Infliction of Emotional Distress

Kenney argues that the circuit court erred by granting summary judgment in Arnold's favor with regard to his claim of negligent infliction of emotional distress. We disagree.

The Kentucky Supreme Court has explained that "an action will not lie for fright, shock or mental anguish which is unaccompanied by physical contact or injury. The reason being that such damages are too remote and speculative, are easily simulated and difficult to disprove, and there is no standard by which they can be justly measured." *Deutsch v. Shein*, 597 S.W.2d 141, 145-46 (Ky. 1980) (citing *Morgan v. Hightower's Adm'r*, 291 Ky. 58, 59-60, 163 S.W.2d 21, 22 (1942)). Thus, "it is necessary that the damages for mental distress sought to be recovered be related to, and the direct and natural result of" some minimal amount of physical contact or injury. *Id*. at 146. Here, Kenney alleges that Arnold sought emotional comfort from him. When he denied Arnold's advances, she filed a false disciplinary report against him. Under these

circumstances, there was no physical contact or injury, and the circuit court did not err by dismissing his complaint insofar as it alleged negligent infliction of emotional distress.[3]

Intentional Infliction of Emotional Distress

Next, Kenney argues that the circuit court erred by granting summary judgment in Arnold's favor with regard to Kenney's claim of intentional infliction of emotional distress. We disagree.

To prevail on a claim of intentional infliction of emotional distress (IIED), a claimant must prove the following elements: 1) the wrongdoer's conduct must be intentional or reckless; 2) the conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality; 3) there must be a causal connection between the wrongdoer's conduct and the emotional distress; and 4) the emotional distress must be severe. *Kroger Co. v. Willgruber*, 920 S.W.2d 61, 65 (Ky. 1996) (citing *Craft v. Rice*, 671 S.W.2d 247, 249 (Ky. 1984)). Even if Kenney could prove the first three elements, he could not prevail on this claim under any circumstances because he could not prove severe emotional distress. Accordingly, we do not believe that the circuit court erred by dismissing his complaint with regard to this claim. Emotional distress

> passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin,

[3] We note that this is only one element a claimant must prove in order to recover for negligent infliction of emotional distress; however, for purposes of this appeal, we only address this element. If Kenney cannot prove this element, he cannot prevail on the claim.

> disappointment, worry, and nausea. It is only where it is extreme that the liability arises.

Restatement (Second) of Torts §46, comment j (1965). Or as the Kentucky Supreme Court has held, "substantially more than mere sorrow is required." *Gilbert v. Barkes*, 987 S.W.2d 772, 777 (Ky. 1999).

Here, Kenney alleged in his complaint that as a result of Arnold's false allegations, he suffered "emotional and mental harm and pain and suffering, in that the inmate population of the facility then accused him of being a 'rat', collaborator, etc." Further, in his response to Arnold's motion to dismiss, Kenney alleged that because of Arnold's false allegations and his placement in segregation, he suffered "mental and emotional pain" as well as "an extended period of high blood pressure, and going without daily exercise[,]" which he contends could "only have a detrimental effect upon [his] well being." While we recognize that Kenney's placement in segregation likely caused him distress, nowhere in his pleadings has he alleged the extreme type of distress that creates liability for IIED. Under these circumstances, Kenney could not prevail on his claim, and the circuit court did not err by dismissing his complaint as it related to intentional infliction of emotional distress.

Eighth/Fourteenth Amendments

Finally, Kenney argues that the circuit court erred by granting summary judgment in favor of Arnold with regard to his Eighth Amendment claim. Kenney does not argue that the conditions of his segregation were cruel and unusual. Rather, he argues that his segregation was cruel and unusual because it was based on a false allegation. As

this argument actually amounts to a challenge of the procedure which resulted in his being placed in segregation, we will analyze it under the Fourteenth Amendment Due Process Clause.

This court previously discussed the Fourteenth Amendment as it relates to segregation in prisons as follows:

> In order to prevail on a Fourteenth Amendment procedural due process claim, a party must establish (1) that he enjoyed a protected "liberty" or "property" interest within the meaning of the Due Process Clause, and (2) that he was denied the process due him under the circumstances. A protected liberty interest may arise from two sources-the Due Process Clause itself and state law or regulations. Challenges to prison conditions including segregation or removal from the general prison population are based on a potential "liberty" interest, but not all deprivations of an interest trigger the procedural safeguards of the Due Process Clause. For example, disciplinary segregation typically does not implicate a liberty interest protected by the Due Process Clause itself because it is the sort of confinement an inmate can reasonably anticipate receiving.

Marksberry v. Chandler, 126 S.W.3d 747, 749-50 (Ky.App. 2003) (internal citations omitted). Here, Kenney does not mention any state laws which could form the basis for his challenge. Further, with regard to any challenge based upon the Due Process Clause, his claim must fail. Either no liberty interest was implicated for the reasons set forth above, or Kenney was afforded the process due. On the day Arnold made the allegations against Kenney, a lieutenant investigated the matter and informed Kenney of the allegations. A hearing was conducted approximately one week later. After Kenney was given a second hearing so that he could call Arnold as a witness, the report was

dismissed. The procedure followed here ultimately led to the dismissal of the charges against Kenney. We cannot say that he was denied due process.

The Lee Circuit Court's order dismissing Kenney's claim is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Milton Kenney, *Pro se*
LaGrange, Kentucky

No Brief for Appellee