

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2013 IL App (4th) 121046-U
NO. 4-12-1046
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
August 29, 2013
Carla Bender
4th District Appellate
Court, IL

JAMES H. SMITH,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	Sangamon County
MARVIN REED, Assistant Warden, Pontiac Correctional)	No. 11L138
Center,)	
Defendant-Appellee,)	Honorable
and)	John Schmidt,
GUY D. PIERCE, Warden,)	Judge Presiding.
Defendant.)	

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Pope and Turner concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court's dismissal of plaintiff's *pro se* complaint, concluding (1) plaintiff's eighth amendment allegations failed to state a claim upon which relief could be granted and (2) plaintiff's negligence claim was barred by sovereign immunity.

¶ 2 After plaintiff, James H. Smith, an inmate at the Pontiac correctional facility (Pontiac), slipped on ice and broke his hip, he filed a *pro se* complaint in the trial court, alleging defendant Marvin Reed, assistant warden of Pontiac, (1) violated plaintiff's eighth amendment rights and (2) acted negligently. (Plaintiff also raised similar claims with respect to Guy D. Pierce, warden of Pontiac; however, because plaintiff failed to obtain service on Pierce before the summons expired, Pierce is not a party on appeal.)

¶ 3 In October 2012, the trial court granted Reed's combined motion to dismiss (735

ILCS 5/2-619.1 (West 2010)), dismissing plaintiff's claims with prejudice. Specifically, the court held (1) plaintiff failed to state a claim upon which relief could be granted and (2) sovereign immunity barred plaintiff's claims.

¶ 4 Plaintiff appeals, arguing the trial court erred by dismissing his eighth amendment and negligence claims. We affirm.

¶ 5 I. BACKGROUND

¶ 6 In April 2011, plaintiff filed a *pro se* complaint in the trial court, naming Pierce and Reed as defendants. Plaintiff asserted that in December 2009, he crossed through a common area at Pontiac designated for inmate travel that had not been cleared of snow and ice. Plaintiff slipped on the ice and shattered his left hip, which required him to undergo hip replacement surgery. While plaintiff was recovering, he spoke to Paul Henderson, another inmate who worked as a groundskeeper. Henderson said on the day of plaintiff's injury, Henderson's supervisor told him Reed instructed the ground crew to again remove snow and ice from the areas around the administration building, and did not allow the inmate travel paths to be cleared. Plaintiff attached to his complaint Henderson's affidavit stating (1) Henderson was a member of the ground crew, (2) the crew "began snow and ice removal at the administration building," and (3) Henderson saw plaintiff slip and fall.

¶ 7 Plaintiff alleged Reed violated his eighth amendment rights and was negligent as assistant warden because Reed had a duty to (1) train and supervise the ground crew to promptly remove snow and ice from the walkways and (2) maintain the safety and security of the Pontiac facility and its inmates. Despite this duty, Reed allegedly told the ground crew "not to worry about removing the snow and ice from the inmate pathways" and allowed inmates to pass

through the walkways, "knowing that an inmate could slip and fall." Plaintiff also made similar allegations with respect to Pierce. Plaintiff sought from Pierce and Reed each \$10,000 in damages and \$50,000 in punitive damages.

¶ 8 Plaintiff failed to obtain service on Pierce before the summons expired. In October 2011, Reed filed a combined motion to dismiss plaintiff's complaint pursuant to section 2-619.1 of the Code of Civil Procedure (Civil Code) (735 ILCS 5/2-619.1 (West 2010)). In the portion of his motion invoking section 2-615 of the Civil Code (735 ILCS 5/2-615 (West 2010)), Reed asserted plaintiff failed to allege Reed acted with deliberate indifference, as required to support plaintiff's eighth amendment claim. In the portion invoking section 2-619(a)(1) of the Civil Code (735 ILCS 5/2-619(a)(1) (West 2010)), Reed argued the trial court lacked subject-matter jurisdiction over plaintiff's complaint because plaintiff's claims against Reed were actually claims against the State, of which the court of claims possessed exclusive jurisdiction. Finally, Reed claimed under section 2-619(a)(9) of the Civil Code (735 ILCS 5/2-619(a)(9) (West 2010)), Reed had no legal duty as a public official to remove the snow and Reed was immune from individual liability for his failure to remove the snow.

¶ 9 In November 2011, plaintiff filed a response to Reed's motion to dismiss. Plaintiff argued his complaint sufficiently alleged Reed acted with deliberate indifference in that Reed knew plaintiff, other inmates, and correctional officers were at a substantial risk of serious harm from slipping and falling on the snow and ice on the inmates' walkway but Reed did not order the inmates' walkway cleared. Plaintiff also asserted (1) he sufficiently alleged Reed and Pierce acted negligently by failing to maintain the walkway despite knowing the walkway had potholes, which did not allow for proper drainage of water; and (2) sovereign immunity did not

bar plaintiff's claim because Reed acted outside the scope of his authority by failing to maintain a safe walkway, a duty owed to the general public. Plaintiff attached to his response the affidavit of Pontiac inmate Perry Hubbard, which stated Hubbard (1) remembered none of the inmate pathways had been shoveled or salted and the pathways were slick from ice and (2) recalled observing plaintiff fall.

¶ 10 In October 2012, the trial court granted Reed's motion and dismissed plaintiff's complaint with prejudice. In its written order, the court found plaintiff failed to state a cause of action on which relief could be granted and plaintiff's claims were also barred by sovereign immunity.

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 On appeal, plaintiff argues the trial court erred by dismissing his eighth amendment and negligence claims.

¶ 14 Initially, we note that although plaintiff named Pierce as a defendant in his complaint, Pierce is not a party on appeal because Pierce was not served with a copy of plaintiff's complaint before the summons expired. Accordingly, the trial court did not obtain personal jurisdiction over Pierce. See *Ryburn v. People*, 349 Ill. App. 3d 990, 994, 811 N.E.2d 1209, 1212 (2004) ("For a court to acquire personal jurisdiction over the defendant, the defendant must be served, waive service, or consent to jurisdiction."). In his reply brief, plaintiff concedes Pierce was not served. However, plaintiff argues we should remand his case to require service on Pierce. We decline to do so.

¶ 15 We now turn to plaintiff's arguments as they relate to Reed, the sole defendant on

appeal.

¶ 16

A. Standard of Review

¶ 17

Section 2-619.1 of the Civil Code (735 ILCS 5/2-619.1 (West 2010)) allows a party to combine motions to dismiss under sections 2-615, 2-619, and 2-1005. 735 ILCS 5/2-619.1 (West 2010); *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 20, 988 N.E.2d 984. On appeal, we review *de novo* a combined section 2-619.1 motion to dismiss pursuant to either section 2-615 or section 2-619 of the Civil Code. *Gatreaux v. DKW Enterprises, LLC*, 2011 IL App (1st) 103482, ¶ 10, 958 N.E.2d 1088. A 2-619 motion may be granted where, construing the pleadings in the light most favorable to the plaintiff, the court finds the plaintiff can prove no set of facts supporting his cause of action. *Reynolds*, 2013 IL App (4th) 120139, ¶ 33, 988 N.E.2d 984. A 2-615(a) motion may be granted where the court, considering the facts alleged in the complaint in the light most favorable to the plaintiff and drawing all reasonable inferences in the plaintiff's favor, finds the complaint fails to state a cause of action upon which relief may be granted. *Reynolds*, 2013 IL App (4th) 120139, ¶ 25, 988 N.E.2d 984.

¶ 18

B. Plaintiff's Eighth Amendment Claim

¶ 19

Plaintiff argues the trial court erred by dismissing his eighth amendment claim. We disagree.

¶ 20

The eighth amendment requires prison officials to provide humane conditions of confinement. *Knight v. Wiseman*, 590 F.3d 458, 463 (7th Cir. 2009). To establish an eighth amendment violation, an inmate must demonstrate a prison official acted with deliberate indifference to an inmate's health. *People v. Manning*, 227 Ill. 2d 403, 423, 883 N.E.2d 492, 505

(2008). "Deliberate indifference requires a showing of more than mere or gross negligence, but less than purposeful infliction of harm." *Knight*, 590 F.3d at 463. An official acts with deliberate indifference when he is aware of a substantial risk of serious injury to the plaintiff and nevertheless fails to take appropriate steps to protect the plaintiff. *Butera v. Cottey*, 285 F.3d 601, 605 (7th Cir. 2002).

¶ 21 Here, plaintiff alleges Reed knew about snow and ice on the inmate walkway but failed to order removal of the snow and ice. Reed asserts that plaintiff's allegations are insufficient because the existence of snow and ice does not show the existence of a condition posing a substantial risk serious of injury. We agree. In *Reynolds v. Powell*, 370 F.3d 1028, 1031 (10th Cir. 2004), the Tenth Circuit noted that, because "slippery floors constitute a daily risk faced by members of the public at large," federal courts have "consistently held that slippery prison floors do not violate the Eighth Amendment." Accordingly, the *Reynolds* court concluded that the "hazard encountered by plaintiff," an inmate on crutches who slipped and fell in standing water, "was no greater than the daily hazards faced by any member of the general public" and the plaintiff could not "constitutionalize what [was] otherwise only a state-law tort claim." *Reynolds*, 370 F.3d at 1032. Likewise, in this case, the risk of slipping and snow and ice on walkways is a risk faced by members of the public at large; accordingly, plaintiff's allegations do not rise to the level of an eighth amendment deliberate indifference claim.

¶ 22 Each of the cases plaintiff cites in support of his eighth amendment claim is factually distinguishable. First, although *Jones v. Morris*, 777 F.2d 1277 (7th Cir. 1985), involved the sufficiency of a plaintiff's eighth amendment claim, the issue in *Jones* was whether dismissal of the plaintiff's complaint was warranted under section 1915(d) of the Judicial Code

(28 U.S.C. § 1915(d)), which permits the dismissal of a frivolous action. *Jones*, 777 F.2d at 1278-79. The *Jones* court also specifically emphasized "the fact-specific nature" of its holding. *Jones*, 777 F.2d at 1279.

¶ 23 *Gutstein v. City of Evanston* 402 Ill. App. 3d 610, 929 N.E.2d 680 (2010), is likewise distinguishable. In *Gutstein*, the plaintiff, a homeowner who tripped in a depression in an unimproved alley, alleged the City of Evanston was negligent in maintaining the alley. *Gutstein*, 402 Ill. App. 3d at 611, 929 N.E.2d at 683-84. Thus, *Gutstein* concerned negligence, not deliberate indifference to a substantial risk of injury, and therefore *Gutstein* does not support plaintiff's claim. Finally, *Gaston v. City of Danville*, 393 Ill. App. 3d 591, 592, 912 N.E.2d 771, 772 (2009), concerned a city's liability under the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/1-101 through 10-201 (West 2006)) after a staircase collapsed on the decedent in a public parking garage. Accordingly, none of plaintiff's cited authority persuades us that Reed's failure to order the removal of ice and snow showed Reed acted with deliberate indifference.

¶ 24 Based on the foregoing, we conclude the trial court properly dismissed plaintiff's eighth amendment claim against Reed because plaintiff failed to state a claim of deliberate indifference under the eighth amendment.

¶ 25 C. Plaintiff's Negligence Claim

¶ 26 Plaintiff also contends the trial court erred by dismissing his negligence claim. We disagree.

¶ 27 Our state constitution abolished the doctrine of sovereign immunity " '[e]xcept as the General Assembly may provide by law.' " *Loman v. Freeman*, 229 Ill. 2d 104, 112, 890

N.E.2d 446, 452-53 (quoting Ill. Const. 1970, art. XIII, § 4). The legislature reestablished sovereign immunity under the State Lawsuit Immunity Act (745 ILCS 5/1 (West 2010), which specifies that, except as provided under various statutes, including the Court of Claims Act (705 ILCS 505/1 through 29 (West 2010)), the State shall not be made a defendant in any lawsuit. 745 ILCS 5/1 (West 2010). The Court of Claims Act provides that the Court of Claims shall have exclusive jurisdiction to hear and determine claims against the State. 745 ILCS 5/8 (West 2010); *Loman*, 229 Ill. 2d at 112, 890 N.E.2d at 453.

¶ 28 Whether a claim is one against the State is not determined by the formal identification of the parties, but rather, by the issues involved and the relief sought. *Loman*, 229 Ill. 2d at 112, 890 N.E.2d at 453. When the "issue involved" is a State employee's alleged negligence, we must determine the scope of the employee's duty. *Loman*, 229 Ill. 2d at 112-13, 890 N.E.2d at 453. If the alleged negligence stems from an employee's breach of a duty imposed on the employee solely by virtue of his employment, the Court of Claims has exclusive jurisdiction. *Id.* If, however, the duty is owed independent of State employment, the claim may be heard in the circuit court. *Id.* An action brought nominally against a State employee in his individual capacity will be found to be an action against the State where a judgment in favor of the plaintiff could operate to control the State's actions or subject the State to liability. *Currie v. Lao*, 148 Ill. 2d 151, 158, 592 N.E.2d 977, 980 (1992).

¶ 29 Here, plaintiff alleges Reed was "Negligent as assistant Warden of the Pontiac Correctional Facility" where Reed "had a Duty to tr[ai]n and Supervise The Pontiac Correctional Facility's Grounds Crew to Promptly Remove The Snow and Ice from The Walkways" inside Pontiac and "Also Had a duty to Maintain The Safety and Security of The Pontiac Correctional

Facility" and the inmates from injury. Thus, the duties plaintiff alleges Reed owed are duties arising solely out of Reed's position as a State employee because absent Reed's employment, Reed would have no duty to train or supervise the grounds crew or maintain the safety and security of Pontiac's inmates. Moreover, as Reed points out, a judgment for plaintiff would subject the State to liability and would control the State's actions regarding snow removal at State correctional facilities. Accordingly, plaintiff's action is against the State, and the trial court lacked jurisdiction to consider the action. Thus, the court's dismissal was proper.

¶ 30

III. CONCLUSION

¶ 31

For the reasons stated, we affirm the trial court's judgment.

¶ 32

Affirmed.