[Cite as *Neinast v. Fairfield Cty. Dist. Library Bd. of Trusteesy*, 2010-Ohio-5569.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ROBERT A. NEINAST	:	JUDGES:
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellant	:	Hon. W. Scott Gwin, J.
	:	Hon. Sheila G. Farmer, J.
-vs-	:	
	:	
BOARD OF TRUSTEES OF	:	Case No. 2010 CA 011
THE FAIRFIELD COUNTY	:	
DISTRICT LIBRARY	:	
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeeal from the Court of Common Pleas, Case No. 2009-CV-0657
JUDGMENT:	Affirmed/Reversed in Part & Remanded
DATE OF JUDGMENT ENTRY:	November 15, 2010

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
ROBERT A. NEINAST, PRO SE 8617 Ashford Lane Pickerington, OH 43147	ROY E. HART 201 South Broad Street Suite 400 Lancaster, OH 43130

Farmer, J.

{¶1} In the beginning of 2008, appellant, Robert Neinast, visited the Fairfield County District Library on three occasions. Each time, appellant was barefoot. On his fourth visit in April of 2008, again barefoot, appellant was informed that the library had a footwear policy and he would have to leave the premises.

{¶2} On May 20, 2008, appellant asked appellee, the Board of Trustees of the Fairfield County District Library, to revoke its footwear policy. Appellee refused and retained the footwear policy.

{¶3} On October 21, 2008, appellant made an oral presentation to appellee, outlining the benefits of going barefoot. On February 17, 2009, appellee again decided to retain its footwear policy.

{¶4} On May 13, 2009, appellant filed an action for declaratory judgment against appellee. Appellant sought a declaration that appellee did not have the statutory authority to require library patrons to wear shoes, and the footwear policy infringed upon his personal liberty, was arbitrary and capricious, and did not bear a real and substantial relation to the health, safety, morals or general welfare of the public. Appellant also sought an injunction preventing appellee from enforcing the footwear policy.

{¶5} Appellant filed a motion for summary judgment and appellee filed a Civ.R. 12(B)(6) motion to dismiss. By entry filed December 9, 2009, the trial court converted appellee's motion to dismiss into a motion for summary judgment, and gave all parties time to file their respective motion, response, and reply. By judgment entry filed February 16, 2010, the trial court granted summary judgment to appellee.

{¶6} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶7} "THE TRIAL COURT ERRED BY NOT STRIKING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS UNTIMELY."

II

{¶8} "THE TRIAL COURT ERRED BY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT."

III

{¶9} "THE TRIAL COURT ERRED BY DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT."

I

{¶10} Appellant claims the trial court erred in not striking appellee's motion for summary judgment as untimely. We disagree.

{¶11} Appellee filed a timely motion to dismiss pursuant to Civ.R. 12(B)(6). Thereafter, the trial court converted the motion to a motion for summary judgment pursuant to Civ.R. 56. Civ.R. 12(B) provides the following:

{¶12} "When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56. All parties

shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56."

{¶13} The question posed under this assignment is whether the timely filing of a motion to dismiss can bootstrap a motion for summary judgment filed beyond the court ordered cut-off date for all motions.

{¶14} The motion to dismiss was based on the same arguments contained in appellee's motion for summary judgment. The issue of collateral estoppel was at the core of both motions. The trial court determined that a motion to dismiss was not the appropriate vehicle to examine the issue and ordered appellee to conform its motion to a motion for summary judgment pursuant to Civ.R. 56(C):

{¶15} "When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. **Provided however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56**. All parties shall be given reasonable opportunity to present **all materials made pertinent to such a motion by Rule 56**.

{¶16} "Upon consideration, therefore, the court, *sua sponte,* converts Defendant's Motion to Dismiss to a Motion for Summary Judgment pursuant to Civ. R. 56(C).

{¶17} "The court therefore **ORDERS**:

{¶18} "(1) Defendant to supplement its Motion to comply with Civ. R. 56(C) on or before **January 8, 2010;**

{¶19} "(2) Plaintiff may file a Supplemental Memorandum Contra on or before **January 22, 2010;**

{¶20} "(3) Defendant may file a Reply on or before **January 29, 2010.**

{¶21} "Plaintiff's and Defendant's Motion for Summary Judgment shall come on for a non-oral hearing on **February 3, 2010.**" Entry filed December 9, 2009.

{¶22} Upon review, we conclude the trial court did not abuse its discretion in converting appellee's motion to dismiss into a motion for summary judgment and ordering the new filing deadlines. We find no indicia of any manifest injustice or prejudice to appellant.

{¶23} Assignment of Error I is denied.

II

{¶24} Appellant claims the trial court erred in granting appellee's motion for summary judgment. Specifically, appellant claims the trial court erred in finding the doctrine of collateral estoppel barred the prosecution of his case because there was no mutuality of parties thereby barring the doctrine. We agree in part.

{¶25} Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶26} "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is

adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274."

{¶27} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc*. (1987), 30 Ohio St.3d 35.

{¶28} Appellant filed a declaratory judgment action on May 13, 2009, requesting the following:

{¶29} "WHEREFORE, Plaintiff Robert A. Neinast respectfully requests that this Court grant him judgment as follows:

{¶30} "(A) Declare that the Board does not have the statutory authority under the law to make regulations requiring that patrons wear shoes in the Library.

{¶31} "(B) Declare that the footwear rule infringes upon Mr. Neinast's personal liberty, is arbitrary and capricious, and does not bear a real and substantial relation to the health, safety, morals or general welfare of the public.

{¶32} "(C) Issue a permanent injunction preventing the Board of Trustees, the Director, or any other Library employee from enforcing any rule or regulation specifying that footwear must be worn in the Fairfield County District Library.

{¶33} "(D) Awarded Plaintiff any other legal and equitable relief to which he is entitled."

{¶34} As we address in Assignment of Error III, the trial court, using Federal and Ohio precedent, found appellee had the authority to promulgate decorum/shoes/dress rules. Therefore, the issues sought to be barred by the doctrine of collateral estoppel are (1) appellant's claim of infringement of his personal liberty; (2) whether appellee's footwear rule has a real and substantial relation to the health, safety, morals, or general welfare of the public; and (3) the barring of the enforcement of appellee's footwear rule.

{¶35} The trial court and appellee rely on previous litigation between appellant and the Board of Trustees of the Columbus Metropolitan Library: *Neinast v. Board of Trustees of the Columbus Metropolitan Library* (2002), 190 F.Supp.2d 1040; *Neinast v. Board of Trustees of the Columbus Metropolitan Library* (2003), 346 F.3d 585; and *Neinast v. Board of Trustees of the Columbus Metropolitan Library,* 165 Ohio App.3d 211, 2006-Ohio-287.

{¶36} It is undisputed that appellant pursued identical arguments in the above cited cases against the Columbus Board and was unsuccessful. These cases held statutory authority permitted the promulgation of a footwear rule, and the Columbus Board had proven a real and substantial relationship of the rule to the health and general welfare of the public.

{¶37} In *Neinast,* supra, 346 F.3d 585, 593-594, the Sixth Circuit specifically acknowledged the facts giving rise to the regulation in the Columbus Metropolitan Library:

{¶38} " 'Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are primarily, and historically, ... matter[s] of local concern, the States traditionally have had great

latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.' *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 475, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (quotations and citations omitted). Here, the Board has provided incident reports documenting various hazards to barefoot patrons, including the presence of feces on the floor of the restroom and in the reading area (JA 133, 153, 163, 176, 197, 212, 250, 252, 254, 256, 257), vomit on the floor of the restroom and in the children's area (JA 170, 224), broken ceiling tiles on the floor of the restroom (JA 134), splintered chair pieces in the children's area (JA 140), drops of blood on the floor of the restroom (JA 184), urine in the elevator, on the floor of the bathroom, on a chair in the reading area, and on the floor of the reading area (JA 161, 165, 168, 176, 266, 276, 291), and broken glass in the lobby (JA 185). The Board also has submitted reports describing incidents where a patron scraped his arm on a staple in the carpet in the meeting room, causing bleeding (JA 260), where a patron's foot went into a gap between the bottom of a door and the ground, causing a cut (JA 297), and where a barefoot patron's toe was caught in a door, causing bleeding and requiring the assistance of paramedics (JA 301). The Board thus has demonstrated the existence of a significant health and safety risk to individual barefoot patrons.

{¶39} "***

{¶40} "Here, the Board's stated rationale for its requirement that patrons of the Library wear shoes is not only to protect individual barefoot patrons from harm to themselves, but also to protect the general public 'by averting tort claims and litigation expenses stemming from potential claims by barefoot patrons who could have suffered injuries that shoes could have prevented.' Avoiding the expense of litigation is a

legitimate governmental interest. *See Listle v. Milwaukee County,* 138 F.3d 1155, 1160 (7th Cir.1998). Injuries suffered by individual barefoot patrons of the Library also impose broader societal costs. In this case, the Board has presented evidence that on at least one occasion paramedics were summoned to assist a barefoot patron who suffered an injury to her feet while in the Library. Describing the costs borne by the general public as a result of the failure of motorcyclists to wear helmets, the Eleventh Circuit explained that '[s]tate and local governments provide police and ambulance services, and the injured cyclist may be hospitalized at public expense.' *Picou,* 874 F.2d at 1522. Similarly, in this case barefoot patrons of the Library who are injured as a result of the hazards previously described impose costs on the general public. For these reasons, we conclude that the Board has demonstrated a significant governmental interest in requiring that patrons of the Library wear shoes."

{¶41} The gravamen of the issue under this assignment is whether the non-mutuality rule as it stands in Ohio applies to appellant's action. First, appellant is the same person as in the Columbus Metropolitan Library cases. Second, appellee was not a party to the Columbus Metropolitan Library cases and third, appellee is governed by the statutory authority of R.C. 3375.06, 3375.33, and 3375.40.

{¶42} It is well established that the prerequisites of the applicability of collateral estoppel are as follows:

{¶43} "Case law in Ohio concerning the general doctrine of *res judicata* has long ago established the general principle that material facts or questions which were in issue in a former suit, and were there judicially determined by a court of competent

jurisdiction, are conclusively settled by a judgment therein so far as concerns the parties to that action and persons in privity with them.***

{¶44} "As a requisite factor in the application of the principle of issue preclusion within the doctrine of *res judicata,* Ohio cases over the years in like manner have consistently held to the effect that a judgment can operate as collateral estoppel only where all of the parties to the proceeding in which the judgment is relied upon were bound by the judgment. Expressions are found within the cases that the record of a judgment, in order to preclude either of the party litigants, must be preclusive upon both. The operation of the rule must be mutual. If a judgment cannot be effective as *res judicata* against a particular person, he cannot avail himself of the adjudication and contend that it is available against others, as between them and himself. Therein lies the general rule of mutuality of estoppel which has long been applied by this court and other courts in Ohio.***

{¶45} "***

{¶46} "As stated, Ohio has continued the requirement of mutuality for the application of collateral estoppel, as a general principle, even though recognizing the view of other states. Accordingly, in *Whitehead, supra,* Justice Thomas M. Herbert stated, 20 Ohio St.2d at page 113, 254 N.E.2d 10, in the opinion:

{¶47} " '***The requirement of mutuality has been lessened, in some jurisdictions, by the expansion of the concept of privity and the creation of explicit exceptions to the rule. Semmel, Collateral Estoppel, Mutuality and Joinder of Parties (1968), 68 Columbia L.Rev. 1457, 1458.'

{¶48} "However, viewing the doctrine on balance, Justice Herbert concluded for the court, at page 116, 254 N.E.2d 10, that:

{¶49} " 'In our opinion, the existing Ohio requirement that there be an identity of parties or their privies is founded upon the sound principle that all persons are entitled to their day in court. The doctrine of *res judicata* is a necessary judicial development involving considerations of finality and multiplicity, but it should not be permitted to encroach upon fundamental and imperative rights. It is our conclusion that the rule advocated by the appellant could create grave problems in establishing the adequacy of non-party's representation in the prior suit and that the case at bar is not one which should result in a departure from present Ohio law.' " *Goodson v. McDonough Power Equipment, Inc.* (1983), 2 Ohio St.3d 193, 195-196 and 198-199, respectively. (Footnotes omitted.)

{¶50} In *Goodson,* Justice Holmes engaged in a thorough discussion of Ohio's general requirement of mutuality versus the general acceptance in federal cases and other state jurisdictions of the lessening of the requirement for mutuality. This concept of "offensive collateral estoppel" in non-mutuality situations has been embraced with some reservations:

{¶51} "The use of 'offensive collateral estoppel' in nonmutuality cases in federal courts was sanctioned by the United States Supreme Court in *Parklane Hosiery Co. v. Shore* (1979), 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552.***However, even the court in *Parklane* pointed out that a party may not invoke collateral estoppel without showing that precisely the same issue was litigated in the prior action. *White v. World Finance of Meridian, Inc.* (C.A.5, 1981), 653 F.2d 147. See, generally, 18 Wright, Miller & Cooper,

Federal Practice and Procedure, Section 4417 (1981). The burden of pleading and proving the identity of issues rests on the party asserting the collateral estoppel. *Hernandez v. Los Angeles* (C.A.9, 1980), 624 F.2d 935. Also, *Parklane* left undisturbed the requisite of privity, *i.e.,* that collateral estoppel can only be applied against parties who have had a prior 'full and fair' opportunity to litigate their claims. *C.A. Hardy v. Johns-Manville Sales Corp.* (C.A.5, 1982), 681 F.2d 334, 338." *Goodson,* at 197-198. (Footnote omitted.)

{¶52} As Justice Holmes concluded in the Supreme Court of Ohio's unanimous opinion, mutuality of interest or privity is the keystone to collateral estoppel:

{¶53} "Upon a considered review of the arguments presented, as well as available cases and comment on the subject, we conclude that the principle of mutuality as a prerequisite to the application of collateral estoppel, as applied in this state, recognizing the need in certain instances for the flexibility and exceptions to such rule, has been responsive to the conflicting principles of due process and judicial economy. We therefore opt to adhere to such principle as a general proposition, while realizing that there may well be other cases in which there are presented additional exceptions which could be acceptable to this court upon the basis of serving justice within the framework of sound public policy.

{¶54} "Whether or not we, in the future, may conclude it to be advisable to adopt the nonmutuality rule as a general proposition, for the present we reaffirm our prior general stance that collateral estoppel may generally be applied only when the party seeking to use the prior judgment and the party against whom the judgment is being

asserted were parties to the original judgment or in privity with those parties." *Goodson,* at 202.

{¶55} In conclusion, we find the issues that mitigate against the non-mutuality of interest are that the reason or purpose of the footwear rule must be established by the individual library board. Although the authority to create the rule is clearly established by case law as to its impact to personal liberties, the matter subject to hearing and fair debate and a day in court is this library's basis for the rule.

{¶56} We therefore determine because there is non-mutuality of parties, it was error to impose collateral estoppel. We remand this case to the trial court to determine if in fact appellee can establish reasons for the footwear rule that applies specifically to appellee. All other issues, including the authority to establish rules and the Federal Courts' holdings that a properly formulated footwear rule does not violate personal freedoms, are resolved under applicable case law.

{¶57} Assignment of Error II is granted in part.

III

{¶58} Appellant claims the trial court erred in denying his motion for summary judgment.

{¶59} Appellant's requests in his declaratory judgment action are listed supra.

{¶60} Although the trial court's decision rested solely on the issue of collateral estoppel, the decision contains a specific finding relative to appellant's motion for summary judgment that defeats his motion.

{¶61} In his motion, appellant argued appellee lacked the statutory authority to promulgate any decorum/shoes/dress rule because such authority was not properly

delegated by the Ohio General Assembly. The trial court reviewed the statutory authority of R.C. 3375.06, 3375.33, and 3375.40 and found appellee had the authority to promulgate and enforce a rule relative to footwear. In doing so, the trial court relied on the *Neinast* cases cited supra.

{¶62} This application of previous decisions is not an application of collateral estoppel, but is a decision of law on whether appellee had the authority to promulgate a rule relative to decorum/shoes/dress. Based upon the trial court's decision, appellant's motion for summary judgment fails. We note this still leaves open a challenge to the appropriate or rational basis of such a rule vis-à-vis appellant's position that a footwear rule is not within appellee's health and safety powers. This is a rule that is recognized by the Sixth Circuit in *Neinast,* supra, 346 F.3d 585, 596, wherein the Federal Court found the Columbus Metropolitan Library had established a legitimate governmental interest of protecting the health and safety of patrons:

{¶63} " 'Even foolish and misdirected provisions are generally valid if subject only to rational basis review.' *Craigmiles v. Giles,* 312 F.3d 220, 223-24 (6th Cir.2002). Consequently, this court will not overturn the Board's requirement that patrons of the Library wear shoes unless the varying treatment of barefoot persons 'is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [Board's] actions were irrational.' *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 84, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000) (quotation omitted). In order to prevail, Neinast must negate 'every conceivable basis that might support' the requirement that patrons wear shoes. *Craigmiles,* 312 F.3d at 224 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973)). Here, as

previously discussed, the Board has made the reasonable determination that the requirement that patrons of the Library wear shoes is necessary to protect both 'the health and safety of Library patrons, who may be harmed in the Library if allowed to enter barefoot,' and 'the economic well-being of the Library, by averting tort claims and litigation expenses stemming from potential claims made by barefoot patrons who could have suffered injuries that shoes could have prevented.' Consequently, the Board's requirement that patrons of the Library wear shoes satisfies rational basis review."

{¶64} Our brethren from the Tenth District in *Neinast,* supra, 165 Ohio App.3d 211, 2006-Ohio-287, ¶9, found R.C. 3375.06 grants libraries the authority to control and manage and therefore promulgate rules:

{¶65} "Under R.C. 3375.06, a board of library trustees 'shall have the control and management of the county free public library, and in the exercise of such control and management shall be governed by sections 3375.33 to 3375.41, inclusive, of the Revised Code.' R.C. 3375.33 provides that '[t]he boards of library trustees***are bodies politic and corporate, and as such are capable of suing and being sued, contracting, acquiring, holding, possessing, and disposing of real and personal property, and of exercising such other powers and privileges as are conferred upon them by law.' See, generally, *Blue Cross of Northeast Ohio v. Ratchford* (1980), 64 Ohio St.2d 256, 259-260, 18 O.O.3d 450, 416 N.E.2d 614 (recognizing that the General Assembly can delegate discretionary functions to administrative bodies and officers and holding that a statute does not unconstitutionally delegate legislative power if it establishes an intelligible principle to which the administrative body or officer must conform and if it establishes a procedure for effective review)."

{¶66} Based upon this reasoning, we concur that public libraries have the authority to promulgate rules and regulations as to public health and safety. This does not mean that the authority sub judice is unfettered, but requires an examination of the relationship of the shoes requirement to health and public safety.

{¶67} Appellant's request for declaratory judgment as listed in his complaint under (A) is denied.

{¶68} Appellant's motion for summary judgment included various documents relative to the value of wearing or not wearing footwear. We note it has been said that "clothes make the man." The wearing of footwear also classifies persons relative to their positions in life: cowboys wear cowboy boots, construction workers wear steel-toed boots, basketball players wear basketball shoes, tennis players wear tennis shoes, and we all know "The Devil Wears Prada."

{¶69} Upon review, we conclude the issue of the authority to promulgate rules is settled based upon case law, and summary judgment for appellant apart from the collateral estoppel issue would not have been appropriate.

{¶70} Assignment of Error III is denied.

{¶71} The judgment of the Court of Common Pleas of Fairfield County, Ohio is hereby affirmed in part and reversed in part.

By Farmer, J.

Edwards, P.J. and

Gwin, J. concur.

_s/ Sheila G. Farmer_____

_s/ Julie A. Edwards_____

_s/ W. Scott Gwin_____

JUDGES

SGF/sg 827

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO

FIFTH APPELLATE DISTRICT

ROBERT A. NEINAST	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
BOARD OF TRUSTEES OF THE FAIRFIELD COUNTY DISTRICT LIBRARY	:	
Defendant-Appellee	:	CASE NO. 2010 CA 011

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Fairfield County, Ohio is affirmed in part and reversed in part, and the matter is remanded to said court for further proceedings consistent with this opinion. Costs to appellant.

_s/ Sheila G. Farmer_____

_s/ Julie A. Edwards_____

_s/ W. Scott Gwin_____

JUDGES