

[Cite as *Banks v. Bur. of Workers' Comp.*, 2017-Ohio-8698.]

ELIZABETH BANKS, Admx.	Case No. 2016-00922
Plaintiff	Judge Patrick M. McGrath Magistrate Holly True Shaver
v.	
OHIO BUREAU OF WORKERS' COMPENSATION	<u>ENTRY GRANTING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS</u>
Defendant	

{¶1} On May 9, 2017, defendant filed a motion for judgment on the pleadings pursuant to Civ.R. 12(C). On May 23, 2017, plaintiff filed a response, or, in the alternative, a motion for leave to file an amended complaint. On June 6, 2017, defendant filed a motion for leave to file a reply brief, which is GRANTED, instanter. On August 28, 2017, plaintiff filed a motion for leave to submit evidence in support of its motion for leave to file an amended complaint. On September 11, 2017, defendant filed a response in opposition to plaintiff's motion for leave to submit evidence.

{¶2} Civ.R. 12(C) states: "After the pleadings are closed but within such times as not to delay the trial, any party may move for judgment on the pleadings." "Determination of a motion for judgment on the pleadings is restricted solely to the allegations in the pleadings and any writings attached to the complaint." *Fontbank, Inc. v. CompuServe, Inc.*, 138 Ohio App.3d 801, 807 (10th Dist.2000), citing *Peterson v. Teodosio*, 34 Ohio St.2d 161, 165 (1973). "Civ.R. 12(C) may be employed by a defendant as a vehicle for raising the several defenses contained in Civ.R. 12(B) after the close of the pleadings. * * * Pursuant to Civ.R. 12(C), the pleadings must be construed liberally and in a light most favorable to the party against whom the motion is made along with the reasonable inferences drawn therefrom. * * * A Civ.R. 12(C) motion presents only questions of law, and it may be granted only when no material factual

issues exist, and the movant is entitled to a judgment as a matter of law.” *Burnside v. Leimbach*, 71 Ohio App.3d 399, 402-403 (10th Dist.1991). To dismiss a complaint for failure to state a claim upon which relief can be granted (Civ.R. 12(B)(6)), it must appear beyond doubt from the complaint that plaintiff can prove no set of facts entitling her to recovery. *O’Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242 (1975), syllabus.

{¶3} In her complaint, plaintiff, Elizabeth Banks, administrator of the estate of Daniel Banks (Banks), asserts that on August 5, 2014, Banks was working as an aluminum extrusion press operator for BRT Extrusions, Inc., (BRT) on extrusion press No. 3 at a facility located in Niles, Ohio. BRT’s normal operating procedures required the extrusion press to be set to “semi-automatic” to prevent the machine from cycling without a worker verifying that no one was in the point of operation when the machine cycled. However, when Banks left for lunch, another employee set the press to “automatic.” After Banks returned from lunch, a butt from the aluminum billet used in the press fell into the press’ point of operation. Banks walked around the back to manually clear the butt, unaware that the press had been set to “automatic.” As Banks attempted to clear the butt, the press cycled, and Banks was crushed in an unguarded pinch point. Banks later died of his injuries.

{¶4} BRT had earlier entered into an agreement with defendant, Bureau of Workers’ Compensation (BWC), under which BWC agreed to provide BRT with safety training consulting services, including evaluating guarding and the safety of extrusion press operations, and recommending actions to meet industry safety standards. Plaintiff asserts that BWC was negligent when it: failed to recommend a comprehensive guarding audit to determine if the press guard was adequate; inspected the press and its guards; failed to advise BRT or others that the extrusion press guarding was inadequate; and, recommended inadequate guards.

{¶5} In its motion, defendant asserts that plaintiff's complaint fails to state a claim upon which relief can be granted, because BWC is entitled to public duty immunity pursuant to R.C. 2743.02(A)(3), and there was no "special relationship" between BWC and plaintiff. The court agrees.

{¶6} R.C. 2743.02(A)(3)(a) states: "Except as provided in division (A)(3)(b) of this section, the state is immune from liability in any civil action or proceeding involving the performance or nonperformance of a public duty, including the performance or nonperformance of a public duty that is owed by the state in relation to any action of an individual who is committed to the custody of the state." Public duty is defined to include inspection functions by the state. Specifically, R.C. 2743.01(E)(1) states, in pertinent part: "[p]ublic duty' includes, but is not limited to, any statutory, regulatory, or assumed duty concerning any action or omission of the state involving any of the following:

{¶7} "(a) Permitting, certifying, licensing, *inspecting*, investigating, supervising, regulating, *auditing*, monitoring, law enforcement, or emergency response activity * * *." (Emphasis added.)

{¶8} Plaintiff alleges that BWC's duty arises from its agreement with BRT to provide safety consulting services including evaluating the guarding and safety of extrusion press operations, and recommending actions to meet industry safety standards. Specifically, plaintiff asserts that BWC was negligent when it failed to recommend a comprehensive guarding audit; inspected the extrusion press and its guards; failed to advise BRT or others that the extrusion press guarding was inadequate; and when it recommended inadequate guards. (Complaint, ¶ 13.)

{¶9} Defendant admits in its answer that at various times, BWC provided consulting services to BRT, at times through BRT's participation in the Industry-Specific Safety Program as set forth in Ohio Administrative Code section 4123-17-56.3, and at other times through BWC's division of safety and hygiene created in R.C. 4121.37.

(Answer, ¶ 5.) Thus, defendant's duty to inspect the extrusion press where Banks was injured was a statutory or assumed duty by BWC. These duties are public duties, and "[a]s such, [public duties] do not flow to any private individual, including the individual being regulated, inspected, licensed or audited, and including any individuals who would benefit from these governmental functions." *Markowitz v. Dept. of Ins.*, 144 Ohio App.3d 155, 161 (10th Dist.2001). "By statute, the state is generally immune from liability in a civil action based on the performance or nonperformance of a 'public duty.'" *Connor v. Wright State Univ.*, 10th Dist. Franklin No. 13AP-116, 2013-Ohio-5701, ¶ 11. However, an exception applies if plaintiff can establish that there was a "special relationship" between the state and the injured party. As set forth in R.C. 2743.02(A)(3)(b), a special relationship "is demonstrated if all of the following elements exist:

"(i) An assumption by the state, by means of promises or actions, of an affirmative duty to act on behalf of the party who was allegedly injured;

"(ii) Knowledge on the part of the state's agents that inaction of the state could lead to harm;

"(iii) Some form of direct contact between the state's agents and the injured party;

"(iv) The injured party's justifiable reliance on the state's affirmative undertaking."

{¶10} The assumption of an affirmative duty relative to establishing a special relationship requires that the state "do more than adhere to its statutory duty. It must voluntarily assume some additional duty." *Commerce & Indus. Ins. Co. v. Toledo*, 45 Ohio St.3d 96, 101 (1989); *Automation Tool & Die, Inc., v. Ohio Bureau of Workers' Comp.*, 10th Dist. Franklin No. 15AP-631, 2016-Ohio-4882, ¶ 18. Plaintiff asserts that BWC was negligent in its performance of safety consultant services provided to BRT, through an agreement between them, and that BRT's justifiable reliance on BWC's services resulted in injury to Banks and his family. However, plaintiff's complaint lacks

adequate underlying factual allegations of promises or actions by BWC to demonstrate that it assumed affirmative duties beyond those that it owed the public. In addition, plaintiff's complaint lacks any allegation that Banks had some form of direct contact between himself and BWC. A plaintiff must allege facts that establish each of the four elements of a special relationship to state a claim for relief. See *Rudd v. Ohio State Highway Patrol*, 10th Dist. Franklin No. 15AP-869, 2016-Ohio-8263, ¶ 13. Plaintiff has failed to do so in this case. Accordingly, making all reasonable inferences in favor of plaintiff, it appears beyond doubt that defendant is immune from liability pursuant to R.C. 2743.02(A)(3)(a) and 2743.02(E)(1), and that no special relationship existed between defendant and Banks. Based on the foregoing, defendant's motion for judgment on the pleadings is GRANTED, and plaintiff's complaint is DISMISSED. Plaintiff's May 23, 2017 motion for leave to file an amended complaint and August 28, 2017 motion for leave to submit evidence in support of its motion for leave to file an amended complaint are DENIED. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge

cc:

Christopher J. Van Blargan
3412 West Market Street
Akron, Ohio 44333

Velda K. Hofacker
Assistant Attorney General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

Michael J. Maillis
4790 Market Street
Boardman, Ohio 44512

Filed October 6, 2017
Sent to S.C. Reporter 11/27/17