

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

ABIGAIL LEMKE, et al.

Case No. 2004-07093

Plaintiffs

Judge J. Craig Wright

v.

DECISION

DEPARTMENT OF COMMERCE, et al.

Defendants

{¶1} On December 12, 2006, defendant, Ohio Department of Commerce (DOC), filed a motion for summary judgment. On January 17, 2007, after obtaining leave of court, plaintiffs filed a memorandum in opposition. On February 2, 2007, the court conducted an oral hearing on the motion. At the close of the proceedings, the parties were granted leave to file supplemental briefs on or before February 12, 2007. DOC filed its supplemental authority thereafter.

{¶2} Plaintiffs filed this action alleging a single claim of negligence that arises as a result of an incident which occurred on July, 2, 1998, during a fireworks exhibition in the city of Independence, Ohio. Plaintiff, Abigail Lemke, the minor child of plaintiffs Karen and Lawrence Lemke, attended the fireworks display with Lacy Seminsky, one of Abigail's best friends. Shortly after the exhibition began, a launching malfunction occurred, which caused an exploding shell to shoot into the audience, where it struck and killed Lacy and injured several others. Plaintiffs allege that Abigail sustained serious, permanent mental injuries as a result of witnessing her friend's death; that DOC is liable for such injuries due to its negligence in issuing an exhibitor's license to the individual responsible for the malfunction; and that DOC was negligent in overseeing the setup and operation of the fireworks display.

{¶3} According to the evidence before the court, the accident occurred because one of the mortars that contained a firework was not properly secured and that, as a result,

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it fell forward, which caused a shell to discharge horizontally into the crowd.¹ DOC asserts that its only connection to the July 2, 1998, fireworks display was that it issued an exhibitor's license to Robert Maurer, the exhibitor of the improperly secured rack. DOC further asserts that, pursuant to R.C. 3743.50,² it has a ministerial duty to issue, or annually renew, such licenses to applicants who meet certain basic requirements. For example, the prospective exhibitor must be 21 years of age, complete a proper application, and pay a fee. The supplemental evidence submitted by DOC shows that Maurer complied with those requirements and was issued annual licenses from 1988 to 1998. (DOC's Exhibits A, B, and C1-C11.)

{¶4} DOC also contends that after the license was issued, it had no further involvement in the exhibitor's work, and that police and fire department officials of the city of Independence issued the permit for the show, making them in turn responsible for approving and inspecting the exhibitor's work. DOC's agents are specifically excluded from the list of persons responsible for safety at a fireworks exhibition. Moreover, pursuant to R.C. 3743.54(B),³ DOC has no authority to issue the permits that are statutorily mandated for fireworks exhibitions in the state of Ohio. R.C. 3743.54(F) states that "[t]he governing

¹Affidavit of Michael Kraft, Chief of Code Enforcement Bureau, State Fire Marshal's office, and attached Investigation Report of Department of Commerce Division of State Fire Marshal, Arson Bureau, submitted with defendant's motion for summary judgment.

²The version of R.C. 3743.50 in effect in 1998, provides:

"Any person who wishes to be an exhibitor of fireworks in this state shall submit to the fire marshal an application for licensure as an exhibitor of fireworks. Except as otherwise provided in this section, the application shall be on a form prescribed by the fire marshal, contain all information requested by the fire marshal, and be accompanied by a fee of one hundred fifty dollars, except that the application of an applicant who is employed by a licensed manufacturer or wholesaler of fireworks shall be accompanied by a fee of fifty dollars. The fire marshal shall prescribe a form for applications for licensure as an exhibitor of fireworks and make a copy of the form available, upon request, to persons who seek that licensure. An applicant for licensure as an exhibitor of fireworks shall be at least twenty-one years of age and be in compliance with Chapter 4123 of the Revised Code."

³This provision of R.C. 3743.54(B) has not changed since 1998.

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authority having jurisdiction in the location where an exhibition is to take place shall require that a certified fire safety inspector, fire chief, or fire prevention officer be present before, during, and after the exhibition, and shall require the certified fire safety inspector, fire chief, or fire prevention officer to inspect the premises where the exhibition is to take place and determine whether the exhibition is in compliance with this chapter.” For these reasons, DOC maintains that it is not liable to plaintiffs because there was no duty owed by them to Abigail or any other spectator at the fireworks display. The court agrees.

{¶15} In order to prevail upon a claim of negligence, plaintiffs must prove by a preponderance of the evidence that DOC owed them a duty, that DOC’s acts or omissions resulted in a breach of that duty, and that the breach proximately caused plaintiffs’ injuries. *Armstrong v. Best Buy Company, Inc.*, 99 Ohio St.3d 79, 81, 2003-Ohio-2573, citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77.

{¶16} In Ohio, “[t]he existence of a duty depends upon the foreseeability of the injury. *** The test for foreseeability is whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act.” *Menifee*, supra. However, foreseeability alone is not always sufficient to establish the existence of a duty.” *Estates of Morgan v. Fairfield Family Counseling Center*, 77 Ohio St.3d 284, 293, 1997-Ohio-194. In cases such as this, even if an injury was foreseeable, DOC had no duty to protect plaintiffs from, or to control, the conduct of a third person. *Conver v. EKH Co.*, Franklin App. No. 02AP-1307, 2003-Ohio-5033, at ¶38. In such situations, a duty only arises if the defendant shares a “special relation” with the plaintiff or the third person that justifies the imposition of the duty. *Estates of Morgan*, supra, at 293-294; see, also, *Wallace v. Ohio Dept. of Commerce*, 96 Ohio St.3d 266, 2002-Ohio-4210.

{¶17} The test for the presence of a special relationship is based upon an analysis of four elements: “(1) an assumption by the [state agency], through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part

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of the [state's] agents that inaction could lead to harm; (3) some form of direct contact between the [state's] agents and the injured party; and (4) that party's justifiable reliance on the [state agency's] affirmative undertaking." *Sawicki v. Ottawa Hills* (1988), 37 Ohio St.3d 222,232.

{¶8} In this case, none of the four elements are present. Most apparent is the lack of any direct contact between DOC and plaintiffs. There were no agents of DOC on duty at the fireworks display, nor was there any legal requirement for such presence. The law clearly provides that it is the city of Independence, acting through its fire and police officials, that was responsible for issuing the permit, inspecting the fireworks setup, and being present during the exhibition. Accordingly, there being no special relationship between the parties, plaintiffs cannot establish that DOC owed any duty to them and, thus, cannot prevail on their claim of negligence. DOC is therefore entitled to judgment as a matter of law and its motion for summary judgment shall be granted. There being no other issues pending in this case, the trial set for March 12-14, 2007, shall not go forward as scheduled.

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JUDGMENT ENTRY

DEPARTMENT OF COMMERCE, et al.

Defendants

An oral hearing was conducted in this case upon defendant's, Ohio Department of Commerce, motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of the Ohio Department of Commerce. Court costs are assessed against plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

J. CRAIG WRIGHT
Judge

cc:

Christine M. LaSalvia Jeffrey H. Friedman 1370 Ontario Street, 6th Floor Cleveland, Ohio 44113-1707	Randall W. Knutti William C. Becker Assistant Attorneys General 150 East Gay Street, 23rd Floor Columbus, Ohio 43215-3130
LH/cmd	

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