[Cite as *Benick v. Dept. of Health*, 2019-Ohio-3693.]

BRIAN L. BENICK Plaintiff v. DEPARTMENT OF HEALTH Defendant	Case No. 2018-01165JD Judge Patrick M. McGrath Magistrate Robert Van Schoyck ENTRY GRANTING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

{¶1} On June 28, 2019, defendant filed a motion for judgment on the pleadings pursuant to Civ.R. 12(C). On July 10, 2019, plaintiff filed a 32-page response without having obtained leave to exceed the 15-page limit prescribed in L.C.C.R. 4(E). On July 17, 2019, defendant filed a reply. On July 26, 2019, plaintiff filed an additional brief. On August 2, 2019, defendant filed a motion to strike plaintiff's additional brief, which is GRANTED on the basis that the brief was filed without leave of court under L.C.C.R. 4(C) ("Additional briefs may be filed only upon a showing of the necessity therefore and with leave of court.").

{¶2} "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, 594 N.E.2d 60 (10th Dist.1991).

{¶3} Defendant's motion raises the defenses contained in Civ.R. 12(B)(1) and (6). "The standard of review for a dismissal pursuant to Civ.R. 12(B)(1) is whether any cause of action cognizable by the forum has been raised in the complaint." *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 80, 537 N.E.2d 641 (1989). "In order for a court 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 the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus.

{¶4} As set forth in the complaint, plaintiff was an employee of the Morrow County Health District (MCHD) when, on June 26 and 27, 2018, defendant conducted a survey of MCHD's sewage treatment systems program. The complaint provides that defendant determined through the survey that certain permits issued by MCHD did not conform to the rules for household sewage treatment systems found in Ohio Adm.Code Chapter 3701-29. More specifically, defendant concluded that in some cases MCHD issued a permit for the alteration of a sewage treatment system where the rules instead required a permit for the replacement of a sewage treatment system, according to the complaint.

{¶5} Plaintiff claims that as a result of defendant's survey MCHD placed him on administrative leave and initiated disciplinary proceedings in which he was subject to "termination for not properly enforcing the sewage rules." (Complaint, p. 3.) Plaintiff's complaint acknowledges his role in issuing the permits in question and that he knew they did not comply with Ohio Adm.Code Chapter 3701-29. As plaintiff explains, in his view certain rules set out in Ohio Adm.Code Chapter 3701-29 are not in accordance with corresponding provisions of Revised Code Chapter 3718 and are therefore invalid. Plaintiff alleges that in the "survey of the MCHD sewage program, [defendant] intentionally and egregiously violated the sewage laws" by applying the allegedly invalid rules. (Complaint, p. 5.) Moreover, plaintiff alleges, these rules work to the financial detriment of "thousands of property owners" and leave them "saddled with inferior sewage systems." (Complaint, p. 9.)

{¶6} Plaintiff brings this action seeking $20 million in damages. In the section of his form complaint designated for describing one's injury, damage, or loss, plaintiff

identifies the following: "Loss of income and benefits for several years, destruction of reputation, forcing me to violate the law and coercing my employer to exacerbate my ADA protected conditions of anxiety and depression." (Complaint, p. 2.)

{¶7} Plaintiff's complaint does not clearly identify any specific cause of action that he seeks to advance as a theory of recovery in this matter. Rather, the complaint is substantially given over to allegations that defendant's adoption of certain rules in the Administrative Code and its reliance on those rules in the survey that it performed of MCHD's sewage treatment systems program constituted violations of R.C. Chapter 3718 "for which the law requires the assessment of financial penalties." (Complaint, p. 9.) Even if the court considers the entire 32-page response that plaintiff filed without leave of court, he explains that he "desires that the law be enforced, moreso than to receive a financial award. Plaintiff's primary goal is to stop hundreds of thousands of our citizens from being illegally screwed by Defendant." (Response, p. 31.)

{¶8} "The Court of Claims is a court of limited jurisdiction that has exclusive, original jurisdiction over claims brought against the state as a result of the state's waiver of immunity in R.C. 2743.02." *Duff v. Ohio Adult Parole Auth.*, 2017-Ohio-8895, 100 N.E.3d 1144, ¶ 6 (10th Dist.). "The Court of Claims has exclusive jurisdiction over civil actions against the state for monetary damages that sound in law." *Victorian's Midnight Café LLC v. Goodman*, 10th Dist. Franklin No. 16AP-177, 2016-Ohio-7947, ¶ 9. "Under the Court of Claims Act, individuals can sue the state in the Court of Claims and have liability determined with the same rules of law applicable to suits between private parties." *Deavors v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 98AP-1105, 1999 Ohio App. LEXIS 2338 (May 20, 1999), citing R.C. 2743.02(A)(1). "Thus, suits against the state are inherently limited by the type of action asserted against it; if the cause of action is not cognizable as between private parties, then there can likewise be no state liability." *Wallace v. Ohio Dept. of Commerce*, 96 Ohio St.3d 266, 2002-Ohio-

4210, 773 N.E.2d 1018, ¶ 37. "When a complaint seeks recovery purely for a statutory violation, no action will lie against the state unless the statute in question provides for a private cause of action." *Vos v. Ohio Environmental Protection Agency*, 10th Dist. Franklin No. 17AP-749, 2018-Ohio-2956, ¶ 10; *see also Bungard v. Dept. of Job & Family Servs.*, 10th Dist. Franklin No. 07AP-447, 2007-Ohio-6280, ¶ 6 ("If no statutory authority for a lawsuit against the state exists, the suit is barred because the court lacks subject matter jurisdiction over the controversy.").

{¶9} Plaintiff has identified no private cause of action provided for in R.C. Chapter 3718 that would enable him to bring an action for monetary damages in the Court of Claims predicated on defendant's alleged violation of any statute within that chapter. Plaintiff claims that defendant's alleged violation of R.C. Chapter 3718 "requires the assessment of financial penalties," but the Court of Claims is not conferred with statutory jurisdiction to assess civil penalties for a violation of R.C. Chapter 3718. *See* R.C. 3718.10; 2743.02. Even if the facts of the complaint are accepted as true, there is no statutory basis upon which plaintiff would have a viable claim for monetary damages in the Court of Claims purely for defendant's alleged failure to adhere to the terms of R.C. Chapter 3718. Also, to the extent plaintiff indicates that he seeks relief on behalf of property owners throughout Ohio, generally a non-attorney pro se litigant may only represent his or her own legal interests. *See Hamilton v. Ohio Dept. of Health*, 2015-Ohio-4041, 42 N.E.3d 1261, ¶ 29 (10th Dist.); *State ex rel. Manning v. Adult Parole Auth.*, 10th Dist. Franklin No. 15AP-1050, 2016-Ohio-7946, ¶ 15.

{¶10} Plaintiff's response to the motion for judgment on the pleadings identifies numerous criminal offenses that he appears to argue were committed either by public officials in Morrow County or potentially by defendant. However, the only defendant in an original action in the Court of Claims is the state, which does not include a political subdivision such as Morrow County nor its officers or employees. *See* R.C. 2743.02(E); R.C. 2743.01(A). And, "[t]he Court of Claims has exclusive, original jurisdiction over

only civil actions against the State permitted by the waiver of immunity contained in R.C. 2743.02 and does not have jurisdiction over criminal matters against the State." *Burse v. Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 17AP-452, 2019-Ohio-2882, ¶ 15.

{¶11} Plaintiff's response also makes some reference to theories of libel and slander, but in order "[t]o prevail on a defamation claim, whether libel or slander, a plaintiff must prove the following elements: (1) a false statement, (2) about the plaintiff, (3) was published without privilege to a third party, (4) with fault of at least negligence on the part of the defendant, and (5) the statement was either defamatory per se or caused special harm to the plaintiff." *Schmidt v. Northcoast Behavioral Healthcare*, 10th Dist. Franklin No. 10AP-565, 2011-Ohio-777, ¶ 8. The complaint fails to set forth facts supporting all the elements necessary to sustain such a claim. As an initial matter, the complaint provides that what defendant reported after the survey was "that MCHD allowed the installation of sewage treatment system components that do not conform to the sewage rules, OAC 3701-29." (Complaint, p. 2.) That statement must be taken as true because plaintiff himself acknowledges he did not comply with those rules. (Complaint, p. 3.) "In Ohio, truth is a complete defense to a claim for defamation." *Ed Schory & Sons, Inc. v. Soc. Natl. Bank*, 75 Ohio St.3d 433, 445, 662 N.E.2d 1074 (1996); *see also Roe v. Heap*, 10th Dist. Franklin No. 03AP-586, 2004-Ohio-2504, ¶ 22. Thus, the complaint does not state an actionable claim of defamation.

{¶12} Additionally, defendant argues that it is immune from liability on any potential cause of action that plaintiff may have by operation of the public duty rule set forth at R.C. 2743.02(A)(3)(a). "Generally, the state is 'immune from liability in any civil action or proceeding involving the performance or nonperformance of a public duty.'" *Lawrence v. Meridian Senior Living, L.L.C.*, 2016-Ohio-8500, 79 N.E.3d 1158, ¶ 8 (10th Dist.), quoting R.C. 2743.02(A)(3)(a). As set forth in R.C. 2743.01(E)(1), "'[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: (a) Permitting, certifying, licensing, inspecting, investigating, supervising, regulating, auditing, monitoring, law enforcement, or emergency response activity * * *."

{¶13} Plaintiff's complaint involves a survey that defendant performed to monitor MCHD's compliance with both R.C. Chapter 3718 and the applicable rules adopted thereunder. Pursuant to R.C. 3718.07, defendant has a duty to perform such surveys at least once every three years. *See also* R.C. 3718.05(D); Ohio Admin.Code 3701-29-04. Even if the factual allegations of the complaint are accepted as true and all reasonable inferences are made in plaintiff's favor, it can only be concluded that defendant's duty to perform the survey was owed to the public at large.

{¶14} Plaintiff argues that the "special relationship" exception to the public duty rule, contained in R.C. 2743.02(A)(3)(b), applies in this case because "[f]or years, plaintiff has sent letters to defendant, informing them of their wrongdoing, their commission of acts of misfeasance, malfeasance and nonfeasance." (Response, p. 24.) Plaintiff also states, though, that defendant did not respond to his letters and that he did not participate in the survey conducted by defendant. (Response, pp. 23-24.)

{¶15} "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." R.C. 2743.02(A)(3)(b). Plaintiff's complaint does not set forth facts to establish the special relationship exception to the public duty rule. There are no allegations of promises or actions by defendant that would suggest it assumed any duty to act on plaintiff's behalf, much less that plaintiff justifiably relied on any such affirmative undertaking. Rather, the complaint demonstrates that in surveying the MCHD sewage treatment systems program,

defendant was doing no more than performing a statutory or regulatory duty owed to the public. The assumption of an affirmative duty, for purposes of 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, 543 N.E.2d 1188 (1989). Since it cannot be inferred from the complaint that defendant voluntarily assumed any such additional duty, the special relationship exception does not apply. Therefore, even if any claim for relief involving the survey that defendant conducted could be construed from the complaint, defendant would be immune from liability under the public duty rule.

{¶16} Based upon the foregoing, defendant's motion for judgment on the pleadings is GRANTED and judgment is rendered in favor of defendant. All previously scheduled events are VACATED. 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

Filed August 14, 2019
Sent to S.C. Reporter 9/13/19