

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

The Tri-M Group, LLC, d/b/a Tri-M Network Services,	:	
	:	
Plaintiff-Appellant,	:	No. 10AP-486
	:	(C.C. No. 2008-01723)
v.	:	
	:	(ACCELERATED CALENDAR)
University of Cincinnati et al.,	:	
	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on December 28, 2010

Aronoff, Rosen & Hunt, and Patrick M. O'Neill, and Edward P. Akin, for appellant.

Richard Cordray, Attorney General, and Jon C. Walden, for appellee University of Cincinnati.

APPEAL from the Ohio Court of Claims.

BROWN, J.

{¶1} The Tri-M Group, LLC, d/b/a Tri-M Network Services ("Tri-M"), plaintiff-appellant, appeals from a judgment of the Ohio Court of Claims, in which the court granted the motion to dismiss filed by the University of Cincinnati ("UC").

{¶2} UC, which is located in Hamilton County, is a "public authority" under R.C. 4115.03(A). UC contracted with Johnson Controls, Inc. ("JCI") to perform work on a

building at the UC campus. The work on the UC building was a "public improvement" under R.C. 4115.03(C), and JCI's work on the building was within the scope of the prevailing wage provisions in R.C. 4115.03, et seq. In 2004, Tri-M entered a subcontract with JCI to perform voice, data, and video electrical work in the same UC building. Pursuant to R.C. 4115.03(A)(2), UC, JCI, and Tri-M were required to pay their workers prevailing wages. The prevailing wage rate applicable to Tri-M's work was published by the Ohio Department of Commerce ("ODC"), and JCI forwarded such to Tri-M during the bidding process for Tri-M's subcontract. Tri-M began the work in the summer of 2004, and was to complete the work in 2008.

{¶3} On October 25, 2005, UC received a notice of a prevailing wage rate schedule change from ODC. UC failed to forward the notice or any other information regarding the prevailing wage rate change to Tri-M.

{¶4} In April 2006, the International Brotherhood of Electrical Workers, Local Union No. 212 ("the union"), filed an administrative complaint with ODC alleging Tri-M had failed to comply with the Ohio prevailing wage law. In June 2006, the union filed a civil action against Tri-M in the Hamilton County Court of Common Pleas, alleging Tri-M had failed to comply with the Ohio prevailing wage law. In defending the action, Tri-M incurred over \$25,000 in attorney fees and other costs.

{¶5} On January 9, 2009, Tri-M filed a complaint in the Ohio Court of Claims against UC. In Count 1, Tri-M alleged, among other things, that UC committed a statutory breach of R.C. 4115.05 when it failed to inform it of the prevailing wage rate schedule change. In Count 2, Tri-M alleged a claim for equitable contribution, asserting that UC should be liable for any damages Tri-M may be found liable for in the Hamilton County

action due to UC's failure to forward to Tri-M the prevailing wage rate schedule change. Count 3 alleged a contribution claim against JCI, which the court dismissed as a party on February 7, 2008. On April 4, 2008, UC filed a Civ.R. 12(B)(6) motion to dismiss Tri-M's complaint. On April 15, 2010, the court granted UC's motion to dismiss the complaint. With regard to Count 1, the court found R.C. 4115.16 provides that an interested party may file a complaint with the director of commerce, and, if the director fails to rule on the complaint, the party may file a complaint in the court of common pleas of the county in which the violation occurred. The court indicated that R.C. 4115 contains no provision for an interested party to file an action for damages against a "public authority" in the Court of Claims, and there is no private cause of action against a "public authority" based upon the failure to comply with a statutory authority. With regard to Count 2, the court found that, although *Ohio Asphalt Paving, Inc. v. Ohio Dept. of Indus. Relations* (1992), 63 Ohio St.3d 512, paragraph two of the syllabus, held that a contractor may maintain an action in contribution against a public authority where the contract indicates culpability on the part of the public authority in failing to comply with the prevailing wage provisions, Tri-M did not have contractual privity with UC. The Court of Claims also held that any common-law claim in tort or statutory claim for contribution against UC would be precluded by the economic loss doctrine which provides that, absent privity of contract, there is no duty to exercise reasonable care to avoid intangible economic loss not arising from tangible physical harm to person or things. Tri-M appeals the judgment of the trial court, asserting the following assignment of error:

The Trial Court Erred to the Prejudice of Tri-M by Dismissing the Complaint Pursuant to Civ.R. 12(B)(6).

{¶6} Tri-M argues in its assignment of error that the Court of Claims erred when it dismissed its complaint pursuant to Civ.R. 12(B)(6). A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548, citing *Assn. for Defense of Washington Local School Dist. v. Kiger* (1989), 42 Ohio St.3d 116, 117. For that reason, a trial court may not rely upon evidence or allegations outside the complaint when ruling on a Civ.R. 12(B)(6) motion. *State ex rel. Fuqua v. Alexander*, 79 Ohio St.3d 206, 207, 1997-Ohio-169. To sustain a Civ.R. 12(B)(6) dismissal, it must appear beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief. *LeRoy v. Allen, Yurasek, & Merklin*, 114 Ohio St.3d 323, 2007-Ohio-3608, ¶14, citing *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, ¶11. Additionally, the complaint's allegations must be construed as true, and any reasonable inferences must be construed in the non-moving party's favor. *Id.*, citing *Maitland v. Ford Motor Co.*, 103 Ohio St.3d 463, 2004-Ohio-5717, ¶11; *Kenty v. Transamerica Premium Ins. Co.* (1995), 72 Ohio St.3d 415, 418.

{¶7} In the present case, Tri-M essentially presents only one argument; that is, the trial court erred in its interpretation and application of *Ohio Asphalt* as it relates to its claim for contribution against UC in Count 2 of its complaint. Tri-M presents no argument that the trial court erred when it dismissed Count 1 of Tri-M's complaint that sought damages from Tri-M for a statutory breach of R.C. 4115.05. We agree with the Court of Claims that R.C. 4115 provides no right for a private party to maintain an action in the Court of Claims against a public authority that fails to comply with its obligations under

R.C. 4115. "R.C. Chapter 4115 imposes certain duties and creates specific remedies to achieve the underlying purpose of ensuring that employees who perform labor on a public improvement are paid the prevailing wage rate enjoyed by similar employees working on private projects in a given locality." *Robbins Sound, Inc. v. Ohio Univ.* (1990), 70 Ohio App.3d 212, 220. R.C. 4115.16 provides the procedure for an "interested party," as defined by R.C. 4115.03(F), to file a complaint against a public authority for violations of the prevailing wage law. R.C. 4115.16 provides that an interested party may file the complaint with the director of commerce. R.C. 4115.16(A). If the director determines there was no violation or it was not intentional, the interested party may appeal the decision to the court of common pleas of the county where the violation is alleged to have occurred. *Id.* If the director fails to rule on the merits of the complaint within 60 days after its filing, the interested party may file a complaint against the public authority in the court of common pleas of the county in which the violation is alleged to have occurred. R.C. 4115.16(B).

{¶8} However, "R.C. Chapter 4115 creates no private cause of action against a public authority who fails to comply with its statutory duties, except as specifically provided under Ohio's Prevailing Wage Law." *Id.*, citing *Harris v. Davis Constr. Sys., Inc.* (1986), 34 Ohio App.3d 350. Tri-M fails to point to any private cause of action specifically provided under R.C. 4115. Although paragraph nine of R.C. 4115.05 requires a public authority to notify all affected contractors and subcontractors with whom the public authority has contracts of the changes to the prevailing wage rate, paragraph ten of that section defines the remedy for a violation of the requirement in paragraph nine. Paragraph ten provides that the public authority is liable for damages for failing to notify

the contractor or subcontractor as required by R.C. 4115.03 to 4115.16 only "[i]f the director determines that a contractor or subcontractor has violated" those sections. As mentioned above, R.C. 4115.16(A) also directs an interested party to first file a complaint with the director regarding any violations of the prevailing wage law. Thus, as these sections make clear, in order to seek damages from a public authority for violations of the prevailing wage law, the interested party must file a complaint with the director. There is nothing in R.C. 4115 to suggest that an interested party may file a complaint for damages in the Court of Claims for violations of the prevailing wage law. For these reasons, we find the trial court did not err when it granted UC's motion to dismiss with regard to Tri-M's first cause of action.

{¶9} As already noted, Tri-M's main argument is that the trial court erred in its interpretation and application of *Ohio Asphalt* as it relates to its claim for contribution against UC in Count 2 of its complaint. In *Ohio Asphalt*, Ohio Asphalt Paving, Inc. ("Ohio Asphalt") contended it was not subject to any prevailing wage rate determination because there was no indication in any of the project contract documents that prevailing wages were required. Ohio Asphalt filed an action for declaratory relief in the court of common pleas against the Ohio Department of Industrial Relations ("ODIR"). The trial court held that a public improvement contractor may be liable for the underpayment of the prevailing rate of wages even when the public authority involved has failed to have such wages determined by the department or has failed to expressly advise the contractor that R.C. Chapter 4115 applies. The court of appeals reversed, finding, in relevant part, that the law imposes on ODIR and local public authorities the duty to insure that all contracts subject to the prevailing wage laws have a prevailing wage fixed in the contract. When the

government fails in such duty, the appellate court found, the contractor cannot be held liable for not paying the prevailing wage.

{¶10} Upon a motion to certify the record, the Supreme Court of Ohio concluded that, except as provided in R.C. 4115.05, a contractor will be held liable for the underpayment of prevailing wages with respect to a public improvement contract, even where the public authority fails to include prevailing wage specifications in that contract. The court then explained that R.C. 4115.05 places liability upon the public authority whenever it fails to notify the contractor of any changes in the prevailing rate of wages during the life of the contract. The court further held that "a contractor may maintain a cause of action in contribution where the facts underlying a particular public improvement contract indicate culpability on the part of the public authority for failing to comply with the prevailing wage provisions. In our view, equity and fairness demand such a remedy." *Ohio Asphalt* at 517.

{¶11} In the present case, the trial court found that, although *Ohio Asphalt* held a contractor may maintain an action in contribution against a public authority where the contract indicates culpability on the part of the public authority in failing to comply with the prevailing wage provisions, Tri-M was a subcontractor without contractual privity with UC. Tri-M argues that the trial court's distinguishing of *Ohio Asphalt* on the basis of contractual privity was in error, and that case did not limit causes of action against a public authority to those in contractual privity with it. Tri-M contends that the prevailing wage provisions are duties imposed by ODC on all contractors and subcontractors on a public project, and, if a subcontractor is burdened by the duties imposed by the prevailing wage law, it

must be afforded the remedies when it is harmed by the public authority's violation of R.C. 4115.

{¶12} Initially, we note that a subcontractor is, in fact, afforded remedies when it is harmed by the public authority's violation of R.C. 4115. The procedure for seeking redress for such harm is provided for in R.C. 4115.16, as set forth above. As for the application of *Ohio Asphalt*, we agree with the trial court that it does not create an action in contribution for a subcontractor against a public authority under these circumstances. Again, the court held in *Ohio Asphalt* that "a contractor" may maintain a cause of action in contribution when "a particular improvement contract" indicates a public authority has failed to comply with the prevailing wage provisions. The court in *Ohio Asphalt* did not hold that a subcontractor with no privity to the "particular improvement contract" between the contractor and public authority may maintain a contribution action against the public authority. In *Ohio Asphalt*, the party seeking redress was a contractor who was a party to the improvement contract with the public authority. To extend *Ohio Asphalt* beyond contractors in contractual privity with the public authority without any further authority to support such extension is unwarranted, especially when R.C. 4115.05 and 4115.16 provide adequate administrative and legal remedies to address Tri-M's present complaints.

{¶13} In its appellate brief, Tri-M does not challenge the trial court's conclusions in any other respect. Insofar as the trial court also held that Tri-M was precluded from bringing a common-law claim in tort against UC or a statutory claim for contribution against UC, we agree with the court that the economic loss doctrine bars Tri-M's claims. "The economic-loss rule generally prevents recovery in tort of damages for purely

economic loss." *Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc.*, 106 Ohio St.3d 412, 2005-Ohio-5409, ¶6, citing *Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co.* (1989), 42 Ohio St.3d 40, 45, and *Floor Craft Floor Covering, Inc. v. Parma Community Gen. Hosp. Assn.* (1990), 54 Ohio St.3d 1, 3. The rule applies primarily in the absence of contractual privity when a plaintiff seeks to recover in tort for a purely economic loss. See, e.g., *Laurent v. Flood Data Serv., Inc.*, 146 Ohio App.3d 392, 401, 2001-Ohio-1660. The economic loss rule is based upon the principle that, "[i]n the absence of privity of contract between two disputing parties the general rule is 'there is no * * * duty to exercise reasonable care to avoid intangible economic loss or losses to others that do not arise from tangible physical harm to persons and tangible things.' " *Floor Craft* at 3, quoting Prosser & Keeton, *Law of Torts* (5th ed.1984) 657, Section 92. In the present case, Tri-M is seeking to recover a purely economic loss from UC while lacking contractual privity with UC, which is precluded by the economic loss doctrine. Thus, Tri-M's claim must fail in this respect, as well. For these reasons, we find the trial court did not err when it granted UC's motion to dismiss as it related to Tri-M's contribution claim. Therefore, we find the trial court did not error when it granted UC's motion to dismiss Tri-M's complaint. For these reasons, Tri-M's assignment of error is overruled.

{¶14} Accordingly, Tri-M's single assignment of error is overruled, and the judgment of the Ohio Court of Claims is affirmed.

Judgment affirmed.

FRENCH and CONNOR, JJ., concur.
