[Cite as *Abdou v. Dept. of Agriculture*, 2019-Ohio-4046.]

AMGAD WILLIAM ABDOU, M.D., etc., et al. Plaintiffs v. DEPARTMENT OF AGRICULTURE Defendant	Case No. 2018-00520JD Judge Patrick M. McGrath DECISION

{¶1} Before the court is defendant Ohio Department of Agriculture's (defendant) motion for summary judgment. Initially, the court notes that its local rules were amended on July 1, 2019 to allow reply memoranda without seeking leave of court. Therefore, the court DENIES as moot defendant's motion for leave to file a reply. For the following reasons, the court grants defendant's motion for summary judgment.

{¶2} Plaintiff Amgad William Abdou, M.D.'s (plaintiff) complaint asserts a negligence claim and alleges recklessness on the part of defendant and/or its employees.[1] Plaintiff's claims are based on severe injuries he sustained while navigating an inflatable obstacle course called the Chaos, which defendant's employees inspected and licensed. The parties submitted a substantial amount of deposition testimony, and documentary evidence.

{¶3} Civ.R. 56(C) states, in part, as follows:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed

[1]For ease of discussion, the court refers to plaintiffs' claims in the singular.

> in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

See also Dresher v. Burt, 1996-Ohio-107, 75 Ohio St.3d 280 (1996). In *Dresher,* the Ohio Supreme Court held, "the moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." A "movant must be able to point to evidentiary materials of the type listed in 56(C)." *Id.* at 292.

{¶4} When the moving party has satisfied its initial burden, Civ.R. 56(E) imposes a reciprocal burden on the nonmoving party. It states:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. *When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of his pleadings, but the*

> *party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.* (Emphasis added).

In seeking and opposing summary judgment, parties must rely on admissible evidence. *Keaton v. Gordon Biersch Brewery Rest. Group*, 10th Dist. No. 05AP-110, 2006-Ohio-2438, 2006 Ohio App. Lexis 2287, ¶18.

{¶5} In its motion, defendant cites exclusively to an unauthenticated report from one of plaintiff's experts. Normally, "a party who wishes to rely on a document not listed in Civ.R. 56(C) must incorporate that document into an affidavit." *Nationstar Mortg. LLC v. Payne*, 10th Dist. No. 16AP-185, 2017-Ohio-513, 2017 Ohio App. Lexis 506, ¶ 20. However, "a trial court may consider evidence not specifically listed [in Civ.R. 56(C)] if the adverse party fails to timely object to that evidence." *Id.* at ¶ 21. Though defendant failed to incorporate plaintiff's expert's report into an affidavit, plaintiff offers no objection to defendant's use of the report and the court, therefore, elects to consider it.

Facts

{¶6} As required, the following facts are stated in a light most favorable to plaintiff. On May 29, 2011, plaintiff attended a party at the Pump It Up Party Center in Avon, Ohio. While navigating an inflatable obstacle course called the Chaos, plaintiff slid head-first down one of its ramps. Plaintiff's head impacted a narrow valley-like portion of the course, resulting in a fractured cervical spine and rendering him a quadriplegic.

{¶7} In March of 2005, Pump It Up management issued a mandatory Safety Information Notice regarding the Chaos, which required that a safety wedge be inserted into the valley where plaintiff sustained his injuries. The safety wedge was intended to prevent injuries by raising and leveling this area and the Chaos was not supposed to be

in operation without the mandatory safety wedge. Though Pump It Up used the safety wedge for several years, the wedge was not in place at the time of plaintiff's accident as it had been removed by a Pump It Up Employee some time in 2010.

{¶8} Defendant's inspectors were aware of the safety bulletin and wedge; they inspected and licensed the Chaos with the safety wedge in place from 2005 to 2009. Further, inspectors were required to review and follow the mandatory safety bulletin before licensing the Chaos. Nonetheless, six months prior to plaintiff's accident, defendant's inspectors licensed the Chaos for operation in 2011 despite the missing safety wedge. In addition, at an unknown point in time, defendant's inspectors instructed Pump It Up employees to discard records, including the Chaos' 2005 mandatory safety bulletin, that were more than two years old. As a mandatory safety bulletin, it should have been kept indefinitely. If the safety wedge was in place at the time of plaintiff's use of the Chaos, plaintiff would not have been injured.

Law and Analysis

{¶9} Defendant asserts it is entitled to judgment as a matter of law based on statutory public duty immunity and/or discretionary immunity. The court will address each theory individually.

Public Duty Immunity

R.C. 2743.02(A)(3)(a) provides:

> 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.

R.C. 2743.01(E)(1)(a) defines public duty as "any statutory, regulatory or assumed duty concerning any act or omission of the state involving any of the following… permitting, certifying, licensing, inspecting, investigating, supervising, regulating, auditing, monitoring, law enforcement, or emergency response activity." The statute provides an exception which states, in pertinent part, that public duty immunity does not apply "to any action of the state under circumstances in which a special relationship can be established between the state and an injured party." R.C. 2743.02(A)(3)(b). The statute specifies four mandatory criteria needed to establish a special relationship, including "[s]ome form of direct contact between the state's agents and the injured party." R.C. 2743.02(A)(3)(b)(iii).

{¶10} As stated in *Estate of Tokes v. Dep't of Rehab. & Corr.*, 10th Dist. No. 18AP-723, 2019-Ohio-1794, 2019 Ohio App. Lexis 1870, ¶ 36:

> The [public duty] rule "is used to determine the first element of negligence, the existence of a duty on the part of the state. If the duty owed is general in nature, the wrong created by its breach is to the public in general and, therefore, not individually actionable." As noted above, the public duty doctrine insulates DRC from liability for the performance and non-performance of public duties in the absence of a special relationship. Accordingly, the Estate must sufficiently plead the existence of a special relationship to avoid imposition of the public duty doctrine and Civ.R. 12(B)(6) dismissal. (Internal citations omitted).

{¶11} Per the plain language of the statute, defendant is entitled to immunity for "*any* act or omission" related to licensing, inspecting, or regulating. (Emphasis added). As a basis for his claims, plaintiff points to evidence that defendant knew of the mandatory safety bulletin and the need for the safety wedge but nonetheless licensed the Chaos for operation in 2011 despite the missing wedge. He presents evidence that defendant

failed to document certain aspects of its inspection. Plaintiff also points to defendant's inspector's instruction to Pump It Up employees to discard documentation more than 2 years old as well as its failure to inform Pump It Up's new management of the need for the safety wedge. While the evidence might establish several ways in which defendant and/or its inspectors were negligent, this same evidence establishes that all of these acts and/or omissions were related to defendant's conduct in inspecting, licensing and/or regulating the Chaos.

{¶12} The court, therefore, finds that defendant has met its burden on summary judgment and has established that there is no genuine issue of material fact that it was performing a public duty. It also finds the evidence does not establish a special relationship between plaintiff and defendant. Most glaring is the absence of evidence of any direct contact between plaintiff and defendant's employees. Finally, the court finds, given the undisputed facts, defendant is entitled to judgment as a matter of law based on the immunity provided by R.C. 2743.02(A)(3)(a).

{¶13} In opposing defendant's motion, plaintiff makes no mention of R.C. 2743.01 or R.C. 2743.02. As such, plaintiff does not contest that defendant's actions meet the definition of public duty under R.C. 2743.02(E)(1)(a) nor does he assert that any special relationship existed. Plaintiff instead advances arguments unrelated to the special relationship exception. Plaintiff first asserts that public duty immunity does not apply because defendant is not immune for negligence in implementing policy decisions. In addition, plaintiff, citing R.C. 9.86, asserts that defendant is not entitled to immunity, based on the recklessness of its inspectors. Both arguments lack merit for the following reasons.

{¶14} R.C. 2743.02(A)(3)(b) and *Tokes* make clear that the only exception to the immunity provided by R.C. 2743.02(A)(3)(a) is the existence of a special relationship. Therefore, plaintiff's reliance on areas of the law germane to other types of immunity is

misplaced. Discretionary function immunity is a type of qualified immunity which protects the state from being "sued for its legislative or judicial functions or the exercise of an executive or planning function involving the making of a basic policy decision that is characterized by the exercise of a high degree of official judgment or discretion." *Risner v. ODOT*, 145 Ohio St.3d 55, 2015-Ohio-4443, ¶ 12. This type of immunity does not protect the state from culpable conduct in "performing the activities necessary to implement that decision." *Id.* at ¶ 13. However, the fact that discretionary immunity does not apply to actions the state takes in implementing policy decisions does not mean that R.C. 2743.02(A)(3)(a), an additional, statutory form of immunity, does not apply to those same actions when the statute explicitly says otherwise. Unlike *Risner* and other cases plaintiff cites, the actions and omissions at issue in this case are explicitly defined as public duties. In short, though the state can be held liable for the negligent implementation of a policy decision, this is not true as to actions or omissions related to a public duty for which the state enjoys statutory immunity. *See Estate of Tokes* at ¶ 45-46 (Holding that, even if a common law duty applied, "the public duty rule would still operate to insulate DRC from liability because the Estate failed to adequately plead the elements of a special relationship).

{¶15} Likewise, R.C. 9.86 speaks only to the personal immunity (or not) of individual state employees and is not an exception to public duty immunity. It specifies the circumstances under which an individual state employee can forfeit personal immunity. It has no bearing on the application of R.C. 2743.02(A)(3)(a) or defendant's entitlement to immunity thereunder.

{¶16} Immunity is a strong defense which applies to all aspects of the activity to which it is granted. Individual actions or omissions related to activities for which the state enjoys immunity are not parsed out from other actions or omissions. Even assuming defendant acted negligently in failing to observe or to document the missing safety

wedge and/or in instructing employees to discard documentation, these negligent failures all involve defendant's licensure, inspection and/or regulation of the Chaos. Though plaintiff points to several negligent acts and omissions of defendant, they all stem from defendant's role in inspecting and licensing the Chaos. As such, the court finds that plaintiff cannot establish a genuine issue of material fact and, therefore, that defendant is entitled to immunity pursuant to R.C. 2743.02(A)(3)(a).

Discretionary Immunity

{¶17} Plaintiff asserts that he is "not criticizing the discretionary, legislative decision to have a policy" but rather, per *Risner* and other similar cases, is seeking recovery for the negligent implementation of decisions. (Memorandum Contra p. 13). Nonetheless, plaintiff asserts that defendant's failure to develop inspection checklists and its failure to implement preventative measures recommended by the Advisory Council on Amusement Ride Safety merit the denial of summary judgment. The court finds that there is no genuine issue of material fact that these are basic policy decisions characterized by the exercise of a high degree of official judgment or discretion. As such and to the extent plaintiff seeks recovery based on these policy decisions, discretionary immunity applies and entitles defendant to judgment as a matter of law.

Conclusion

{¶18} Plaintiff's injuries are very serious and his accident on the Chaos is truly regrettable and extremely unfortunate. However, the law in Ohio is that defendant is entitled to immunity for any actions or omissions related to a public duty absent evidence of a special relationship. There is no such evidence. Rather, defendant has pointed to evidence which establishes the absence of any genuine issue of material fact that it was engaged in a public duty when it inspected and licensed the Chaos in 2010

and that no special relationship existed.[2] For the reasons stated herein, the court shall grant defendant's motion for summary judgment.

PATRICK M. MCGRATH
Judge

[2]The parties both make arguments regarding the statute of limitations relative to inspections occurring prior to March 31, 2005, the effective date of the public duty immunity statute. However, the court finds that an analysis on this issue is unnecessary because the safety wedge was in place from 2005-2009 and because the 2010 inspection, in which the Chaos was licensed without the wedge, is the only inspection which could have proximately caused plaintiff's injuries.

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{¶19} 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 defendant. All previously scheduled events are VACATED. 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.

PATRICK M. MCGRATH
Judge

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Sent to S.C. Reporter 10/2/19