

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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| Alfonsia Perry, | : | |
| Plaintiff-Appellant, | : | |
| v. | : | No. 12AP-814 |
| | : | (Ct. of Cl. No. 2012-05312) |
| Department of Rehabilitation and | : | |
| Correction, | : | (ACCELERATED CALENDAR) |
| Defendant-Appellee. | : | |
| | : | |

D E C I S I O N

Rendered on September 5, 2013

Alfonsia Perry, pro se.

Michael DeWine, Attorney General, and Kristin S. Boggs, for appellee.

APPEAL from the Court of Claims of Ohio

TYACK, J.

{¶ 1} Alfonsia Perry is appealing the dismissal of his lawsuit against the Ohio Department of Rehabilitation and Correction ("ODRC"). He assigns two errors for our consideration:

[I.] The Trial Court Abused It's [sic] Discretion by Dismissing Plaintiff's Complaint Where The Law Clearly has been established That Plaintiff's Claims are To Be Tried To A Jury.

[II.] The Court of Claims Abused Its Discretion By Ruling That Appellant Did Not State [a claim] Upon Which Relief Could Be Sought.

{¶ 2} Since the two assignments of error are closely related, we will address them together.

{¶ 3} Perry is an inmate at the Chillicothe Correctional Institution ("CCI"). He and several other inmates filed suit in the Court of Claims of Ohio against ODRC, its director, CCI and the warden of CCI. The Court of Claims, via a prescreening order, narrowed the named defendants to ODRC. Perry apparently also filed a civil action in the United States District Court for the Southern District of Ohio.

{¶ 4} The office of the Ohio Attorney General ("Ohio AG") filed a motion to dismiss the case in the Court of Claims alleging two separate grounds. First, Perry's complaint makes reference to the case being a civil rights action, which is not an appropriate case for the Court of Claims. Second, the other claim set forth in Perry's complaint is a claim for negligent or intentional infliction of emotional distress. The office of the Ohio AG alleged that the complaint did not allege a viable claim for negligent infliction of emotional distress such that dismissal was appropriate under Civ.R. 12(B)(6). Perry's complaint literally alleges "Negligent Intentional Infliction of Emotional Distress." Complaint, at 1. As a result, we will consider him as alleging intentional infliction of emotional distress and negligent infliction of emotional distress.

{¶ 5} The standard for dismissing a case under Civ.R. 12(B)(6) is high. Dismissal is appropriate only when a plaintiff can prove no set of facts in support of his or her claim which would entitle him or her to relief. *See O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242 (1975). In addressing a motion to dismiss under Civ.R. 12(B)(6), the nonmoving party is entitled to the presumption that all factual allegations made in the complaint are true and all reasonable inferences to be drawn from those allegations are to be made in favor of the nonmoving party.

{¶ 6} Applying those legal standards, we now turn to the allegations Perry made in his complaint initiating the lawsuit.

{¶ 7} To the extent the complaint is alleging a civil rights violation, the Ohio AG is correct. Civil rights cases are to be litigated in federal court or in the court of common pleas. The parts of Perry's complaint which alleged a civil rights theory were appropriately dismissed in the Court of Claims.

{¶ 8} The remaining issue, then, is whether Perry sufficiently alleged a claim for intentional or negligent infliction of emotional distress.

{¶ 9} Perry alleged that he is suffering from compensable emotional distress because he is being forced to live in a building or buildings at CCI which contains asbestos. He does not claim to be suffering from asbestoses or from any other disease which can result from exposure to asbestos. However, he claims to being housed in the "most critical dorms" at CCI based upon a study of the presence of asbestos at CCI. He also claims that, due to his prolonged incarceration at CCI, he has had prolonged exposure to asbestos and "suffers from CANCERPHOBIA," presumably meaning a fear of getting cancer.

{¶ 10} Perry alleges several facts about how he and other inmates are exposed to asbestos particles, especially from the areas surrounding the aging windows at CCI. His fears of developing some sort of disease as a result of his exposure to asbestos is not irrational. As older buildings deteriorate, friable asbestos particles are released into the atmosphere if the buildings were insulated through the use of asbestos. *See Abramovsky, Asbestos and Overcriminalization: A Pro-Compliance Solution*, 18 Fordham Env'tl.L.Rev. 67, 72 (2006) ("Given that asbestos often degrades from a nonfriable to a friable state through age, older buildings with asbestos insulation frequently pose a significant health risk to the people who live and work in them."); *Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1214 (6th Cir.1980) ("The problem is that tiny asbestos particles can become airborne when asbestos is mined and processed, when asbestos materials are used at a construction or other site, and when old buildings containing asbestos are demolished."). As Perry alleges, asbestos has been a problem at CCI since it was constructed in the 1920s.

{¶ 11} The private settlement agreement in *Smith v. Ohio Dept. of Rehab. and Corr.*, S.D.Ohio No. 2:08cv0015, which is attached to Perry's complaint, states that the buildings at CCI were originally part of a federal penal complex. (R. 1, Exhibit A.) The state of Ohio received the buildings from the federal government many years ago.

{¶ 12} The issue in this lawsuit becomes whether an inmate who has been exposed to asbestos particles in the past as a result of his incarceration in old and deteriorating buildings and who continues to be exposed to asbestos particles as a result of his ongoing

incarceration in such buildings can recover from the state of Ohio before he develops full blown asbestosis or mesothelioma. Based upon what is currently known medically, Perry and other inmates like him may have suffered harm to their lungs. *Ins. Co. of N. Am.* at 1214 ("If, over the years, enough asbestos particles are inhaled, they can cause a variety of pulmonary diseases. Medical science is not certain exactly how these diseases develop, but there is universal agreement that excessive inhalation of asbestos can and does result in disease. These asbestos-caused diseases include mesothelioma, broncheogenic carcinoma (lung cancer), and asbestosis."). Perry and other inmates like him are not at liberty to just leave jail.

{¶ 13} These facts, however, do not establish a claim for negligent or intentional infliction of emotional distress.

{¶ 14} A claim for negligent infliction of emotional distress requires the alleging of distress which is both severe and debilitating. *See* the syllabus for *Paugh v. Hanks*, 6 Ohio St.3d 72 (1983). The complaint filed by Perry mentions "CANCERPHOBIA" as resulting from his perceived exposure to asbestos particles, but does not allege that his fear of getting cancer is either severe or debilitating. Virtually everyone has some greater or lesser fear of getting cancer, but the fear does not so disrupt the person's life as to be the basis for negligent infliction of emotional distress.

{¶ 15} Perry has not pled the harm required for a claim for negligent infliction of serious emotional distress.

{¶ 16} The necessary allegations for a claim for intentional infliction of emotional distress, per our prior case of *Aycox v. Columbus Bd. of Edn.*, 10th Dist. No. 03AP-1285, 2005-Ohio-69, include:

- (1) the defendant intended to cause emotional distress or knew or should have known that actions taken would result in severe emotional distress;
- (2) the defendant's conduct was so extreme and outrageous that it went beyond all bounds of decency, and was such as to be considered utterly intolerable in a civilized community;
- (3) the defendant's actions proximately caused plaintiff's psychic suffering; and
- (4) the plaintiff suffered serious mental anguish of a nature that no reasonable man could be expected to endure.

{¶ 17} In his complaint, Perry notes that courts have held that an increased fear of cancer could be compensable if an asbestosis affected person is aware that he, in fact, possesses an increased statistical likelihood of developing cancer, and from this knowledge, springs a reasonable apprehension which manifests itself as emotional distress.¹ However, the complaint filed on behalf of Perry fails to allege a number of required elements of emotional distress, but especially the second element requiring ODRC to have acted in an extreme and outrageous manner and the fourth element of serious emotional anguish.

{¶ 18} In short, Perry's complaint does not allege what is required for a viable claim for negligent infliction of emotional distress or intentional infliction of emotional distress. The Court of Claims was correct to sustain the Ohio AG's motion to dismiss under Civ.R. 12(B)(6).

{¶ 19} We also do not sustain the first assignment of error. The mere requesting of a jury trial does not insulate a plaintiff from dismissal of his or her lawsuit. The first assignment of error is overruled.

{¶ 20} As a result of the above, the first and second assignments of error are overruled. The judgment of the Court of Claims of Ohio is affirmed.

Judgment affirmed.

SADLER and O'GRADY, JJ., concur.

¹ See *Slane v. MetaMateria Partners, L.L.C.*, 176 Ohio App.3d 459, 2008-Ohio-2426 (10th Dist.) citing *Lavelle v. Owens-Corning Fiberglas Corp.*, 30 Ohio Misc.2d 11, 14 (1987) (An increased fear of cancer may be compensable if an asbestosis afflicted individual is aware that he, in fact: (1) possesses an increased statistical likelihood of developing cancer; and (2) from this knowledge, springs a reasonable apprehension which manifests itself as emotional distress).