

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Barron Brown,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 12AP-815
v.	:	(Ct. of Cl. No. 2012-05321)
	:	
Ohio Department of Rehabilitation and Correction,	:	(ACCELERATED CALENDAR)
	:	
Defendant-Appellee.	:	
	:	

D E C I S I O N

Rendered on September 17, 2013

Barron Brown, pro se.

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

APPEAL from the Court of Claims of Ohio.

SADLER, J.

{¶ 1} Plaintiff-appellant, Barron Brown, appeals from the judgment of the Court of Claims of Ohio granting a motion to dismiss filed by defendant-appellee, the Ohio Department of Rehabilitation and Correction ("ODRC"). For the following reasons, we affirm the judgment of the trial court.

I. FACTUAL AND PROCEDURAL BACKGROUND

{¶ 2} According to appellant's complaint, he is currently incarcerated at Chillicothe Correctional Institution ("CCI") where he is serving a mandatory 20-year sentence. The complaint asserts that, arising out of litigation in federal court, he and a class of inmates housed at CCI entered into a settlement agreement with appellee wherein

appellee agreed to remediate asbestos in several CCI housing units. In this action, appellant seeks compensation for "Negligent Intentional Infliction of Emotional Distress," due to the alleged exposure of "unreasonable dangerous levels of unabated, exposed, and fiable [sic] asbestos" at CCI, where he has been housed for the previous eight years. (Complaint 1, 2.) According to appellant's complaint, because of such prolonged exposure, he now suffers from "CANCERPHOBIA." (Complaint, 3.)

{¶ 3} Appellee filed a motion to dismiss pursuant to Civ.R. 12(B)(1) and (6). The trial court granted the motion to dismiss, pursuant to Civ.R. 12(B)(6), after finding appellant's complaint failed to state a claim upon which relief could be granted.

II. ASSIGNMENTS OF ERROR

{¶ 4} This appeal followed, and appellant brings the following two assignments of error for our review:

[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 Upon Which Relief Could Be Sought.

III. DISCUSSION

A. Second Assignment of Error

{¶ 5} Because the second assignment of error is dispositive, we address it first. In his second assignment of error, appellant contends the trial court erred in finding his complaint failed to state a claim upon which relief could be granted.

{¶ 6} In deciding whether to dismiss a complaint, pursuant to Civ.R. 12(B)(6), for failure to state a claim upon which relief can be granted, the trial court must presume all factual allegations in the complaint are true and construe the complaint in the light most favorable to the plaintiff, drawing all reasonable inferences in favor of plaintiff. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192 (1988). Before the court may dismiss the complaint, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling the plaintiff to recovery. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242 (1975), syllabus. We review de novo the dismissal of a

complaint pursuant to Civ.R. 12(B)(6). *Shockey v. Wilkinson*, 96 Ohio App.3d 91, 94 (4th Dist.1994).

{¶ 7} The trial court construed appellant's complaint as alleging claims for both negligent and intentional infliction of emotional distress and granted appellee's motion to dismiss pursuant to Civ.R. 12(B)(6). A claim for negligent infliction of emotional distress requires an allegation of emotional distress that is both severe and debilitating. *Perry v. Dept. of Rehab. & Corr.*, 10th Dist. No. 12AP-814, 2013-Ohio-3828, ¶ 14, citing *Paugh v. Hanks*, 6 Ohio St.3d 72 (1983). In *Perry*, this court affirmed a Court of Claims dismissal of a complaint alleging negligent infliction of emotional distress due to asbestos exposure. The basis for the affirmance of the dismissal was, though the plaintiff alleged he suffered from cancerphobia, the complaint failed to allege the condition was either severe or debilitating. *Id.*; see also *Coffman v. Dept. of Rehab. & Corr.*, 10th Dist. No. 12AP-816, 2013-Ohio-3829 (Civ.R. 12(B)(6) dismissal of negligent infliction of emotional distress claim based on cancerphobia due to asbestos exposure proper where complaint failed to allege the emotional distress was either severe or debilitating).

{¶ 8} Like the complaint in *Perry*, appellant's complaint alleges he suffers emotional distress in the form of cancerphobia due to alleged exposure to asbestos, but the complaint fails to allege the emotional distress is either severe or debilitating. Accordingly, appellant's allegation of negligent infliction of emotional distress fails to state a claim upon which relief can be granted, and the trial court did not err in dismissing this claim pursuant to Civ.R. 12(B)(6). *Perry*; *Coffman*.

{¶ 9} To survive a motion to dismiss when alleging a claim of intentional infliction of emotional distress, a complaint must include allegations that (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. *Perry* at ¶ 16, citing *Aycox v. Columbus Bd. of Edn.*, 10th Dist. No. 03AP-1285, 2005-Ohio-69. See also *Coffman* at ¶ 14.

{¶ 10} Additionally, it has been held that a claim for intentional infliction of emotional distress in the form of cancerphobia may be compensable if an asbestosis-afflicted 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. *Perry* at ¶ 17; *Coffman* at ¶ 15. In *Perry*, this court concluded ODRC was entitled to a Civ.R. 12(B)(6) dismissal where the complaint alleged intentional infliction of emotional distress based on cancerphobia, but failed to allege extreme and outrageous conduct on behalf of ODRC or that the plaintiff suffered serious emotional anguish.

{¶ 11} Similarly, in the case at bar, appellant alleges he has been exposed to asbestos and suffers emotional distress due to cancerphobia. Appellant does not, however, allege extreme and outrageous conduct, that he suffers serious emotional anguish or that he suffers from asbestosis and is aware that he, in fact, has a known increased statistical likelihood of developing cancer. Accordingly, we conclude appellant's allegation of intentional infliction of emotional distress fails to state a claim upon which relief can be granted, and the trial court did not err in dismissing said claim pursuant to Civ.R. 12(B)(6).

{¶ 12} Because appellant's complaint fails to state a claim upon which relief can be granted, the trial court did not err in granting appellee's motion to dismiss the complaint. Consequently, we overrule appellant's second assignment of error.

B. First Assignment of Error

{¶ 13} Our disposition of appellant's second assignment of error renders appellant's first assignment of error moot. Moreover, this action was brought in the Court of Claims pursuant to R.C. 2743. As stated in R.C. 2743.11, "[n]o claimant in the court of claims shall be entitled to have his civil action against the state determined by a trial by jury." As defined by R.C. 2743.01(A), "state" includes, but is not limited to "all departments, boards, offices, commissions, agencies, institutions, and other instrumentalities of the state." Further, as recognized in both *Perry* and *Coffman*, requesting a jury trial does not preclude the dismissal of a claim pursuant to Civ.R. 12(B)(6). *Perry* at ¶ 19; *Coffman* at ¶ 2.

IV. CONCLUSION

{¶ 14} Having overruled appellant's first assignment of error, appellant's second assignment of error is rendered moot, and the judgment of the Court of Claims of Ohio is hereby affirmed.

Judgment affirmed.

TYACK and O'GRADY, JJ., concur.
