

[Cite as *Busam v. Ohio Dept. of Retardation & Developmental Disabilities*, 2004-Ohio-876.]

IN THE COURT OF CLAIMS OF OHIO

CLAIRE M. BUSAM, Admx., etc. :
Plaintiff : CASE NO. 2000-01660
v. : Judge Fred J. Shoemaker
DEPARTMENT OF MENTAL : DECISION
RETARDATION AND DEVELOPMENTAL :
DISABILITIES :
Defendant :

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{¶1} This is a negligence action brought by plaintiff, Claire M. Busam, on behalf of her deceased son Joseph Busam, Jr. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} Joseph Busam, Jr. (Joey) was a mentally retarded individual who for 25 years resided at Good Shepherd Manor (GSM) in Wakefield, Ohio. Defendant, the Ohio Department of Mental Retardation and Developmental Disabilities (MRDD), licensed and regulated GSM. However, it is undisputed that GSM was privately owned and operated by an order of Catholic Brothers known as the “Little Brothers of the Good Shepherd” (The Brothers). The Brothers were an independent organization under the direct control of the Catholic Diocese.

{¶3} According to the testimony at trial, the decision to place Joey at GSM, and the facility where he resided before he was old enough to go there, was a result of careful consideration by the entire family. Joey was the third of plaintiff’s eight children and the only one with any type of disability. Notwithstanding his placement in residential care, Joey remained an integral part of his family throughout his lifetime; he visited home frequently

and was visited at GSM at least once a month by family members. He was active with his siblings and was much loved and deeply cared for. Plaintiff testified that Joey was approximately 12 years old when she began seeking alternative living arrangements for him; that she did so because he was becoming increasingly frustrated at home after all of his brothers and sisters began attending school and he was unable to do so.

{¶4} Joey transferred to GSM when it opened in 1967; he was 16 years old at the time. He remained there, with the exception of his visits home, until 1992, when the family was notified that Joey was ill. It was subsequently discovered that he was suffering from AIDS. As is commonly known in today's culture, AIDS is a disease that results from infection by the HIV virus that can lay dormant in infected persons for many years. According to the medical evidence in this case, there is at least a 97% certainty that Joey contracted the virus between 1977 and 1985 while he was a resident of GSM. When he was diagnosed in 1992, he was in a "full-blown" stage of the disease. Joey succumbed to complications stemming from AIDS in January 1996, at the age of 45.

{¶5} Plaintiff alleges that Joey was physically and sexually abused at GSM, and that MRDD's negligence in its licensing process and its failure to abide by its own policies in dealing with allegations of abuse proximately caused Joey's injuries and ultimately, his death.

{¶6} Although the alleged actions and inactions that gave rise to this case occurred decades ago, it is important to note that plaintiff's legal actions were timely commenced. She first began proceedings in this court on May 24, 1993. That case was later stayed for many years pending the outcome of a connected action in the Pike County Court of Common Pleas. After the connected case was settled in 1997, the stay in this court was lifted and the case was scheduled for trial, to commence in March 1999. However, plaintiff voluntarily dismissed the action shortly before the trial date.

{¶7} The complaint now before the court is a refiling of plaintiff's previous action. Shortly after her complaint was refiled in January 2000, plaintiff's counsel at the time filed a

motion requesting that this court issue a preliminary determination as to whether the proceeds of the settlement in the connected action should be treated as a collateral source offset. The basis for the motion was that plaintiff and her family had placed the settlement monies in a trust for other victims of abuse and had derived no personal benefit therefrom. The court ruled that the funds did constitute a collateral source, regardless of their use. Plaintiff's appeal from that decision was dismissed and the case was remanded to this court.

{¶8} Defendant does not dispute that Joey had AIDS or that AIDS was the cause of his death. However, defendant denies liability for any personal injury sustained by Joey. Defendant maintains that plaintiff's claims fall into the category of third-party tort law. Specifically, defendant contends that unless it is shown that MRDD was responsible for controlling the conduct of The Brothers at their privately owned and operated facility, plaintiff cannot establish an essential element of her case: a duty owed by MRDD to Joey.

{¶9} Alternatively, defendant maintains that even if a duty did arise from MRDD's licensing responsibilities, it did not breach any such duty because it exercised reasonable care at all times pertinent to the events at issue. Further, defendant asserts that even if there were lapses or inadequacies in MRDD's licensing procedures, those failures were neither a direct nor a proximate cause of any harm that befell Joey at the hands of The Brothers of GSM. Nevertheless, defendant acknowledged, and this court agrees, that Joey's death under these circumstances was devastating, not only to his family, but to all the others who had entrusted their loved ones into the care of The Brothers.

{¶10} For the reasons that follow, this court finds defendant's arguments to be well-taken.

{¶11} In order to establish actionable negligence, one must show the existence of a duty, a breach of that duty, and injury resulting proximately therefrom. *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318, citing *Di Gildo v. Caponi* (1969), 18 Ohio St.2d 125. The existence of a duty in a negligence action is a question of law for the court to determine.

Id., citing *Railroad Co. v. Harvey* (1907), 77 Ohio St. 235, 240. “There is no formula for ascertaining whether a duty exists. *** Any number of considerations may justify the imposition of duty in particular circumstances, including the guidance of history, our continually refined concepts of morals and justice, the convenience of the rule, and social judgment as to where the loss should fall.” Id., quoting Prosser, *Palsgraf Revisited* (1953), 52 Mich. L. Rev. 1, 15. (Additional citations omitted.)

{¶12} The facts pertinent to the determination of duty in this case can be summarized as follows. MRDD licenses facilities such as GSM in accordance with R.C. Chapter 5123. Pursuant to that statute, annual reviews are conducted, a “Survey Report” is prepared, and renewal recommendations are made. In order to qualify for renewal, a facility must demonstrate compliance with a variety of statutory requirements. Over the course of time, MRDD performed numerous annual reviews of GSM. Those reviews are documented in the Survey Reports and Renewal Surveys dating from August 23, 1977, through July 30, 1985, all of which were submitted as part of plaintiff’s exhibits.

{¶13} There is no question that various deficiencies were noted in the reviews of GSM from year to year. For example, questions were raised about staff shortages, fire safety, preparation of Individual Habilitation Plans (IHPs), and the lack of day programs for the residents. Some of the cited deficiencies were never corrected, for example, staffing shortages and development of IHPs. Nevertheless, the most significant problems (relative to plaintiff’s allegations in this case) began in May 1983, when it came to the attention of Joanna Salem (nka Joanna Corfias), the state licensing specialist assigned to the facility, that Brother John Thomas was allegedly “beating” residents of GSM.

{¶14} The physical abuse allegation came to Salem’s attention through an anonymous telephone call that she received on May 11, 1983. According to a “memorandum for the record” (Plaintiff’s Exhibit 4) prepared by her, she contacted GSM’s Administrator, Brother Finton, and arranged for a visit to the facility. The visit occurred on May 13, 1983. At that time, Salem interviewed ten employees, 7 of which reported that

“they had personally witnessed Brother John either slapping, hitting with his fists, kicking, and beating residents. There was also reports of Brother John yelling and humiliating [r]esidents.” The allegations ultimately proved to be true. Salem’s memorandum notes that she advised the administrator that GSM was in violation of Licensure Rule 5123:2-3-25(B), which forbid corporal punishment of residents. On May 15, 1983, the administrator contacted Salem at her home and advised that Brother John Thomas had left GSM under orders of the “Superior General” and would not be returning. In response to the citation for noncompliance, GSM was required to draft and submit a “no corporal punishment” policy. Otherwise, no further action was taken.

{¶15} Additional problems soon followed at GSM. By late August 1984, Salem had learned that a resident of GSM, Fred Moore, had made allegations of being sexually abused by The Brothers. (Plaintiff’s Exhibit 15.) In an August 21, 1984, letter to Salem, Moore named four brothers and stated that they “use me for a girl. *** I am sick and tired of being pushed around.” The letter also states: “I have never told this to anyone before. I never had the opportunity, because I didn’t know I had any rights until you told me.”

{¶16} The evidence demonstrates that Salem immediately notified the Pike County Sheriff’s Office and, in accordance with MRDD procedure, reported the allegations to Bryan Porter, the regional case manager, and to MRDD’s central office in Columbus, Ohio. According to Salem, the sheriff’s office did not follow up on the information, nor did officials of the welfare department, to whom she was referred by the sheriff. However, as a result of the information reported by Salem, Bryan Porter began investigating the allegations of abuse occurring at GSM. Porter’s investigation was not concluded until October 1985.

{¶17} Porter’s investigation was discontinued for a period of time while an independent investigator, Attorney Robert Lee, looked into the matter. It is not clear how Lee came to be appointed to this task. There is evidence in the record that one of the partners in Lee’s firm, who was a member of GSM’s Board of Trustees, initiated the investigation. Plaintiff contends that such action essentially amounted to allowing GSM to

investigate itself. Of further interest is the fact that the same GSM board member was responsible for initially precluding Porter's access to The Brothers' records. In any event, subsequent to Lee's investigation, which took place from October 1 to November 1, 1984, he provided a report of his results to Arlene Lynch, Inspector General for MRDD. For what it is worth, the report concludes, among other things, that "[m]y investigation has shown that while some of the allegations set forth by [name redacted] have been substantiated, most of them have not." (Plaintiff's Exhibit 20.)

{¶18} After Lee's investigation, Porter resumed his own inquiries, conducting interviews with residents and staff of GSM for another six months. He forwarded the results of his investigation to the central office on a regular basis. In response to questioning as to why he took so long to complete his investigation, Porter stated that his process was comparable to "peeling an onion." In other words, Porter stated that he first attempted to build trust with the residents he was speaking with, and he then visited time after time to ensure that he was receiving consistent information. After his investigation was concluded, the local police "raided" the facility and The Brothers were evicted. The matter was referred to the Pike County Prosecutor and two brothers were indicted, one for sexual misconduct, the other for embezzlement. The records of the criminal proceedings were sealed by order of the county court.

{¶19} Plaintiff maintains that MRDD was negligent in waiting for 14 months before taking action to protect the residents of GSM and in failing to notify any of the parents or guardians of the information being uncovered during the investigations.

{¶20} Following the eviction of The Brothers, Inspector General Lynch was forced to resign, allegedly for failing to make an adequate response to the allegations that were investigated. A group of lay persons known as "Friends of the Good Shepard" took over GSM and continued its operation. Joey remained there until his parents learned that he was ill. Many questions were raised at trial as to why plaintiff and her family allowed Joey to stay at GSM after the scandal surrounding the ouster of The Brothers and the criminal

prosecutions. According to plaintiff, the Superior General and others she questioned led her to believe that it was a one-person, one-time incident. Moreover, according to both plaintiff and her daughter, Claire Corcoran, the family, who had long been devout members of the Catholic church, revered The Brothers and trusted them implicitly. As members of the Catholic faith, they were taught to hold their religious leaders in the highest regard, so much so that they thought them to be “infallible.” As further example of her faith, plaintiff testified that she knew Fred Moore; that she knew of the allegations he had made; that when he tried to contact her at one point, she did not want to speak to him because she could not bear to hear anyone even *speaking* ill of The Brothers.

{¶21} It is within this context that the court must decide what duty, if any, was owed by MRDD to plaintiff’s decedent and, if a duty did exist, whether any breach of such duty was the proximate cause of the decedent’s illness and subsequent death.

{¶22} Under Ohio tort law, a special relationship must exist in order to satisfy the duty element in negligence actions where, as here, the allegations are based upon a failure to act or a failure to control the conduct of a third person. *Wallace v. Ohio Dept. of Commerce, Div. of State Fire Marshal*, 96 Ohio St.3d 266, 2002-Ohio-4210 citing, *Littleton v. Good Samaritan Hosp. & Health Ctr.* (1988), 39 Ohio St.3d 86, 92. A “special relation” exists when one takes charge of a person whom he knows or should know is likely to cause bodily harm to others if not controlled. 2 Restatement of the Law 2d, Torts (1965), 116-122, Sections 314-315.

{¶23} In the present case, the state’s duty arises from its statutory licensing responsibilities. The evidence is clear that MRDD licensing specialists generally fulfilled those responsibilities by twice-yearly visits to the facilities to which they were assigned; however, one or two random unscheduled visits would also be made. If deficiencies were found, a plan of compliance would be issued for approval of the MRDD central office. The licensing specialist would then return to the facility to ensure that the plan had been implemented and that any required changes had been made. Plaintiff’s claims center

around the handling of the yearly licensing process by Joanna Salem, and 14-month investigation by Bryan Porter prior to The Brother's removal from GSM.

{¶24} In making this determination the court recognizes that, during the time period in question, there had not been the massive exposé of sexual abuse within the Catholic Church that has been the subject of so much wide-spread media attention in recent times. Plaintiff's reverence for the leaders of her church was not uncommon. Likewise, it would be fair to state that the public, in general, would have found it difficult to question the piety of the individuals alleged to have committed the flagrant abuses discovered in this case. Consequently, the court is mindful that, viewed from today's standpoint, there was more that could have been done by MRDD to protect the residents of GSM. However, the court is convinced by the evidence that MRDD did all that was required of it in light of the prevailing attitudes of the time surrounding the Catholic Church. Moreover, the court recognizes that the process was complicated by the difficulty of fairly assessing allegations made by individuals with diminished mental capacities such as the residents of GSM.

{¶25} With respect to the conduct of Joanna Salem, the court is persuaded by the evidence that she reasonably believed the occurrence of physical abuse was resolved when Brother John Thomas left GSM. The court finds, in light of the attitudes of the time, that there was no negligence on the part of Salem, or MRDD, in failing to take further action. The court is also persuaded that Salem was responsive to resident needs and concerns, especially since Fred Moore stated in his letter to her, that it was Salem who advised him of his "rights."

{¶26} With respect to Bryan Porter's investigation, the court finds it significant that at no time was Joey ever mentioned as a victim. His family did not believe him to be the victim of any sexual abuse until almost seven years after Fred Moore made his allegations. And, while there was testimony that Joey told a GSM employee that The Brothers were hurting him, the evidence shows that the employee never revealed the information to Joey's family members, anyone at the facility, or to MRDD.

{¶27} In *Wallace*, supra, the Supreme Court of Ohio relied extensively upon the Restatement of the Law of Torts in deciding the question of whether a special relationship existed. The essential elements of a “special relationship” are set forth in Sections 314 and 315 of that text. Section 314 states: “The fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.” Section 315 goes on to state as matter of “General Principle” that:

{¶28} “There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

{¶29} “(a) a special relation exists between the actor [MRDD] and the third person [a brother] which imposes a duty upon the actor to control the third person’s [brother’s] conduct, or

{¶30} “(b) a special relation exists between the actor [MRDD] and the other [Joey Busam] which gives to the other a right to protection.”

{¶31} Sections 314A, 314B, 316, 317, 318, 319, and 320 enumerate all of the categories of special relations. Review of those categories reveals that the relationship, between MRDD and the individual residents of GSM, was not of the kind or nature that would create a special relationship under the law. Simply stated, MRDD did not have control over The Brothers’ conduct, rather, it was responsible for licensing the facility, not for its operation. GSM was the custodian of Joey, not MRDD. In short, the court cannot conceive of how a special relationship duty could arise where MRDD’s contacts with the facility it licensed was limited to three or four visits per year.

{¶32} For the foregoing reasons, the court concludes that MRDD fulfilled any duty owed by it under the circumstances of this case. Accordingly, absent any duty or breach of duty, plaintiff cannot prevail on the negligence claims asserted in her complaint. As stated in *Prosser, Palsgraf Revisited*, supra, “[a]ny number of considerations may justify the imposition of duty in particular circumstances, including *** our continually refined concepts

of morals and justice *** and social judgment as to where the loss should fall.” In this case, the court can find no circumstances which would require the imposition of a duty upon the state in its role as the licensing authority.

{¶33} However, even assuming that plaintiff could establish a duty owed and breached, the court further finds that she could not prevail because the evidence does not support a finding that any breach of such duty was the proximate cause of Joey’s illness and death. Specifically, the evidence shows that sexual activity was not uncommon at GSM between residents, between residents and visitors, and between residents and staff. During Brother Finton’s administration, The Brothers were notorious for hosting drinking parties in their private residence and for including small groups of residents in those events. Certain Brothers were known to drink heavily and to roam the halls visiting sleeping residents at night. Brother Finton died from AIDS. An employee, Dale Lamerson, also died from AIDS. There is some evidence that Joey may have had sexual contact with Lamerson. There is also evidence that Brother Declan repeatedly visited the residents’ bedrooms, awakened them and performed sexual acts upon them. Overall, it appears that the majority of the sexual activity took place at night; however, the evidence shows that a lack of night watchmen was not a problem identified by licensing specialists. Thus, there is simply no persuasive evidence as to how, or by whom, Joey was abused and/or infected with HIV.

{¶34} Plaintiff states in her post-trial brief, under the heading “Causation” that: “It can easily be speculated that ***.” Upon consideration of all of the evidence, plaintiff’s language is an apt summarization for this court: “speculation.” Could the abuse have been prevented had there been adequate staff present at all times? Would the development and use of IHPs and day programs have made a difference? Would the parents or guardians have believed and acted upon the allegations had they been revealed sooner by MRDD? Although Joey was exposed to a horrific state of affairs at GSM, in the end, only

speculation that can determine whether any act or failure to act on the part of MRDD was the proximate cause of his injury or death.

{¶35} For all of the foregoing reasons, judgment shall be rendered in favor of defendant.

{¶36} This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant. 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.

FRED J. SHOEMAKER
Judge

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