

[Cite as *Fuerst v. Ohio Dept. of Aging*, 2007-Ohio-1926.]

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

SIEGFRIED FUERST

Plaintiff

v.

OHIO DEPARTMENT OF AGING

Defendant

Case No. 2006-05969-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶1} Plaintiff, Siegfried Fuerst, asserted his relative, Helen Fuerst, an elderly resident of Harborside Healthcare, an assisted living facility in Troy, Ohio, was exposed to numerous abuses from January 7, to March 23, 2004. Helen Fuerst died on May 1, 2004. Plaintiff, in responding to the alleged abuses of his relative, asserted he filed a complaint about Harborside Healthcare with the State Long Term Care Ombudsman (“SLTCO”) office in Dayton. The SLTCO Office in Dayton is one of twelve regional offices established under the direction and control of defendant, Ohio Department of Aging (“ODA”). See R.C. 173.14 to 173.26. Plaintiff initially maintained he was instructed by the Dayton SLTCO office to file his complaint with a Columbus office, which he stated he did. However, plaintiff pointed out the Columbus office was the incorrect entity to receive the complaint and consequently, the complaint was allegedly forwarded to the Dayton SLTCO office. Plaintiff related the Dayton SLTCO office denied receiving this complaint from Columbus. These events all allegedly transpired before May 1, 2004, the date Helen Fuerst died.

{¶2} Plaintiff asserted he filed a written complaint with the Dayton SLTCO office in July, 2004 regarding the alleged abuses Helen Fuerst allegedly endured at Harborside Healthcare. Plaintiff stated he subsequently attempted to check the progress of the complaint he maintained he filed with the Dayton SLTCO office and discovered no investigation had been initiated and the complaint had been apparently misplaced. Plaintiff recalled he was then advised to file a new complaint, which he claimed he did; hand delivering the new complaint form to the Dayton SLTCO office. In September, 2005, and again in November, 2005, plaintiff sent letters to the Dayton SLTCO office requesting written responses regarding the status of his complaint and any progress in any ensuing investigation supposedly being conducted. In September, 2005, plaintiff received a letter from Sandy Cherry, the Director of the Dayton SLTCO office. Plaintiff recalled he responded to this letter with a phone call and during the conversation with a Dayton SLTCO office employee he discovered the matter expressed in his July 5, 2004, complaint was never investigated. Plaintiff explained he subsequently requested, on two separate occasions, some kind of written report from the Dayton SLTCO office memorializing the fact his complaint was not investigated. Plaintiff noted he did not receive a response to his requests.

{¶3} Plaintiff related the SLTCO office under the control of defendant, “failed to help-resolve-prevent and investigate wrong doings committed against,” Helen Fuerst by the

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Harborside Healthcare Center. Plaintiff also related Dayton SLTCO office personnel lied to him. Plaintiff claims the failure to investigate and other acts and omissions by the SLTCO office have caused him, "loss of time spent at the Nursing home-daily," plus, "mental anguish and suffering." Plaintiff, in his Administrative Determination claim, also seeks recovery of some funeral and related expenses he incurred. Plaintiff wants \$2,500.00, the statutory maximum amount recoverable under R.C. 2743.10. Plaintiff did not elaborate how the ODA may have caused him to suffer the express loss claimed. The filing fee was paid. Plaintiff essentially based his cause of action on the failure of the Dayton SLTCO office to investigate a complaint he stated was filed in July, 2004.

{¶4} Plaintiff submitted a letter dated September 13, 2005, from Sandy Cherry, Director of the Dayton SLTCO office. In the letter Cherry acknowledges receiving a complaint from plaintiff concerning Harborside Healthcare in Troy, Ohio. Cherry noted she tried, unsuccessfully to telephone plaintiff and tell him about the, "Ohio Department of Health survey and complaint investigation results." In the letter, Cherry requested that plaintiff call her at the Dayton SLTCO office and receive update information about his complaint.

{¶5} Plaintiff submitted a copy of a July 5, 2004, written complaint he stated he filed with the Dayton SLTCO office regarding Helen Fuerst's treatment at Harborside Healthcare where she was a resident from January 7, 2004, to March 23, 2004. Plaintiff explained, Helen Fuerst, after leaving Harborside Healthcare was hospitalized for three weeks, then admitted to a new nursing care facility where she remained for about twelve days, before being readmitted to the Greenville Hospital where she expired on May 1, 2004. In the complaint (dated July 5, 2004) to Dayton SLTCO office, plaintiff specifically listed the perceived problems he wanted addressed regarding the treatment Helen Fuerst received at Harborside Healthcare. Plaintiff listed incidents of indifferent care such as nurses and aides not responding to call lights, or responding in an untimely manner, not providing ready access to a call button, not cleaning or sanitizing the living quarters and

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equipment, not providing available medically necessary supplies, such as oxygen, and generally not giving adequate care to Helen Fuerst which caused her pain and suffering. Plaintiff also accused an aide of trying to punch Helen Fuerst. Furthermore, plaintiff contended Helen Fuerst received such inadequate care that she fell, had bruises on her body, and was allowed to pass into a hypoglycemic coma. Additionally, plaintiff asserted Helen Fuerst was inadequately medicated causing skin problems and her physical problems were exacerbated due to indifferent or no care. Plaintiff generally complained of staff members "who gave Helen a hard time or hurt her." Plaintiff reasserted his dissatisfaction with the quality of the care at the Harborside facility, specifically listing the areas where he felt Harborside staff were inadequate or insufficient.

{¶6} Defendant, ODA, denied receiving the complaint plaintiff insisted he directed to the Dayton SLTCO office in July, 2004. Defendant asserted the Dayton regional office has no record of receiving this written complaint. Plaintiff submitted a certified mail receipt showing he mailed a document on July 8, 2004, to the Dayton SLTCO office. However, plaintiff did not provide or pay for a return receipt for this mailing. There is no evidence verifying the July 8, 2004, mailing was received at the Dayton SLTCO office. Since the Dayton SLTCO office denied receiving plaintiff's complaint and plaintiff has not provided sufficient proof of receipt, the trier of fact finds insufficient evidence exists to prove the July 5, 2004, complaint was actually received at the Dayton SLTCO office. Defendant acknowledged the Dayton SLTCO office received a letter from plaintiff dated September 8, 2004. Defendant stated attempts to contact plaintiff by telephone to respond to his September 8, 2005, letter were unsuccessful. Sandy Cherry, the Director of the Dayton SLTCO office, then sent plaintiff the previously described letter (dated September 13, 2005). Defendant related plaintiff sent a letter to the Dayton SLTCO office on November 18, 2005, in which he acknowledges he received the September 13, 2005, correspondence from Sandy Cherry. In this November 18, 2005 letter, plaintiff wrote he talked by phone to Gail in the Dayton SLTCO office and he requested Gail send him a letter regarding the

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findings/status of his complaint. Plaintiff in the body of this letter denied he had received any written notification from the Dayton SLTCO office.

{¶17} Defendant explained the Dayton SLTCO office was “unable to perform preventive service and resolve alleged problems,” due to plaintiff’s failure to contact the regional office until after Helen Fuerst’s death. Defendant denied any liability in this matter based on the contention the Dayton SLTCO office was unaware of any alleged problems affecting Helen Fuerst’s nursing home care before her death. ODA denied any acts or omissions on the part of the Dayton SLTCO or the ODA caused the damages claimed by plaintiff.

{¶18} Defendant submitted a written statement from Beverly Laubert of the Dayton regional office SLTCO regarding her recollections of a complaint by plaintiff. Laubert related the Dayton regional office has no record of receiving a written complaint in July 2004, filed by plaintiff in the matter of Helen Fuerst’s period of residency at Harborside Healthcare in Troy, Ohio. Laubert stated her investigation revealed the Dayton regional office received a telephone call on June 7, 2004, “from a caller who identified himself as the husband of a deceased resident (only) with concerns related to Harborside Healthcare in Troy, Ohio.” According to Laubert, the Dayton office received no further contact from plaintiff until September 8, 2004, when a letter was received and a telephone number for reaching plaintiff was included in the letter but the number provided was not operational. Consequently, the Dayton regional office sent plaintiff a letter on September 13, 2005, informing him he could telephone the SLTCO for assistance. Laubert noted plaintiff left a phone message at the Dayton regional office on October 4, 2005, stating he would send a follow up letter. Laubert wrote, “[o]n 11/18/ 2005, plaintiff sent another letter six weeks after leaving the previous telephone message indicating that he would be sending a letter.”

Laubert maintained the Dayton regional SLTCO has no record of receiving this letter. Plaintiff provided a copy of the letter in which he acknowledges receiving the September 13, 2005, correspondence from the Dayton SLTCO, notes he talked to an employee at the

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regional office, and makes an additional request from the Dayton SLTCO office for a written report regarding the findings and status of his complaint. Laubert advised that any complaint plaintiff may have filed or verbalized with the Dayton SLTCO regarding the nursing home care of Helen Fuerst was never investigated. Laubert also advised, “[t]he ombudsman was not able to perform preventative service and resolve alleged problems for [Helen L. Fuerst] because the plaintiff did not contact defendant regional program until after [Helen L. Fuerst’s] death.”

{¶9} Plaintiff, in his response to defendant’s investigation report, insisted he sent three letters to the Dayton regional SLTCO on July 8, 2004, September 8, 2005, and November 18, 2005. Plaintiff provided certified mail receipts filled out by an employee of the United States Postal Service showing three pieces of correspondence were mailed to the SLTCO office in Dayton on the dates listed. No receipts were provided to establish the three pieces of mail were received, although plaintiff asserted he did indeed file two original complaints with the Dayton SLTCO office against Harborside Healthcare. Plaintiff related he telephoned the Dayton SLTCO office before July, 2004 and requested a cover sheet to assist him in filing a new complaint. Plaintiff provided a copy of this described cover sheet which was printed for the SLTCO office and is designated as a “complaint referral.” Plaintiff recalled he talked to Dayton SLTCO office employee, Barbara Ehler, who provided him with the complaint referral sheet and advised him that the Ohio Department of Health (“ODH”), may provide assistance to him in filing his new complaint. Plaintiff submitted a copy of an undated hand written note to him from Barbara Ehler listing the appropriate address for ODH and notifying him a complaint referral form is enclosed with the note. Plaintiff recalled that he was later told by the ODH to pursue his complaint regarding Helen Fuerst’s care with SLTCO.

{¶10} Plaintiff pointed out he first contacted the Dayton SLTCO in early 2004 and it was suggested he talk to the Harborside Healthcare director and doctor about his concerns for Helen Fuerst’s quality of care. Plaintiff sent letters to both the Harborside Healthcare

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director and doctor that resulted in a meeting with the director, plus contact by mail and telephone from the doctor. Plaintiff maintained responses from the director and doctor did nothing to improve the situation of Helen Fuerst at Harborside Healthcare in Troy, Ohio.

{¶11} Plaintiff related he telephoned the Dayton SLTCO office in late 2004 and spoke to Gail (Gail Basine). Plaintiff further related he was told by Gail, “that nobody had checked into my complaint” and was encouraged to file a new complaint. Plaintiff asserted he went to the Dayton SLTCO office in early 2005 and asked to see Gail but was told she was unavailable. Plaintiff stated he instead had a meeting with the Dayton SLTCO office director (Sandy Cherry) who, “took possession [sic] of my report [and] [s]he promised [sic] to put Gail on the case right away.” Apparently, no further contact between plaintiff and the Dayton SLTCO office occurred until mid-summer 2005, when plaintiff telephoned the office, spoke to an unidentified male employee, and asked for a written response to his complaint.

{¶12} Plaintiff observed he did not hear from the Dayton SLTCO office again until September 13, 2005, when he received a letter from Sandy Cherry. A copy of this letter, filed with plaintiff’s complaint contains an acknowledgment by Sandy Cherry that she received a complaint from plaintiff about Harborside Healthcare in Troy, Ohio. This letter contains the request to plaintiff: “If you would please call me I can update you as to the results of the Ohio Department of Health survey and complaint investigation results.” Plaintiff explained he was not interested in an ODH survey, but was interested in receiving a written report of investigation into the matter involving the basis of his complaint against Harborside Healthcare.

{¶13} Plaintiff asserted he continued to pursue the matter by subsequently telephoning the Dayton SLTCO office and speaking to Gail. Plaintiff related that during this phone conversation he was told by Gail his report was gone, no investigation was conducted, and records regarding Helen Fuerst were removed to some unidentified location and sealed. Plaintiff professed he asked Gail to send him a written statement

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regarding the information she had disclosed to him, but no statement was ultimately received.

{¶14} It is undisputed the SLTCO program is a state entity under the direction and control of defendant, Department of Aging, pursuant to R.C. 173.15. R.C. 173.19 specifically details procedures, powers, and duties of the SLTCO in handling complaints. R.C. 173.19 states:

{¶15} “173.19. Investigation and resolution of complaints

{¶16} “(A) The office of the state long-term care ombudsperson program, through the state long-term care ombudsperson and the regional long-term care ombudsperson programs, shall receive, investigate, and attempt to resolve complaints made by residents, recipients, sponsors, providers of long-term care, or any person acting on behalf of a resident or recipient, relating to either of the following:

{¶17} “(1) The health, safety, welfare, or civil rights of a resident or recipient or any violation of resident’s rights described in sections 3721.10 to 3721.17 of the Revised Code;

{¶18} “(2) Any action or inaction or decision by a provider of long-term care or representative of a provider, a governmental entity, or a private social service agency that may adversely affect the health, safety, welfare, or rights of a resident or recipient.

{¶19} “(B) The department of aging shall adopt rules in accordance with Chapter 119. of the Revised Code regarding the handling of complaints received under this section, including procedures for conducting investigations of complaints. The rules shall include procedures to ensure that no representative of the office investigates any complaint involving a provider of long-term care with which the representative was once employed or associated.

{¶20} “The state ombudsperson and regional programs shall establish procedures for handling complaints consistent with the department’s rules. Complaints shall be dealt with in accordance with the procedures established under this division.

{¶21} “(C) The office of the state long-term care ombudsperson program may

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decline to investigate any complaint if it determines any of the following:

{¶22} “(1) That the complaint is frivolous, vexatious, or not made in good faith;

{¶23} “(2) That the complaint was made so long after the occurrence of the incident on which it is based that it is no longer reasonable to conduct an investigation;

{¶24} “(3) That an adequate investigation cannot be conducted because of insufficient funds, insufficient staff, lack of staff expertise, or any other reasonable factor that would result in an inadequate investigation despite a good faith effort;

{¶25} “(4) That an investigation by the office would create a real or apparent conflict of interest.

{¶26} “(D) If a regional long-term care ombudsperson program declines to investigate a complaint, it shall refer the complaint to the state long-term care ombudsperson.

{¶27} “(E) Each complaint to be investigated by a regional program shall be assigned to a representative of the office of the state long-term care ombudsperson program. If the representative determines that the complaint is valid, the representative shall assist the parties in attempting to resolve it. If the representative is unable to resolve it, the representative shall refer the complaint to the state ombudsperson.

{¶28} “In order to carry out the duties of section 173.14 to 173.26 of the Revised Code, a representative has the right to private communication with residents and their sponsors and access to long-term care facilities, including the right to tour resident areas unescorted and the right to tour facilities unescorted as reasonably necessary to the investigation of a complaint. Access to facilities shall be during reasonable hours or, during investigation of a complaint, at other times appropriate to the complaint.

{¶29} “When community-based long-term care services are provided at a location other than the recipient’s home, a representative has the right to private communication with the recipient and the recipient’s sponsors and access to the community-based long-term care site, including the right to tour the site unescorted. Access to the site shall be

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during reasonable hours or, during the investigation of a complaint, at other times appropriate to the complaint.

{¶30} “(F) The state ombudsperson shall determine whether complaints referred to the ombudsperson under division (D) or (E) of this section warrant investigation. The ombudsperson’s determination in this matter is final.”

{¶31} Furthermore, R.C. 173.23(A) states in pertinent part:

{¶32} “(A) Representatives of the office of the state long-term care ombudsperson program are immune from civil or criminal liability for any action taken in the good faith performance of their official duties under sections 173.14 to 173.26 of the Revised Code.”

{¶33} Therefore, in the instant claim, considering plaintiff could prove he did indeed timely file a complaint with the Dayton SLTCO office, all representatives of that office would be immune from liability for a refusal to investigate the complaint. To date, considering defendant has been served with all documents in the instant claim, there has been no investigatory action concerning plaintiff’s issues with Harborside Healthcare in Troy, Ohio. Defendant’s continued disinclination to investigate is covered by the immunity provision of R.C. 173.23(A).

{¶34} Additionally, after reviewing the issues presented, the court lacks jurisdiction over plaintiff’s claim. Jurisdiction in the Court of Claims is governed by R.C. 2743.02 which provides in pertinent part:

{¶35} “This state hereby waives its immunity from liability, . . . and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, except that the

{¶36} determination of liability is subject to the limitations set forth in this chapter . . . and except as provided in division (A)(2) or (3) of this section. To the extent that the state has previously consented to be sued, this chapter has no applicability.”

{¶37} This Court lacks jurisdiction to hear plaintiff’s claims since they are beyond

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the State's limited waiver of immunity established by the General Assembly. The State's waiver of immunity limits jurisdiction of the Court of Claims. R.C. 2743.02 provides that the State shall be liable in the Court of Claims only ". . . in accordance with the same rules of law applicable to suits between private parties." For example, the State cannot be held liable in the Court of Claims for violations of rights which require State action, since a private party could not be held liable for the same. See *NCAA v. Tarkanian* (1988), 488 U.S. 179. There is no common law cause of action between private parties for the cause of action advanced by plaintiff, namely that defendant refused to respond to a complaint about a private nursing care facility and failed to conduct an investigation of the facility for regulatory violations. The State has not waived its immunity from suit for this particular type of claim presented and accordingly, this court lacks jurisdiction to hear such a claim. See *McCord v. Division of Parks and Recreation* (1978), 54 Ohio St. 2d 72. Plaintiff's claim is based on alleged misconduct by defendant's entities in failing to properly investigate a complaint. Plaintiff's claim contests defendant's decision to not investigate his complaint about Harborside Healthcare. In *Reynolds v. State* (1984), 14 Ohio St. 3d 68, the Ohio Supreme Court held that:

{¶38} "The language in R.C. 2743.02 that 'the state' shall 'have its liability determined *** in accordance with the same rules of law applicable to suits between private parties ***' means that the state cannot be sued for its legislative or judicial functions or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion ***" *Reynolds*, at 68, paragraph 1 of the syllabus.

{¶39} The ODA cannot be sued for a decision to not conduct an investigation of complaints regarding assisted living facilities. Therefore, plaintiff's claim is dismissed.

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SIEGFRIED FUERST

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Case No. 2006-05969-AD

Deputy Clerk Daniel R. Borchert

ENTRY OF ADMINISTRATIVE
DETERMINATION

Having considered all the evidence in the claim file and, for the reasons set forth in the memorandum 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.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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RDK/laa
2/7
Filed 3/22/07
Sent to S.C. reporter 4/20/07