

# Court of Claims of Ohio

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LEGACY ACADEMY FOR LEADERS AND THE ARTS

Plaintiff/Third-Party Defendant

and

ATTORNEY GENERAL MIKE DEWINE

Plaintiff

v.

CARL SHYE, et al.

Defendants

and

MT. CALVARY PENTECOSTAL CHURCH, et al.

Defendants/Third-Party  
Plaintiffs

v.

OHIO AUDITOR OF STATE

Third-Party Defendant

Case No. 2012-06394-PR

Judge Patrick M. McGrath

## ENTRY GRANTING THIRD-PARTY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

{¶1} On March 6, 2015, defendants/third-party plaintiffs, Edward Bolling, A. Glenn Brady, C. Wayne Brantley, Gary Brantley, Jerry McKinney, Leonard Randall, and Mt. Calvary Pentecostal Church (“the Mt. Calvary parties”), filed a motion for summary

judgment pursuant to Civ.R. 56. On that same date, third-party defendant, Ohio Auditor of State (“Auditor of State”), filed a cross-motion for summary judgment.

{¶2} On March 20, 2015, the Auditor of State filed a response to the Mt. Calvary parties’ motion for summary judgment. Also on March 20, 2015, the Mt. Calvary parties filed a motion requesting an extension of time until March 31, 2015, to file their response to the Auditor of State’s motion for summary judgment. The motion for an extension of time was not opposed and is hereby GRANTED such that the response filed by the Mt. Calvary parties on March 31, 2015, is deemed timely.

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

{¶4} “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 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 *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977).

{¶5} This action originated in the Franklin County Common Pleas Court on February 13, 2012, upon the filing of a complaint against the Mt. Calvary parties and others by Attorney General Mike DeWine (“Attorney General”), in a representative capacity on behalf of Legacy Academy for Leaders and the Arts (“Legacy”), a nonprofit corporation that operated as an Ohio community school pursuant to R.C. Chapter 3314. The Attorney General’s complaint was filed pursuant to R.C. 117.28, 117.36, and

117.42 for the purpose of recovering public money alleged to have been improperly expended or unaccounted for. Those allegations arose from regular audits for fiscal years 2004 and 2005, and a special audit for fiscal years 2005 to 2010, performed by the Auditor of State, and the corresponding audit reports that the Auditor of State prepared and certified to the Attorney General pursuant to R.C. 117.27. The Mt. Calvary parties subsequently filed a counterclaim, as well as a third-party claim against the Auditor of State, thereby invoking the jurisdiction of the court of claims, to which the action was removed pursuant to R.C. 2743.03(E)(1).

{¶6} On February 6, 2013, the court of claims issued an entry granting motions to dismiss both the counterclaim and the third-party claim against the Auditor of State, and ordering that the action be remanded to the Franklin County Common Pleas Court. The Mt. Calvary parties appealed, and on September 26, 2013, the Tenth District Court of Appeals issued a decision that affirmed the dismissal of the counterclaim, but reversed the dismissal of the third-party claim against the Auditor of State, and remanded the action to the court of claims for further proceedings. See *Legacy Academy for Leaders v. Mt. Calvary Pentecostal Church*, 10th Dist. Franklin No. 13AP-203, 2013-Ohio-4214.

{¶7} Given that the third-party claim against the Auditor of State invokes the jurisdiction of the court of claims and is the sole claim pending against the state, that claim shall be addressed first. As set forth in their amended third-party complaint, the Mt. Calvary parties allege that audits of Legacy performed by the Auditor of State “breached the standard of care applicable to an auditor under Ohio law and the Restatement Second of Torts §552,” and that the resulting audit reports contained negligent misrepresentations which were relied upon by others to the detriment of the Mt. Calvary parties.

{¶8} “The Supreme Court of Ohio first recognized the tort of negligent misrepresentation in *Haddon View Invest. Co. v. Coopers & Lybrand*, 70 Ohio St.2d

154 (1982). To define the new cause of action, the court adopted Section 552 of the Restatement of the Law 2d, Torts (1965) \* \* \*.” *Brothers v. Morrone-O’Keefe Dev. Co., LLC*, 10th Dist. Franklin No. 05AP-161, 2006-Ohio-1160, ¶ 18. “The elements of negligent misrepresentation are: (1) one who, in the course of his or her business, profession or employment, or in any other transaction in which he or she has a pecuniary interest; (2) supplies false information for the guidance of others in their business transactions; (3) is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information; and (4) if he or she fails to exercise reasonable care or competence in obtaining or communicating the information.” *Martin v. Ohio State Univ. Found.*, 139 Ohio App.3d 89, 103 (10th Dist.2000); see also *Delman v. Cleveland Hts.*, 41 Ohio St.3d 1, 4 (1989).

{¶9} The Auditor of State argues that the conduct at issue in the Mt. Calvary parties’ third-party claim arises from the performance of a public duty, rendering the state immune from liability pursuant to R.C. 2743.02(A)(3)(a). “[U]nder R.C. 2743.02(A)(3)(a), the state is generally immune from liability in any civil action or proceeding involving the performance or nonperformance of a public duty.” *Legacy Academy* at ¶ 9; see also *Conner v. Wright State Univ.*, 10th Dist. Franklin No. 13AP-116, 2013-Ohio-5701, ¶ 11.

{¶10} As defined in R.C. 2743.01(E)(1), “[p]ublic duty’ includes, but is not limited to, any statutory, regulatory, or assumed duty concerning any action or omission of the state involving any of the following:

{¶11} “(a) Permitting, certifying, licensing, inspecting, investigating, supervising, regulating, *auditing*, monitoring, law enforcement, or emergency response activity;

{¶12} “(b) Supervising, rehabilitating, or liquidating corporations or other business entities.” (Emphasis added.)

{¶13} The Mt. Calvary parties, relying on a statutory exception to the public duty rule set forth at R.C. 2743.02(A)(3)(b), assert that immunity does not apply because there existed a “special relationship” between them and the state.

{¶14} “The immunity afforded by R.C. 2743.02(A)(3)(a) ‘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). \* \* \* Thus, under R.C. 2743.02(A)(3)(b), the state can be held liable for its performance or non-performance of a public duty, which is otherwise exempted from the state’s waiver of sovereign immunity, when it stands in a special relationship with the injured party.” *Burr v. Ohio State Hwy. Patrol*, 10th Dist. Franklin No. 12AP-26, 2012-Ohio-4906, ¶ 20.

{¶15} As set forth in R.C. 2743.02(A)(3)(b), a special relationship “is demonstrated if all of the following elements exist:

{¶16} “(i) An assumption by the state, by means of promises or actions, of an affirmative duty to act on behalf of the party who was allegedly injured;

{¶17} “(ii) Knowledge on the part of the state’s agents that inaction of the state could lead to harm;

{¶18} “(iii) Some form of direct contact between the state’s agents and the injured party;

{¶19} “(iv) The injured party’s justifiable reliance on the state’s affirmative undertaking.”

{¶20} In the amended third-party complaint, the Mt. Calvary parties allege that the Auditor of State assumed a duty to act on behalf of the “volunteer members of boards of directors” of Legacy and other community schools to ensure that the schools’ operations and expenditures were lawful. They further allege that the Auditor of State knew that, at least during the relevant period of time, there was no requirement that the fiscal officers of community schools be licensed as treasurers by the state, and that the

schools' directors consequently relied on the Auditor of State to detect or prevent financial improprieties.

{¶21} The motion for summary judgment filed by the Mt. Calvary parties raises defenses to the claims asserted against them by the Attorney General, and also argues that the underlying audits by the Auditor of State were negligently performed or otherwise erroneous. The Mt. Calvary parties also raise arguments to the effect that the Department of Education and the state as a whole have failed to adequately regulate and supervise community schools, and to that end they submitted various articles from newspapers and other sources as supporting evidence. Also in support of the motion, the Mt. Calvary parties submitted an affidavit from Delbert Tyler, CPA, who avers in part that the Auditor of State's findings "concerning the overpayment of rent by Legacy to Mt. Calvary Pentecostal Church violate the applicable standard of care owed by an accountant for the reason that the underlying mathematical calculations are incorrect." The Mt. Calvary parties also submitted affidavits from two other individuals whose averments pertain to the facts surrounding Legacy's rent payments. But, as to the issue of whether there existed a special relationship under R.C. 2743.02(A)(3)(b), the Mt. Calvary parties essentially rely on the allegations in the amended third-party complaint without providing any supporting evidence or authority.

{¶22} The Auditor of State argues that no duty was assumed to act on behalf of the Mt. Calvary parties. Rather, the Auditor of State contends that all actions in performing audits of Legacy were exclusively in furtherance of public duties, particularly the statutory duties set forth at R.C. 117.10, to account for the public money received by Legacy. The Auditor of State submitted a supporting affidavit from Kevin M. Saionzkowski, Chief Auditor of Special Audits for the Auditor of State. Saionzkowski avers in part that the audit reports for the 2004 and 2005 fiscal years, as well as the special audit report for fiscal years 2005 to 2010, appended to the original complaint are true and accurate copies. According to Saionzkowski, those audits were

performed pursuant to the Auditor of State's statutory duties. Saionzkowski further avers that the Mt. Calvary parties were not parties to any of the audits and that the Auditor of State offered them no advice.

{¶23} R.C. Chapter 117 sets forth certain duties of the Auditor of State, including the duty to account for public money received by an entity such as Legacy. See R.C. 117.10; see also 3314.03(A)(8) (Audits of community schools by the auditor of state "shall be conducted in accordance with section 117.10 of the Revised Code."). "Courts have regularly found that statutory duties imposed on state officials to audit are public duties." *Legacy Academy* at ¶ 9; see also *Oregon v. Ferguson*, 57 Ohio App.2d 95, (10th Dist.1978). "As such, they do not flow to any private individual, including the individual being \* \* \* audited, and including any individuals who would benefit from these governmental functions. Public duties will not form the basis for liability to any such individuals in the absence of a special relationship." *Markowitz v. Dept. of Ins.*, 144 Ohio App.3d 155, 161 (10th Dist.2001). The assumption of an affirmative duty relative to establishing a special relationship requires that the state "do more than adhere to its statutory duty." *Commerce & Indus. Ins. Co. v. Toledo*, 45 Ohio St.3d 96, 101 (1989). "It must voluntarily assume some additional duty." *Id.*

{¶24} The statutory duties at issue in this case cannot be read to create a duty for the Auditor of State to act on behalf of the Mt. Calvary parties individually. Rather, those duties are owed to the general public, and Mt. Calvary does not appear to dispute this point. While the Mt. Calvary parties allege that the Auditor of State assumed some additional duty to act on their behalf, they have failed to support those allegations. The Mt. Calvary parties have not pointed to any evidence of a promise or action on the part of the Auditor of State that would support an inference that the Auditor of State voluntarily assumed any additional duty. Moreover, Saionzkowski's affidavit and the copies of the relevant audit reports indicate that the Auditor of State's actions were merely in furtherance of the duty owed to the public to account for the expenditure of

public money. Insofar as the Mt. Calvary parties fault the state in a general sense for what they characterize as a deficient regulatory framework for community schools, particularly with respect to the lack of a licensure requirement for the schools' fiscal officers, and although they allege that the Auditor of State had knowledge of the same, they provide no authority for their contention that by virtue of any such alleged deficiency the Auditor of State owed some additional duty to act on behalf of the Mt. Calvary parties or similarly situated parties.

{¶25} Accordingly, reasonable minds can only conclude that Mt. Calvary cannot establish the duty element of the special relationship analysis. Similarly, absent the duty element, the reliance element cannot be established because there is no evidence of an affirmative undertaking by the Auditor of State that would furnish a reasonable basis upon which to rely. Indeed, the Mt. Calvary parties offer no affidavits or other evidence to substantiate any reliance upon the Auditor of State. Moreover, regarding the element of knowledge on the part of the state's agents that the state's inaction could lead to harm, there is no authority or evidence in this case from which reasonable minds could conclude that the Auditor of State had an obligation to take any action beyond the statutory duties it owed to the public. See *Lewis v. Ohio Dept. of Health*, 66 Ohio App.3d 761, 763 (10th Dist.1990).

{¶26} As previously stated, the Mt. Calvary parties must establish all the elements under R.C. 2743.02(A)(3)(b) to demonstrate the existence of a special relationship. Reasonable minds must conclude that the Mt. Calvary parties cannot demonstrate a genuine issue of material fact as to one or more of those elements. Therefore, the special relationship exception to the public duty rule is inapplicable, and it must be concluded that the Auditor of State is immune from liability on Mt. Calvary's third-party claim under the public duty rule set forth at R.C. 2743.02(A)(3)(a).

{¶27} Finally, while the Mt. Calvary parties do not expressly request a determination of personal immunity pursuant R.C. 2743.02(F) and 9.86, to the extent



that the amended third-party complaint raises an allegation of personal liability against Auditor of State Dave Yost, no evidence has been presented from which a trier of fact could reasonably conclude that personal liability may be imposed.

{¶28} Based upon the foregoing, the court concludes that there are no genuine issues of material fact and that the Auditor of State is entitled to judgment as a matter of law. As a result, the Auditor of State's motion for summary judgment is GRANTED. The Mt. Calvary parties' motion for summary judgment is DENIED, in part, to the extent that it pertains to the third-party claim against the Auditor of State. Judgment is hereby rendered in favor of the Auditor of State on the third-party claim asserted by the Mt. Calvary parties against the Auditor of State.

{¶29} Considering that no claim remains pending against the state, the action is hereby REMANDED to the Franklin County Common Pleas Court pursuant to R.C. 2743.03(E)(2). The clerk is directed to return the original papers to the Franklin County Common Pleas Court. All previously scheduled events are VACATED. All other pending motions are DENIED as moot. Court costs are assessed against the Mt. Calvary parties. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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PATRICK M. MCGRATH  
Judge

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