[Cite as *Duncan v. Cuyahoga Community College*, 2015-Ohio-687.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101644

HEATHER DUNCAN, ET AL.

PLAINTIFFS-APPELLANTS

vs.

CUYAHOGA COMMUNITY COLLEGE, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CV-09-687796 and CV-11-762933

BEFORE: Keough, J., S. Gallagher, P.J., and McCormack, J.

RELEASED AND JOURNALIZED: February 26, 2015

ATTORNEYS FOR APPELLANTS

Blake A. Dickson
James A. Tully
Mark D. Tolles
The Dickson Firm
3401 Enterprise Parkway
Cleveland, Ohio 44122

ATTORNEYS FOR APPELLEES

Todd D. Raskin
Frank H. Scialdone
Joseph F. Nicholas
David M. Smith
Mazanec, Raskin, Ryder & Keller Co.
100 Franklin's Row
34305 Solon Road
Cleveland, Ohio 44139

KATHLEEN ANN KEOUGH, J.:

{¶1} Plaintiffs-appellants, Heather Duncan and her children — B.S., A.D., H.D., and R.D. — appeal the trial court's judgment granting the motion for summary judgment of defendants-appellees, Cuyahoga Community College ("Tri-C") and Greg Soucie. For the reasons that follow, we affirm.

I. Background

{¶2} This case arises out of Duncan's participation in a training program for corrections officers provided by Tri-C in 2005. Attendance at such a course is required by persons who wish to sit for the corrections officer certification test issued by the Ohio Peace Officers Training Commission ("OPOTC"). All corrections officers in Ohio must attend an OPOTC-approved training course and pass the OPOTC certification examination. Soucie was responsible for running the training program at Tri-C. Duncan, who was employed by the Bedford Heights Police Department, was injured during the self-defense training portion of the class.

{¶3} She filed suit in 2009 against Tri-C and Soucie, alleging claims for negligence and breach of contract caused by their failure to use mats during the self-defense training part of the class. Duncan's children subsequently filed a complaint for loss of consortium against Tri-C and Soucie (Cuyahoga C.P. No. 11CV762933); the cases were later consolidated.

{¶4} Appellees filed an answer and a Civ.R. 12(C) motion for judgment on the pleadings on the basis of political subdivision statutory immunity under R.C. 2744.01 et seq. The trial court denied the motion. This court reversed the trial court's ruling on the negligence claim, and found that Tri-C and Soucie were entitled to statutory immunity on that claim. *Duncan v. Cuyahoga Community College*, 8th Dist. Cuyahoga No. 97222, 2012-Ohio-1949

("*Duncan I*"). This court found that R.C. 2744.01 et seq. did not apply to Duncan's breach of contract claim, however, and that accordingly, the trial court's denial of the motion for judgment on the pleadings meant the claim was still pending and not subject to interlocutory review. This court remanded the matter to the trial court for further proceedings regarding the breach of contract claim. *Id.* at ¶ 29-30.

{¶5} The trial court subsequently granted Duncan's motion to reinstate her negligence claim in light of *M.H. v. Cuyahoga Falls*, 134 Ohio St.3d 65, 2012-Ohio-5336, 979 N.E.2d 1261, a case decided by the Ohio Supreme Court after the decision in *Duncan I*. On appeal, this court held that the trial court erred by reinstating the negligence claim, reversed the trial court's judgment, and remanded the matter for further proceedings. *Duncan v. Cuyahoga Community College*, 8th Dist. Cuyahoga No. 100121, 2014-Ohio-835, ¶ 13 ("*Duncan II*").

{¶6} Appellees then filed a motion for summary judgment on Duncan's breach of contract claim. The trial court granted the motion and this appeal followed.

II. Analysis

A. Standard of Review

{¶7} An appellate court reviews the trial court's judgment regarding a summary judgment motion de novo, using the same standard that the trial court applies under Civ.R. 56(C). *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241. Civ.R. 56(C) provides that summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) after construing the evidence most favorably for the party against whom the motion is made, reasonable minds can only reach a conclusion that is adverse to the nonmoving party. *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201 (1998); *Temple v. Wean United, Inc.*, 50 Ohio

St.2d 317, 327, 364 N.E.2d 267 (1977).

B. A Genuine Issue of Material Fact

{¶8} In their first assignment of error, appellants assert that the trial court erred in granting summary judgment to Tri-C and Soucie "because reasonable minds could easily conclude that [appellees] breached the contracts relative to Duncan's participation in the corrections officer training program." In short, appellants contend, for various reasons discussed below, that there is a genuine issue of material fact regarding Duncan's breach of contract claim and, therefore, the trial court erred in granting summary judgment.

{¶9} In their motion for summary judgment, appellees argued that they were entitled to summary judgment for three reasons: (1) Duncan's breach of contract claim is just a disguised tort claim that is subject to political subdivision immunity; (2) Duncan cannot demonstrate the existence of a contract between her and appellees or the breach of any contract; and (3) appellants' loss of consortium claim is a derivative claim that cannot survive the dismissal of Duncan's negligence claim. The trial court did not specify the grounds upon which it granted summary judgment other than to find there was no genuine issue of material fact and appellees were entitled to judgment as a matter of law.

{¶10} Duncan first contends that the trial court erred in granting summary judgment because, even though she seeks damages for bodily injury, her breach of contract claim is not a tort claim subject to political subdivision immunity under R.C. 2744.01 et seq. We agree, based on the law-of-the-case doctrine, that Duncan's breach of contract claim is not subject to political subdivision immunity. In *Duncan I*, this court cited to R.C. 2744.09(A), which states, "this chapter does not apply to, and shall not be construed to apply to * * * [c]ivil actions that seek to recover damages from a political subdivision or any of its employees for contractual

liability." *Duncan I*, at ¶ 29. Finding that statutory immunity did not apply to Duncan's breach of contract claim pursuant to R.C. 2744.09(A), this court concluded that the trial court's judgment denying appellees' motion for judgment on the pleadings regarding the breach of contract claim was therefore not "[a]n order that denies a political subdivision or an employee the benefit of an alleged immunity from liability as provided in [R.C. Chapter 2744.01 et seq.]" and consequently, the judgment was not subject to interlocutory review. *Id.*

{¶11} The Ohio Supreme Court did not accept *Duncan I* for review. *Duncan v. Cuyahoga Community College*, 133 Ohio St.3d 1410, 2012-Ohio-4650, 975 N.E.2d 1029. Thus, the law of the case provides that the issue is settled: Duncan's breach of contract claim is not barred by statutory immunity. Any argument to the contrary by appellees in their motion for summary judgment or on appeal is therefore meritless, and the trial court erred if it granted summary judgment on this basis.

{¶12} Nevertheless, appellees also argued in their motion that they were entitled to summary judgment because Duncan failed to demonstrate there was a contract between her and Tri-C or that Tri-C breached the contract. Accordingly, we analyze whether the trial court properly granted summary judgment to appellees on this basis.

{¶13} Duncan first contends that appellees failed to carry their burden, as the moving party, of demonstrating there was no contract relative to her participation in the training program. As authority for her argument, Duncan cites *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996), which pronounced that a party seeking summary judgment on the ground that the nonmoving party cannot prove its case may not rely on simply conclusory assertions, but "must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving

party's claims." Duncan contends that appellees did not provide any testimony, affidavit, or any other evidence permitted by Civ.R. 56(C) to demonstrate they did not have a contractual relationship with her.

{¶14} Duncan misconstrues appellees' burden. The party moving for summary judgment has "the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential elements(s) of the nonmoving party's claims." *Id.* at 293. "In doing so, the moving party is not required to produce any affirmative evidence, but must identify those portions of the record that affirmatively support its argument." *Bierl v. BGZ Assoc. II, LLC,* 3d Dist. Marion No. 9-12-42, 2013-Ohio-648, ¶ 17, citing *Dresher*.

{¶15} The record indicates that appellees provided more than mere "conclusory assertion[s]" in their motion for summary judgment. They identified the standard Duncan must meet in order to prove breach of contract, and pointed to evidence in the record, including answers to interrogatories, deposition testimony, and pleadings, that indicates she is unable to prove all the necessary elements. This was sufficient to meet their burden. Contrary to Duncan's argument, it is well-settled that "there is no express or implied requirement in [Civ.R. 56] that the moving party must support its motion with affidavits or other similar materials negating the opponent's claim." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "In other words, the defendant, in supporting his motion for summary judgment is not required to 'prove a negative.'" *Mahvi v. Stanley Bldrs.*, 11th Dist. Geauga No. 2004-G-2607, 2005-Ohio-6581, ¶ 32, quoting *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 187 (D.C.Cir.1985).

{¶16} To recover on a claim for breach of contract, a plaintiff must demonstrate (1) the

existence of a binding contract; (2) performance by the plaintiff; (3) breach by the defendant; and (4) damages resulting from the breach. *Corsaro v. ARC Westlake Village, Inc.*, 8th Dist. Cuyahoga No. 84858, 2005-Ohio-1982, ¶ 20, citing *Am. Sales, Inc. v. Boffo*, 71 Ohio App.3d 168, 175, 593 N.E.2d 316 (2d.Dist.1991).

{¶17} Duncan contends that three contracts form the basis of her breach of contract claim: a contract between her and Tri-C, a contract between her then-employer the city of Bedford Heights and Tri-C, and a contract between Tri-C and the OPOTC, which approved Soucie's request for Tri-C to provide the program.[1] According to Duncan, defendants breached these contracts by not providing safety mats during the self-defense portion of the program. We find that the trial court properly granted summary judgment to appellees because Duncan failed to demonstrate both the existence of these contracts and any breach by appellees.

{¶18} With respect to the alleged contract between Duncan and Tri-C, Duncan never produced any written contract. And at her deposition, Duncan admitted that if there were a written contract, it would have been between her then-employer, the city of Bedford Heights, and Tri-C, and not between her and Tri-C.

{¶19} Despite her deposition testimony, Duncan contends that the absence of a written contract is not fatal to her claim because when a student enrolls in a college or university, pays his tuition and fees, and attends the school, the resulting relationship may reasonably be construed as contractual in nature. *Spafford v. Cuyahoga Community College*, 8th Dist. Cuyahoga No. 84786, 2005-Ohio-1672, ¶ 34, citing *Behrend v. State*, 55 Ohio App.2d 135, 139, 379 N.E.2d 617 (10th Dist.1977). She also contends that "a college's handbooks, rules, guidelines, policies, and brochures" may provide the terms of the contract that exists between a

student and a college. *See, e.g., Elliott v. Univ. of Cincinnati*, 134 Ohio App.3d 203, 730 N.E.2d 996 (10th Dist.1999).

{¶20} According to Duncan, Tri-C's Public Safety Training Institute advertisement for the class sets forth the terms of the contract between her and Tri-C. The one-page advertisement lists the course as "Ohio Peace Officer Training Commission Certified 136 Hour Corrections Training Academy" and describes the course as "designed to fulfill the training requirements of Administrative Code 109-9-05(A)(4) for new or new assigned corrections staff." Ohio Adm.Code 109-9-05(A)(4) refers to "completion of training that allows a person to gain specific knowledge and skills in a unit for which certification is requested." No additional terms are contained in the course advertisement. Thus, the only promises contained in the course advertisement are that the course would be certified by the OPOTC, and that the course would allow an individual to gain knowledge and skills for certification by the OPOTC.

{¶21} Duncan also contends that there was an oral contract between her and Tri-C based on Soucie's statements to the participants on the first day of class. Duncan testified at her deposition that Soucie told the class participants that if they showed up every day and listened to the instructions, they would pass the OPOTC certification test. Thus, according to Duncan, the oral contract between her and Tri-C was that Tri-C agreed to provide sufficient instruction for her to pass the OPOTC certification examination.

{¶22} In Ohio, "political subdivisions cannot be bound by contract unless the agreement is in writing and formally ratified through proper channels." *Schmitt v. Edn. Serv. Ctr. of Cuyahoga Cty.*, 8th Dist. Cuyahoga No. 97605, 2012-Ohio-2208, ¶ 18. Accordingly, Duncan's assertion that Soucie's representations to the class somehow created an oral contract between her

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[1]Duncan contends she was an intended third-party beneficiary of the latter two contracts.

and Tri-C is meritless.

{¶23} And even assuming for the purposes of argument that the Tri-C's course advertisement for the training program somehow created a contract between Tri-C and Duncan, the record demonstrates no breach. In the advertisement, Tri-C promised that the program would be certified by the OPOTC, and the record reflects that it was. Tri-C also promised the program would allow a participant to gain the knowledge and skills necessary for OPOTC certification, and Duncan testified that she did, in fact, pass her certification examination.

{¶24} Duncan next relies on written Student Performance Objectives ("SPOs") for the self-defense portion of the class to support her claim that Tri-C breached its contract with her to provide safety mats. Specifically, Duncan asserts that Ohio Adm.Code 109:2-9-02(F) specifies the minimum required training for corrections officers on various topics, including training on technical skills. Self-defense training is part of the technical skills unit. She then cites to Ohio Adm.Code 109:2-9-02(G), which states that "the units, topics, hours, and *student performance objectives* recommended by the Ohio Peace Officer Training Commission and approved by the attorney general are established as a mandatory minimum for obtaining a certificate of completion." (Emphasis added.)

{¶25} The SPOs relating to self-defense techniques such as Duncan was performing when she was injured provide that "given a safety mat," the student will be able to demonstrate various maneuvers. Duncan contends that Tri-C therefore breached its contract with her by failing to provide safety mats in the class on the day she was injured.

{¶26} As is evident from the face of the document, however, the SPOs were drafted and promulgated by the OPOTC, not Tri-C, and are the textbook for the course. We reject any contention that a course textbook, not drafted or reviewed by a college, can somehow create a

contractual obligation on the part of the college. More importantly, the SPOs contain no promise by Tri-C to do anything, much less a specific promise to comply with the OPOTC training requirements. Accordingly, the SPOs provide no basis for a contract between Duncan and Tri-C.

{¶27} We likewise reject Duncan's assertion that the trial court erred in granting summary judgment because she was a third-party beneficiary of contracts between Tri-C and the city of Bedford Heights, and Tri-C and the OPOTC. With respect to the contract between Tri-C and the city of Bedford Heights, Duncan contends that Tri-C agreed with the city of Bedford Heights "to provide a corrections officer training program * * * that complied with OPOTC's training requirements for corrections officers," which Duncan contends included the use of safety mats. To demonstrate a contract, Duncan relies upon (1) her deposition testimony that she "assumed" there was a contract between the city and Tri-C, (2) Tri-C's advertisement for the program, and (3) documents demonstrating that the city paid for, and Duncan registered for and attended, the training program. These documents fail to demonstrate a breach of the contract between the city and Tri-C. First, as discussed above, a political subdivision cannot be bound by contract unless the agreement is in writing and ratified through the proper channels. The documents Duncan relies upon do not demonstrate an express contract that was ratified through the proper channels by the city. Moreover, as also discussed above, Tri-C complied with the representations made in the training program advertisement. And the documents demonstrating that the city paid for Duncan's attendance at the training program demonstrate only an agreement that Tri-C agreed to provide the corrections officer training program, and the city agreed to pay for Duncan's attendance at the program. The record reflects that both parties complied with these obligations. Accordingly, there was no breach of the contract between the

city and Tri-C. Finally, as discussed below, even if Duncan were able to establish a breach of the agreement between Tri-C and the city, she has no standing to assert a claim for breach of contract because she is not an intended third-party beneficiary of the contract.

{¶28} Regarding the alleged contract between Tri-C and the OPOTC, Duncan argues that Soucie, on behalf of Tri-C, applied to the OPOTC to host the corrections officer training program, and that the OPOTC's subsequent written approval to host the program resulted in an agreement that Tri-C would conduct the program in compliance with applicable rules and regulations of the Ohio Administrative Code and the OPOTC, including the SPOs.

{¶29} However, Duncan's argument that the statutory and administrative requirements in the Ohio Revised Code and the Ohio Administrative Code somehow created a contract between Tri-C and the OPOTC is meritless. The statutes and regulations do not create "contracts" between the state and its citizens. Moreover, even if Duncan could rely upon statutory and administrative requirements to establish a contract between Tri-C and the OPOTC, she has failed to demonstrate any breach. None of the administrative code sections that Duncan references require the use of safety mats. *See* Ohio Adm.Code 109:2-9-02(F) and (G); Ohio Adm.Code 109:2-9-07(F). And Duncan's reliance upon the SPOs to demonstrate a breach of a contract between Tri-C and the OPOTC is meaningless because, as discussed above, the SPOs were the textbook for the course and cannot form the basis of a contract between Tri-C and the OPOTC.

{¶30} Finally, it is apparent that Duncan has no standing to assert a claim for breach of the alleged contracts between Tri-C and Bedford Heights, and Tri-C and the OPOTC. Only a party to a contract or an intended third-party beneficiary may bring an action on a contract. *Grant Thornton v. Windsor House, Inc.*, 57 Ohio St.3d 158, 161, 566 N.E.2d 1220 (1991).

{¶31} "'A beneficiary of a promise is an intended beneficiary if recognition of a right to

performance in the beneficiary is appropriate to effectuate the intention of the parties and * * * the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.'" *Huff v. FirstEnergy Corp.*, 130 Ohio St.3d 196, 2011-Ohio-5083, 957 N.E.2d 3, ¶ 10, quoting 2 Restatement of the Law 2d, Contracts, Section 302(1)(5), at 439-440 (1981). If the parties to a contract had no intent to directly benefit that third party, then any third-party beneficiary is merely an incidental beneficiary with no enforceable rights under the contract. *Prince v. Kent State Univ.*, 10th Dist. Franklin No. 11AP-493, 2012-Ohio-1016, ¶ 21. Ohio law requires for a third party to be an intended beneficiary under a contract, there must be evidence that the contract was intended to directly benefit that individual. *Huff* at ¶ 12. Generally, if the parties intend to benefit a third party, the parties will express that intention in the language of the agreement. *Id.*

{¶32} It is also well-established that private citizens have no right to enforce government contracts on their own behalf, unless a different intention is "clearly manifested" in the contract. *Akron v. Castle Aviation, Inc.*, 9th Dist. Summit No. 16057, 1993 Ohio App. LEXIS 2993 (June 14, 1993), *see also Fifth Third Bank v. Cope*, 162 Ohio App.3d 838, 835 N.E.2d 779 (12th Dist.2005); *Doe v. Adkins*, 110 Ohio App.3d 427, 674 N.E.2d 731 (4th Dist.1996). We find no clearly manifested intention that Duncan would have a right to sue in any of the documents that she contends created contracts between Tri-C and the city of Bedford Heights, and Tri-C and the OPOTC. And even if we were to ignore that the alleged contracts are public contracts that Duncan has no right to enforce, the alleged contracts do not indicate, as required by *Huff*, a specific intention to benefit Duncan.

{¶33} In light of the foregoing discussion, we find that the trial court properly granted summary judgment to appellees on Duncan's breach of contract claim.

C. Loss of Consortium Claim

{¶34} A claim for loss of consortium is derivative of the other claims and, although a separate cause of action, can only be maintained if the primary cause of action is proven. *Natl. City Bank v. Goodyear Tire & Rubber Co.*, 8th Dist. Cuyahoga No. 100178, 2014-Ohio-2977, ¶ 44. In their motion for summary judgment, appellees argued that they were entitled to summary judgment on the childrens loss of consortium claim because the claim could not survive dismissal of Duncan's negligence claim. Duncan argues on appeal that the trial court erred in granting summary judgment on the loss of consortium claim because the claim is derivative of her breach of contract claim, not the negligence claim. Having established that the breach of contract claim fails, Duncan's argument is moot and we need not address it. App.R. 12(A)(1)(c). We note, however, that under Ohio law, a loss of consortium claim must be based on underlying tortuous conduct. *Bowen v. Kil-Kare, Inc.*, 63 Ohio St.3d 84, 93, 585 N.E.2d 384 (1992); *Greinader v. Diebold Inc.*, 747 F.Supp 417, 420 (S.D.Ohio 1990).

D. Duncan's Cross-motion for Summary Judgment

{¶35} Duncan filed a cross-motion for partial summary judgment in the trial court seeking judgment on the first and third elements of her breach of contract claim. In her second assignment of error, she argues that the trial court erred in denying her cross-motion for partial summary judgment. Because the trial court properly granted summary judgment to appellees on Duncan's breach of contract claim, this assignment of error is without merit and overruled.

{¶36} Judgment affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into

execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KATHLEEN ANN KEOUGH, JUDGE

SEAN C. GALLAGHER, P.J., CONCURS WITH
SEPARATE CONCURRING OPINION
TIM McCORMACK, J., CONCURS WITH MAJORITY
AND SEPARATE CONCURRING OPINION

SEAN C. GALLAGHER, P.J., CONCURRING:

{¶37} I concur in the judgment and analysis of the majority, but write separately to address my concerns about the scope of immunity afforded governmental entities under R.C. 2744.01.

{¶38} Appellate judges do not make public policy, but we certainly see the positive and negative effects of those determinations. This is a case where Duncan is certainly adversely affected by a law that affords no flexibility beyond the limited exceptions under R.C. 2744.02(B).

{¶39} In an earlier incantation of this case, we considered the Supreme Court decision in *M.H.*, 134 Ohio St.3d 65, 2012-Ohio-5336, 979 N.E.2d 1261, and determined it was not an intervening decision that construed the "physical defect" requirement of R.C. 2744.02(B)(4).

{¶40} Appellate judges cannot turn the lack of mats into a physical defect any more than we can devise a contractual claim for Duncan where none exists.

{¶41} In my view, a gross negligence exception would at least afford individuals like Duncan some possible recourse against governmental entities where they might show the entity

acted with a reckless and heedless indifference to the safety of those present. This is not to suggest the failure to have the mats available would establish gross negligence, but it would at least give Duncan, and those like her, a manner to pursue compensation that would be more fair than what the present immunity statute affords.