

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Robert A. Neinast,	:	
Plaintiff-Appellant,	:	No. 09AP-349
v.	:	(C.P.C. No. 09CVH-01-1082)
Ohio Expositions Commission et al.,	:	(ACCELERATED CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on September 15, 2009

Robert A. Neinast, pro se.

Richard Cordray, Attorney General, and Richard M. Jones,
for appellees.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Plaintiff-appellant, Robert A. Neinast, filed a complaint against the Ohio Expositions Commission ("Commission") and Virgil L. Strickler, in his official capacity as the General Manager of the Commission and State Fair (collectively, "appellees"), seeking declaratory and injunctive relief. Appellant was ejected from the Ohio State Fair on August 9, 2008, for not wearing shoes. At the entrance to the fair were signs labeled "Conditions for Admission" requiring shirts and shoes be worn on the

fairgrounds. Appellant was aware of the signs, but had been to the fair without wearing shoes on at least 11 other occasions.

{¶2} Appellant alleged that the Commission did not have the authority to create and enforce such a rule because it was not authorized by any legislative enactment of the General Assembly and was an unconstitutional usurpation of the legislative function by the Commission and its General Manager. Appellant sought declaratory relief from the rule by asking for a finding that it was promulgated without authority and was therefore void. He also sought injunctive relief to prevent the Commission or its General Manager from enforcing any such rule requiring footwear at the Ohio State Fair.

{¶3} Appellees filed a Civ.R. 12(B)(1) and (6) motion to dismiss, and the trial court granted the motion finding that the Commission was created by statute for conducting the Ohio State Fair and the statutes provide that the fair operates events and activities "consistent with the general welfare and interests of the people of the state, and includes such services as are necessary for the care and comfort or amusement of the public." The trial court found that the shoe requirement at the fair protects both the health and safety of fair patrons and is consistent with the general welfare of fairgoers. The trial court also found that appellant did not show he was irreparably harmed by the shoe rule and, thus, the trial court denied him injunctive relief. The trial court found appellant stated no claim upon which relief could be granted, and dismissed the complaint.

{¶4} Appellant appealed the dismissal of his complaint and raised the following assignment of error:

THE TRIAL COURT ERRED IN GRANTING
DEFENDANT[S] MOTION TO DISMISS WHEN THE

COMPLAINT STATED A CLAIM UPON WHICH RELIEF
CAN BE GRANTED.

{¶5} Appellate review of a trial court's decision to dismiss a case, pursuant to Civ.R. 12(B)(1), for lack of subject-matter jurisdiction, is de novo. *Crestmont Cleveland Partnership v. Ohio Dept. of Health* (2000), 139 Ohio App.3d 928, 936. De novo review means that we apply the same standards as the trial court. *GNFH, Inc. v. W. Am. Ins. Co.*, 172 Ohio App.3d 127, 2007-Ohio-2722, ¶16. The standard of review is whether the plaintiff has alleged any cause of action over which the court has authority to decide. *McHenry v. Indus. Comm.* (1990), 68 Ohio App.3d 56, 62; *Crestmont* at 936. When a trial court is determining its subject-matter jurisdiction, it has the authority to consider pertinent materials and is not confined to the allegations in the complaint. *Southgate Dev. Corp. v. Columbia Gas Transmission Corp.* (1976), 48 Ohio St.2d 211, paragraph one of the syllabus.

{¶6} Appellees' motion to dismiss, pursuant to Civ.R. 12(B)(1), was for lack of jurisdiction over the subject matter to the extent appellant sought monetary damages in the common pleas court when such claims may only be heard in the Ohio Court of Claims. However, the trial court did not specifically address this issue because appellant did not seek monetary damages in the complaint.

{¶7} The trial court found the shoe requirement at the fair protects both the health and safety of fair patrons, is consistent with the general welfare of fairgoers, and that appellant did not show he was irreparably harmed by the shoe rule. The trial court granted appellees' Civ.R. 12(B)(6) motion, denied appellant injunctive relief, and dismissed his complaint.

{¶8} A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 1992-Ohio-73. In order for a trial court to grant a motion to dismiss for failure to state a claim upon which relief may be granted, "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, syllabus. In construing the complaint upon a Civ.R. 12(B)(6) motion, a court must presume all factual allegations contained in the complaint to be true and make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. We review a judgment on a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted de novo. *Stewart v. Fifth Third Bank of Columbus* (Jan. 25, 2001), 10th Dist. No. 00AP-258. In addressing a Civ.R. 12(B)(6) motion, a trial court may only consider the statements and facts contained in the complaint and may not consider or rely on evidence outside the complaint. *Estate of Sherman v. Millhon* (1995), 104 Ohio App.3d 614, 617.

{¶9} R.C. 991.01 through 991.03 are the relevant statutes regarding the Commission. R.C. 991.01 provides, as follows:

As used in sections 991.01 to 991.07 of the Revised Code:

(A) "Commission" means the Ohio expositions commission.

(B) "Fair" or "exposition" means an exhibition of agricultural, business, manufacturing, or other industries and labor, education service organizations, social and religious groups, or any other events or activities consistent with the general welfare and interests of the people of the state, and includes such services as are necessary for the care and comfort or

amusement of the public. Such services include rest areas, sanitary and other such comforts, and concessions for food, drink, amusements, and sale of trinkets.

(C) "Exhibition" means one or more displays or demonstrations which are of educational or entertainment value to those witnessing such exhibition.

{¶10} R.C. 991.02 provides, in pertinent part, as follows:

(A) There is hereby created the Ohio expositions commission which shall consist of the following thirteen members[.]

* * *

(G) The commission shall employ and prescribe the powers and duties of a general manager who shall serve in the unclassified civil service at a salary fixed pursuant to section 124.14 of the Revised Code.

{¶11} R.C. 991.03 provides, in pertinent part, as follows:

(A) The Ohio expositions commission shall:

(1) Conduct at least one fair or exposition annually;

(2) Maintain and manage property held by the state for the purpose of conducting fairs, expositions, and exhibits[.]

{¶12} The legislature granted the Commission the statutory authority to "conduct at least one fair annually" and to "maintain and manage property held by the state for the purpose of conducting fairs." The issue is whether the prohibition against bare feet at the state fair is incompatible with the Commission's authority.

{¶13} "It is well settled that an administrative agency has only such regulatory power as is delegated to it by the General Assembly." *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, ¶38. Such authority cannot be extended by the administrative agency. *Id.*, citing *Burger Brewing Co. v. Thomas*

(1975), 42 Ohio St.2d 377, 379. However, "[a] power of a state agency may be fairly implied from an express power where it is reasonably related to the duties of the agency." *Waliga v. Bd. of Trustees of Kent State Univ.* (1986), 22 Ohio St.3d 55, 57, citing *State ex rel. Corrigan v. Seminatore* (1981), 66 Ohio St.2d 459.

{¶14} In *D.A.B.E., Inc.*, the Supreme Court of Ohio explained that " 'the limitation put upon the implied power is that it is only such as may be reasonably necessary to make the express power effective. In short, the implied power is only incidental or ancillary to an express power, and, if there be no express grant, [it] follows, as a matter of course, that there can be no implied grant.' " *Id.*, ¶39, quoting *State ex rel. A. Bentley & Sons Co. v. Pierce* (1917), 96 Ohio St. 44, 47. Moreover, " '[i]n construing such grant of power, particularly administrative power through and by a legislative body, the rules are well settled that the intention of the grant of power, as well as the extent of the grant, must be clear; that in case of doubt that doubt is to be resolved not in favor of the grant but against it.' " *Id.*, ¶40, quoting *Bentley* at 47.

{¶15} Thus, the Commission has the power as is delegated to it by the General Assembly, and the Commission also has the power that may be fairly implied from an express power where it is reasonably related to the duties of the Commission. The Commission has the express power to conduct the state fair and maintain and manage the property. Reasonably related to these express powers are the implied powers to conduct a state fair in a safe manner and to protect the fairgoers against potential hazards.

{¶16} During appellant's prior litigation against the Columbus Metropolitan Library, this court and the federal courts recognized that the library board reasonably

determined that the requirement that library patrons wear shoes is necessary to protect the health and safety of the patrons against hazards in the library, as well as protect the economic well-being of the library, by averting tort claims and litigation expenses from potential claims of injured barefoot patrons. The same principal holds true here. See *Neinast v. Bd. of Trustees of the Columbus Metro. Library* (2002), 190 F.Supp.2d 1040; *Neinast v. Bd. of Trustees of the Columbus Metro. Library* (2003), 346 F.3d 585; and *Neinast v. Bd. of Trustees of the Columbus Metro. Library*, 165 Ohio App.3d 211, 2006-Ohio-287.

{¶17} Another instructive case is *Internal. Soc. for Krishna Consciousness, Inc. v. Evans* (1977), 440 F.Supp. 414, where the plaintiffs were seeking declaratory and affirmative relief to enable them to proselytize their religious beliefs at the Ohio State Fair in a manner that was not confined to a booth. The Ohio Department of Agriculture had adopted rules for county fairs that did not permit roving solicitors, but confined solicitors to renting a booth and staying in the booth without roaming the fairgrounds. The Commission had not formally adopted the rules, but followed them. The United States District Court concluded that the failure of the Commission to formally adopt the Ohio Department of Agriculture regulations for the conduct of county fairs did not preclude enforcement of those regulations. The court concluded that, as long as there was no discriminatory application of the rule, the enforcement power fell within the power of the Commission to maintain and manage the fairgrounds pursuant to R.C. 991.03(A)(2).

{¶18} Also, in footnote 4, the court stated that a fairgoer's ticket of admission "is essentially a contract between the fairgoer and Expo [Commission]. An implied

condition of admission is that it may be revoked for failure to adhere to reasonable regulations governing conduct, and there is no constitutional requirement that these have been formally adopted." Thus, the courts have previously interpreted the Commission's statutory authority to include rule-making and enforcing regulations to conduct the state fair as part of its statutory authority of R.C. 991.01 through 991.03.

{¶19} Thus, the Commission has the express power as is delegated to it by the General Assembly, and the implied power reasonably related to the duties of the Commission. The Commission has the express power to conduct the state fair and maintain and manage the property and reasonably related to these express powers are the implied powers to conduct a state fair in a safe manner and to protect the fairgoers against potential hazards and the ability to require patrons to wear shoes at the fair to do so. Appellant has not set forth a claim upon which relief can be granted and the trial court did not err in dismissing his complaint. Appellant's assignment of error is overruled.

{¶20} For the foregoing reasons, appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

FRENCH, P.J., and SADLER, J., concur.
