

IN THE COURT OF CLAIMS OF OHIO

REESE C. DEHEN

Plaintiff

v.

THE OHIO STATE UNIVERSITY

Defendant

Case No. 2023-00457JD

Judge Lisa L. Sadler
Magistrate Robert Van Schoyck

DECISION

{¶1} Plaintiff, Reese C. Dehen (Dehen), who is enrolled as an undergraduate student with Defendant, The Ohio State University (OSU), brings this action arising from OSU’s decision not to award her an academic scholarship known as the National Buckeye Merit Scholarship (NBMS). The Amended Complaint raises claims for negligent misrepresentation, fraud, negligence, violation of the Ohio Consumer Sales Practices Act, and promissory estoppel.

{¶2} On July 2, 2024, OSU filed a Motion for Summary Judgment under Civ.R. 56(B). Dehen filed a response on July 16, 2024, and OSU filed a reply on July 23, 2024. The motion is now before the Court for a non-oral hearing pursuant to Civ.R. 56 and L.C.C.R. 4. For the reasons explained below, OSU’s motion shall be granted.

Standard of Review

{¶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.*, 2004-Ohio-7108, ¶ 6, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977).

{¶5} "The party moving for summary judgment bears 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." *Starner v. Onda*, 2023-Ohio-1955, ¶ 20 (10th Dist.), citing *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). "The moving party does not discharge this initial burden under Civ.R. 56 by simply making conclusory allegations." *Id.* "Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Id.* "Once the moving party discharges its initial burden, summary judgment is appropriate if the non-moving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that a genuine issue exists for trial." *Hinton v. Ohio Dept. of Youth Servs.*, 2022-Ohio-4783, ¶ 17 (10th Dist.), citing *Dresher* at 293; *Vahila v. Hall*, 77 Ohio St.3d 421, 430 (1997); Civ.R. 56(E).

Factual Background

{¶6} The following factual allegations are taken from the Amended Complaint. In 2020 the coaching staff of OSU's swimming program recruited Dehen for the Fall 2021 class of incoming students. (Amended Complaint, ¶ 5.) OSU offered Dehen a partial athletic scholarship. (Amended Complaint, ¶ 6, 14.) To supplement the partial athletic scholarship, Dehen understood from the coaching staff that, based on her record of academic achievement at her high school in Minnesota, "it was anticipated she would very likely receive the NBMS", an academic scholarship valued at approximately \$54,000 over the span of a four-year education. (Amended Complaint, ¶ 10, 14-15.)

{¶7} The NBMS at that time was available to out-of-state students "who are highly competitive as demonstrated through grade point average, class rank (if available), and ACT or SAT scores (if available)." (Amended Complaint, ¶ 7, 8.) "Prior to OSU's 2021 incoming class, there was a mandatory requirement for submission of ACT/SAT scores

for NBMS consideration.” (Amended Complaint, ¶ 22.) But during the COVID-19 pandemic, OSU “made the decision to waive the requirement for ACT/SAT scores for incoming 2021 students with respect to . . . NBMS consideration” and stated on its website that applicants would receive “full consideration” for scholarships “even if they are unable or choose not to submit a test score.” (Amended Complaint, ¶ 17-18.)

{¶8} Dehen opted to apply without submitting an ACT/SAT score and signed a letter of intent to attend OSU as a student-athlete. (Amended Complaint, ¶ 25.) Dehen explains, however, that the financial aid package OSU ultimately offered her did not include the NBMS, leaving her needing “to find \$54,000 additional monies for those four years or look for another school she could afford.” (Amended Complaint, ¶ 30.)

{¶9} Dehen claims that OSU failed to give her and other applicants who did not submit an ACT/SAT score “full consideration” for the NBMS. (Amended Complaint, ¶ 48.) According to Dehen, she “would have received the NBMS had OSU truthfully given full consideration of her GPA and class rank.” (Amended Complaint, ¶ 53.)

Analysis

A. Consumer Sales Practices Act (CSPA)

{¶10} OSU argues that the Court of Claims lacks jurisdiction over Dehen’s CSPA claim.

{¶11} “The Court of Claims Act, effective January 1, 1975, waived the state’s sovereign immunity and established the Court of Claims” *Keller v. Dailey*, 124 Ohio App.3d 298, 302 (10th Dist. 1997). But, the Court of Claims Act provides, in part, that “[t]o the extent that the state has previously consented to be sued, this chapter has no applicability.” R.C. 2743.02(A)(1). “R.C. 2743.02(A)(1) makes clear that the Court of Claims has jurisdiction to render judgment only as to those complaints which, prior to the enactment of the Court of Claims Act, were precluded by state immunity. Thus, where the state has previously consented to be sued, the Court of Claims lacks jurisdiction.” *Columbus Green Building Forum v. State*, 2012-Ohio-4244, ¶ 15 (10th Dist.), quoting *Stauffer v. Ohio Dept. of Transp.*, 63 Ohio App.3d 248, 251 (10th Dist. 1989).

{¶12} Predating the 1975 enactment of the Court of Claims Act, “[t]he CSPA was enacted in 1972 and prohibits suppliers from committing unfair, deceptive, or

unconscionable acts or practices in connection with consumer transactions.” *Krueck v. Youngstown State Univ.*, 2019-Ohio-3219, ¶ 13 (9th Dist.). “Accordingly, to the extent that the CSPA applies to actions against the state, the Court of Common Pleas retains jurisdiction to consider those claims.” *Id.* at ¶ 14, citing *Owens College Nursing Students v. Owens State Community College*, 2014-Ohio-5210, ¶ 6 (6th Dist.); see also *Rastaturin v. Ohio State Veterinary Med. Ctr.*, 2023-Ohio-3262, ¶ 9 (Ct. of Cl.) (“The state consented to be sued when the legislature enacted R.C. 1345, the CSPA, in 1972. The Court of Claims statute was enacted in 1975. Therefore, based on the language of R.C. 2743.02(A)(1), this court lacks jurisdiction to determine claims under the CSPA.”); *Ridenour v. Chillicothe Corr. Inst.*, 2009-Ohio-3576, ¶ 5 (Ct. of Cl.) (“Therefore, based on the language of R.C. 2743.02(A)(1), this court lacks jurisdiction to determine claims under the CSPA.”).

{¶13} Accordingly, Dehen’s CSPA claim shall be dismissed for lack of jurisdiction.

B. Discretionary Immunity

{¶14} OSU argues that Dehen’s claims are barred by the doctrine of discretionary immunity.

{¶15} “The doctrine of discretionary immunity provides 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.’” *Cristino v. Ohio Bur. of Workers’ Comp.*, 2012-Ohio-4420, ¶ 22 (10th Dist.), quoting *Reynolds v. State, Div. of Parole & Community Servs.*, 14 Ohio St.3d 68, 70 (1984). “Therefore, the Court of Claims does not have jurisdiction when the state makes highly discretionary decisions pursuant to its legislative, judicial, executive, or planning functions, because the state has not waived its sovereign immunity for those decisions.” *Smith v. Ohio State Univ.*, 2024-Ohio-764, ¶ 16. “It is important to note that discretionary immunity is not absolute. Once a discretionary decision has been made to engage in a certain activity, ‘the state may be held liable, in the same manner as private parties, for the negligence of the actions of its employees and agents in the performance of such activities.’” *Id.* at ¶ 17, quoting *Reynolds* at paragraph one of the syllabus. “This means that when a suit challenges the

manner in which the state implements one of its discretionary decisions, the Court of Claims will not be barred from hearing the case.” *Id.* at ¶ 17.

{¶16} In this case, OSU argues that “[a]s a result of the pandemic, OSU developed criteria to determine the students who helped OSU meet its recruitment goals given the difficulties some students faced in sitting for standardized tests” and that this “was a discretionary function for which OSU is immune.” (Motion, p. 6.) According to OSU, “[t]his Court lacks subject matter jurisdiction to weigh OSU’s discretionary decisions to establish scholarship criteria and to determine to whom to award scholarships.” (Motion, pp. 6-7.)

{¶17} In support of its motion, OSU submitted an affidavit from Assistant Vice Provost for University Admissions Beth Wisner, who previously served as Executive Director of Undergraduate Admissions during the time when Dehen applied for admission and academic scholarships. Wisner avers, in part:

3. OSU has limited funds to award for high academic achievement. In order to maintain a high level of academic excellence, these limited funds are awarded to those students who will best help the University meet this goal.
4. Prior to the unprecedented circumstances of the COVID-19 pandemic, OSU used a holistic approach to determine how academic scholarships are awarded. The admissions team examined a student’s class rank and standardized test scores.
5. Prior to the COVID-19 pandemic, students were required to submit standardized test scores.
6. The pandemic created difficulties for students to satisfy the requirement that standardized test scores be submitted because of the inability of some students to sit for those exams.
7. In response, OSU decided to make standardized tests optional during the pandemic as a pilot in an effort to reduce barriers for prospective students to further their education during the chaos and uncertainty of the once-in-a-lifetime COVID-19 pandemic. In making standardized tests optional, it was not OSU’s intention to lower its admission and scholarship standards.

8. Standardized tests are still a valuable tool to assist the University in making admissions determinations and deciding who is entitled to receive an academic scholarship. Indeed, the University still encouraged students to take standardized tests if they were available.

9. Pursuant to this new, temporary policy, prospective students could opt not to take tests or submit their test scores for consideration.

10. During the first year OSU allowed applicants to be test optional, it developed criteria to be used to select students for academic merit-based scholarships. The criteria were listed generally on the university's website.

11. In determining who would receive a scholarship, OSU opted to use a student's class rank (or estimated class rank) used for admission and a standardized test score if the student opted to have the score used for admission or scholarship.

12. If a prospective student opted not to have their test scores considered, a proxy score was developed using criteria long used within the admissions process. The proxy score considered a student's academic curriculum in high school and an academic index which was a projection of the prospective student's performance at OSU. This created a proxy score that estimated how a student may have done on the ACT, and it was used in lieu of a standardized test score for all students who did not submit their test scores for consideration.

13. One of the academic scholarships available for prospective out-of-state students is the National Buckeye Merit Scholarship. This is an academic scholarship awarded to out-of-state students with excellent academic records.

14. When determining whether a prospective student should be awarded the National Buckeye Merit Scholarship, OSU used the methodology described above for students who submitted their test scores and for those who did not.

{¶18} Regarding OSU's decision adopting a policy during the pandemic that temporarily waived the requirement for scholarship applicants to submit a standardized

test score and established criteria for evaluating those students' applications, Dehen concedes that “[e]stablishing the criteria is discretionary . . .” (Response, p. 7.) But Dehen argues that her claim represents a challenge to the manner in which OSU implemented its policy. According to Dehen, “[w]hat is truly at issue here is whether Defendant, in awarding those scholarships by actually applying its own stated criteria, followed-through on properly administering all those criteria as it relates to Plaintiff. Defendant improperly declined to award Plaintiff a scholarship by not applying its own stated criteria.” (Response, p. 7.) Dehen submitted a screenshot of an OSU website from September 2020 which states the following regarding the NBMS:

Criteria: Those considered are non-Ohio residents (U.S. citizens or permanent residents) who are highly competitive as demonstrated through grade point average, class rank (if available), and ACT or SAT scores (if available).

(Walton Affidavit, Bates No. OSU 0009.)

{¶19} Dehen asserts that OSU did not use these criteria and instead used “unstated, unpublicized secret criteria” in the form of the proxy score calculated for applicants who did not submit standardized test scores. (Response, p. 7.) But the same page from OSU’s website that Dehen references stated that “[a]ward amounts and criteria are subject to change without notice.” (Emphasis original.) (Walton Affidavit, Bates No. OSU 0009.) Whether or not the use of a proxy score for applicants who did not submit standardized test scores was explained on OSU’s website in September 2020, Wiser’s affidavit demonstrates that the proxy score was part of the process OSU developed for use in selecting students under the temporary, pandemic-era policy that waived the requirement of standardized test scores. (Wiser Affidavit, ¶ 10.) And it is uncontroverted from Wiser’s averments that OSU considered Dehen’s NBMS application accordingly. Specifically, Wiser relates that after she “received inquiries from [Dehen’s] father questioning why his daughter did not receive scholarship money based upon her academic performance”, she reviewed the pertinent records and information and “confirmed that [Dehen] was properly denied the National Buckeye Merit Scholarship as she did not meet the actual criteria used to award eligible students the National Buckeye Merit Scholarship” but she “can confirm that Plaintiff was given full consideration for a

National Buckeye Merit Scholarship.” (Wiser Affidavit, ¶¶ 17-19.) Wiser authenticates a document which shows Dehen’s ACT proxy score was 28.841, which was at the 40th percentile, whereas the cutoff for NBMS eligibility was an ACT proxy score of 28.995, which was the 50th percentile. (Wiser Affidavit, ¶ 18.)

{¶20} Reasonable minds can only conclude that OSU’s decision to adopt a policy amid the pandemic by which it waived the requirement for scholarship applications to include a standardized test score and developed criteria for considering such applications was an executive or planning function for which the state is immune. To the extent Dehen’s claims in this matter challenge OSU’s policy, including the decision OSU made under that policy to not award her the NBMS, this Court is without jurisdiction and such claims shall be dismissed.

C. Promissory Estoppel, Fraud, Negligent Misrepresentation, and Negligence

{¶21} OSU argues that even if discretionary immunity did not bar all of Dehen’s claims, she still cannot prove that she is entitled to relief.

{¶22} OSU first argues that “the relationship between a university and a student is a contractual one” and that “[w]here a contract exists which governs the relationship of the parties, that party must sue on the contract and cannot assert tort claims.” (Motion, p. 8.)

{¶23} “It is axiomatic that ‘. . . when a student enrolls in a college or university, pays his or her tuition and fees, and attends such school, the resulting relationship may reasonably be construed as being contractual in nature.’” *Bleicher v. Univ. of Cincinnati College of Med.*, 78 Ohio App.3d 302, 308 (10th Dist. 1992), quoting *Behrend v. State*, 55 Ohio App.2d 135, 139 (10th Dist. 1977). The terms of the contract are “typically found in a handbook, catalogue, or other guideline.” *Tate v. Owens State Community College*, 2011-Ohio-3452, ¶ 21 (10th Dist.).

{¶24} In this case, however, OSU does not point to evidence that Dehen was enrolled or had paid tuition during the time in question, nor does OSU otherwise point to evidence of a contract existing between the parties at that time. Accordingly, OSU has not met its burden at the summary judgment stage of showing that the relationship between the parties was contractual.

{¶25} Alternatively, OSU argues that Dehen cannot prove the elements necessary to grant relief on her claims for promissory estoppel, fraud, negligent misrepresentation, or negligence. The Court shall address each of these claims in the order in which the parties address them in their briefs.

1. Promissory Estoppel

{¶26} “The elements necessary to establish a claim for promissory estoppel are a (1) promise, (2) clear and unambiguous in its terms, (3) reliance that is reasonable and foreseeable, and (4) injury caused by such reliance.” *Patel v. Univ. of Toledo*, 2017-Ohio-7132, ¶ 21 (10th Dist.).

{¶27} Regarding Dehen’s promissory estoppel claim, the Amended Complaint provides, in part:

97. In the case at hand, OSU’s promise was to give “full consideration” to all prospective student applicants who meet the website stated criteria. OSU’s website criteria does not require an applicant to submit an ACT/SAT examination.

98. In spite of OSU’s claimed commitment to fairness and equality, undergraduate admissions staff failed to follow its own criteria of giving such “full consideration” to those applicants and deceived and prevented student applicants like plaintiff who did not take or submit ACT/SAT scores from receiving financial aid such as the NBMS.

{¶28} OSU argues that “there is no genuine issue of material fact that applicants who did not submit a test score (like Dehen) were given full consideration for admission and scholarship awards.” (Motion, p. 9.) As support, OSU points to the affidavit of Beth Wisser, who avers that in determining who would receive the NBMS, OSU used the methodology described earlier involving an applicant’s class rank (or estimated class rank) and a standardized test score if the student opted to have the score used for admission or scholarship, and if the student did not submit a standardized test score OSU used a proxy score. As previously noted, Wisser avers that after receiving an inquiry from Dehen’s father about why she did not receive the NBMS, Wisser reviewed the matter and “confirmed that [Dehen] was properly denied the National Buckeye Merit Scholarship as

she did not meet the actual criteria used to award eligible students the National Buckeye Merit Scholarship” but she “can confirm that Plaintiff was given full consideration for a National Buckeye Merit Scholarship.” (Wiser Affidavit, ¶ 17-19.) And a document authenticated by Wiser shows Dehen’s ACT proxy score was 28.841, which was at the 40th percentile, whereas the cutoff for NBMS eligibility was an ACT proxy score of 28.995, which was the 50th percentile. (Wiser Affidavit, ¶ 18.)

{¶29} Dehen argues that there are genuine issues of material fact as to “whether Defendant university gave Plaintiff full consideration” because, in Dehen’s view, the proxy score methodology used by OSU for applicants who did not submit standardized test scores effectively “penalized them, or in other words gave them less than full or even equal consideration as test submitting applicants.” (Response, p. 11.) Dehen asserts that this is shown “by the fact that an unequal amount and unequal percentage of test-submitters and non-submitting students received the NBMS” (Response, p. 12.) In this regard, Dehen apparently refers to an affidavit from her father, John Dehen, who avers that his analysis of NBMS data indicates that “[o]ut of the 5,508 eligible applicants that were offered a NBMS, 1,071 opt out students (19%) received offers while 4,437 (81%) of those applicants submitted test scores.” (John Dehen Affidavit, ¶ 13.) But Dehen does not point to evidence as to the number of applicants who submitted test scores versus those who did not and does not show that the awards were disproportionate with the way these two categories made up the overall applicant pool. Notably, OSU’s website still encouraged applicants to submit test scores, even though they were not required.

{¶30} Dehen fails to present evidence from which an inference can be drawn that, as she contends, students who did not submit standardized test scores were “penalized” instead of receiving “full consideration” for the NBMS. Dehen submitted affidavits from her parents in which they offer their own conclusions or opinions that OSU’s policy “penalized” applicants who did not submit a standardized test score. (John Dehen Affidavit, ¶ 9; Julie Dehen Affidavit, ¶ 28.) But Dehen does not present evidence creating a material issue of fact with Wiser’s testimony setting forth the facts about the methodology and about how Dehen received full consideration under that methodology.

{¶31} Furthermore, OSU submitted a transcript of Dehen’s deposition in which she stated that before applying to OSU she sat for the ACT and received a score of 26, and she understood from OSU’s coaching staff that if she submitted this score she would probably not receive the NBMS, as recipients of the NBMS generally scored 29 or higher on the ACT. (Dehen Depo., p. 57.) There is no dispute that under OSU’s methodology Dehen received an ACT proxy score of 28.841. Dehen thus received a proxy ACT score that was higher than her actual ACT score which she elected not to submit.

{¶32} Lastly, Dehen argues that OSU used “hidden, and additional internal criteria” that differed from the NBMS criteria that OSU’s website identified in September 2020 (“Those considered are non-Ohio residents (U.S. citizens or permanent residents) who are highly competitive as demonstrated through grade point average, class rank (if available), and ACT or SAT scores (if available).”, Walton Affidavit, Bates No. OSU 0009.) But as discussed previously, the website expressly stated that scholarship criteria were subject to change without notice. OSU asserts, and the Court agrees, that the website language taken together “did not limit OSU from developing specific criteria, and was not intended to provide an exhaustive or exclusive statement of how OSU awards merit scholarships.” (Reply, p. 2.)

{¶33} Upon review, reasonable minds can only conclude that Dehen received full consideration for the NBMS under the methodology OSU adopted for considering NBMS applicants for the Fall 2021 class of incoming students. Therefore, Dehen cannot prevail on her promissory estoppel claim.

2. Fraud

{¶34} “The elements of a fraud claim are: (1) a representation (or concealment of a fact when there is a duty to disclose); (2) that is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) with intent to mislead another into relying upon it; (5) justifiable reliance; and (6) resulting injury proximately caused by the reliance.” *Dunlop v. Ohio Dept. of Job & Family Servs.*, 2012-Ohio-1378, ¶ 19 (10th Dist.).

{¶35} In the Amended Complaint, Dehen claims that “OSU’s website represented that there would be ‘full consideration’ of those applicants who did not submit ACT/SAT scores”, but “for a number of prospective students, there was a pattern of defects and deviations, an intentional or reckless disregard by OSU as to whether those promises and commitments were being followed.” (Amended Complaint, ¶ 70, 75.)

{¶36} OSU argues, in part, that Dehen cannot prove that its representation of giving full consideration to NBMS applicants who did not submit standardized test scores was false. As discussed above, Wiser’s affidavit demonstrates that Dehen received full consideration for the NBMS under the methodology adopted by OSU as part of its pandemic-era policy of waiving the requirement that applicants submit standardized test scores. Dehen again argues that she was “penalized” under this methodology for not submitting a standardized test score, and that “‘full consideration’ should have been the implementation and application of the published criteria” from OSU’s website. But, as with the promissory estoppel claim, again Dehen does not present evidence creating a material issue of fact with Wiser’s testimony about the methodology and about how Dehen received full consideration under that methodology. Nor does Dehen present evidence controverting the language on OSU’s website that scholarship criteria were subject to change without notice and did not limit OSU from using a proxy ACT score in the consideration of NBMS applicants.

{¶37} Upon review, reasonable minds can only conclude that Dehen cannot show that OSU made a false representation for purposes of a fraud claim.

3. Negligent Misrepresentation

{¶38} “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, 4) if he or she fails to exercise reasonable care or competence in obtaining or communicating the information.’” *Patel v. Univ. of Toledo*, 2017-Ohio-7132, ¶ 30 (10th Dist.), quoting *Federated Mgt. Co. v. Coopers & Lybrand*, 137 Ohio App.3d 366, 395 (10th Dist. 2000).

{¶39} According to the Amended Complaint, for purposes of the negligent misrepresentation claim, OSU supplied false information in two ways: (1) OSU’s website provided that NBMS applicants who did not submit standardized test scores would receive “full consideration” for the NBMS, and (2) “[c]oaching staff expounded on that website information and further attempted to guide and provide athletes like Plaintiff advice including making oral representations on the prudence of submitting ACT/SAT scores as part of the application process.” (Amended Complaint, ¶ 59, 60.)

{¶40} Regarding any statement—whether made on OSU’s website or made by coaching staff—that applicants not submitting standardized test scores would receive “full consideration” for the NBMS, the Court has previously determined that OSU met its burden of coming forward with evidence that Dehen received full consideration for the NBMS, and Dehen did not meet the reciprocal burden of coming forward with evidence creating a genuine issue of material fact on that issue.

{¶41} Regarding OSU’s coaching staff, even if it is assumed that they informed Dehen that “it was anticipated she would very likely receive the NBMS”, OSU correctly asserts that Dehen could not have justifiably relied on that information. (Amended Complaint, ¶ 15.) Dehen admitted in her deposition that when deciding to apply to OSU, she understood that the coaching staff had no decision-making power or authority over academic scholarship awards. (Dehen Deposition, p. 66.) Rather, Dehen understood that OSU’s admissions office would decide whether she received the NBMS, and no one from the admissions office made a promise or guarantee that she would receive the NBMS. (Dehen Deposition, pp. 62, 66.)

{¶42} “Ohio courts have ‘recognized that “persons seeking information from the government must assume the risk that the agent of the government might be wrong.”’” *Dalrymple v. Westerville*, 2022-Ohio-4094, ¶ 75 (10th Dist.), quoting *Mueller v. Vandalia*, 1997 Ohio App. LEXIS 822 (2d Dist. Mar. 7, 1997), quoting *Gaston v. Ohio Bur. of Emp. Serv.*, 17 Ohio App.3d 12, 14, (8th Dist. 1983). Further, it is well-settled that “public officers cannot bind the state by acts outside their express authority.” *Struna v. Ohio Lottery Comm.*, 2004-Ohio-5576, 14 (10th Dist.), quoting *Drake v. Med. College of Ohio*, 120 Ohio App. 3d 493, 496 (10th Dist. 1997); see also *Raabe v. Ohio Bd. of Speech-Language Pathology & Audiology*, 2005-Ohio-2335, ¶ 37 (10th Dist.), quoting *Nealon v.*

Cleveland, 140 Ohio App.3d 101, 109 (8th Dist. 2000), quoting *Cooney v. Independence*, 1994 Ohio App. LEXIS 5290 (8th Dist. Nov. 23, 1994) (“Ohio law requires that “whoever relies on the conduct of public authorities must take notice of the limits of their power.””).

{¶43} Accordingly, reasonable minds can only conclude that Dehen cannot prove that she justifiably relied on any false information allegedly supplied by OSU, and, as a result, cannot prevail on her negligent misrepresentation claim.

4. Negligence

{¶44} “[T]o establish actionable negligence, one seeking recovery must show the existence of a duty, the breach of the duty, and injury resulting proximately therefrom.” *Strother v. Hutchinson*, 67 Ohio St.2d 282, 285 (1981).

{¶45} Like the theory of negligent misrepresentation, Dehen’s negligence claim is predicated on allegations that OSU allegedly failed to “rank applicants based upon the criteria stated on the OSU website” and OSU’s “coaching staff breached their duty to provide accurate information to Plaintiff.” (Amended Complaint, ¶ 83-85.)

{¶46} But as explained above, Dehen does not present evidence creating a material issue of fact with Wisner’s testimony about the criteria OSU used to consider NBMS applications and about how Dehen received full consideration under that methodology. Nor does Dehen present evidence controverting the language on OSU’s website that scholarship criteria was subject to change without notice and did not limit OSU from using a proxy ACT score in the consideration of NBMS applicants. And as to the coaching staff, again Dehen knew that they had no decision-making power or authority over academic scholarship awards, and the coaching staff could not subject OSU to liability by acts outside their express authority. See *Struna* at ¶ 14.

{¶47} Accordingly, reasonable minds can only conclude that Dehen cannot show that OSU breached a duty owed to her for purposes of a negligence claim.

Conclusion

{¶48} Based upon the foregoing, the Court concludes that there are no genuine issues of material fact and that OSU is entitled to judgment as a matter of law. Accordingly, OSU’s Motion for Summary Judgment shall be granted such that Dehen’s

CSPA claim and any claims barred by discretionary immunity shall be dismissed without prejudice for lack of jurisdiction. Judgment shall be rendered on all remaining claims in favor of OSU. All previously scheduled events are VACATED.

LISA L. SADLER
Judge

[Cite as *Dehen v. Ohio State Univ.*, 2024-Ohio-5473.]

REESE C. DEHEN

Plaintiff

v.

THE OHIO STATE UNIVERSITY

Defendant

Case No. 2023-00457JD

Judge Lisa L. Sadler
Magistrate Robert Van Schoyck

JUDGMENT ENTRY

IN THE COURT OF CLAIMS OF OHIO

{¶49} A non-oral hearing was conducted in this case upon Defendant’s Motion for Summary Judgment. For the reasons set forth in the decision filed concurrently herewith, the Court concludes that there are no genuine issues of material fact and that Defendant is entitled to judgment as a matter of law. As a result, Defendant’s Motion for Summary Judgment is GRANTED such that Plaintiff’s CSPA claim and any claims barred by discretionary immunity are DISMISSED without prejudice for lack of jurisdiction, and judgment is hereby rendered on all remaining claims in favor of Defendant. All previously scheduled events are VACATED. 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.

LISA L. SADLER
Judge

Filed October 2, 2024
Sent to S.C. Reporter 11/21/24