

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO  
CIVIL DIVISION  
G.SCOTTCO INVESTMENT CO., et. al.,

Plaintiffs/Counterclaim  
Defendants/Third-Party  
Plaintiffs,

v.

Case No.05CVH-04-10023

DIRECTOR CHRIS KORLESKI  
OHIO ENVIRONMENTAL PROTECTION  
AGENCY, et al.,

Judge Sheward

Defendants

Magistrate Petrucci

v.

GAYLE SCOTT, JR. et. al.,

Third-Party Defendants/  
Third-Party Plaintiffs,

v.

WATER SPECIALISTS, INC. et.al.,

Third-Party Defendants

FILED  
COMMON PLEAS COURT  
FRANKLIN CO. OHIO  
2008 DEC 19 PM 3:15  
CLERK OF COURTS

**ORDER ADOPTING DECISION OF MAGISTRATE**  
**JOURNALIZED ON OCTOBER 10, 2008**  
**AND**  
**DECISION AND ENTRY OVERRULING THIRD-PARTY DEFENDANT**  
**WINELCO'S OBJECTIONS TO THE MAGISTRATE'S DECISION, FILED ON**  
**OCTOBER 21, 2008**

Rendered this 19 day of December, 2008. (Sheward, J.).

This matter is before the Court upon the Objections filed October 21, 2008, to the Magistrate's Decision Denying the Third-Party Defendant's (Winelco, Inc.) Motion to Dismiss, filed on September 25, 2008. The Third-Party Plaintiffs (G. Scottco Investment Co. dba Pleasant Acres Mobile Home Park and Gayle Scott,

Jr.) filed a Memorandum in Opposition to the Objections on November 4, 2008 and the Third-Party Defendant filed a Reply on September 19, 2008.

### I. Procedural History

Previously, on September 25, 2008, the Third-Party Defendant, Winelco, filed a Motion to Dismiss the Third-Party Complaint filed by G. Scottco Investment Co. for failure to state a claim. The Third-Party Plaintiffs filed a Memorandum in Opposition on October 3, 2008, to which the Third-Party Defendants filed a Reply on October 9, 2008. In their Motion, the Third-Party Defendants argued that the Third-Party Plaintiffs' claims for contribution and indemnification did not state a claim upon which relief could be granted, pursuant to Civ. R. 12 (B)(6), and the remaining claims were not proper pursuant to Civ.R. 14. The Motion to Dismiss was referred to Magistrate Petrucci on April 16, 2008, in accordance with Civ. R. 53 and Loc. R. 99.02. After reviewing the briefs, Magistrate Petrucci issued a Decision denying the Motion to Dismiss. Magistrate Petrucci decided that Winelco's arguments were strikingly similar to those made by Third-Party Defendant Water Specialists'. Consequently, when he ruled on Winelco's Motion to Dismiss, he incorporated his earlier Decision Denying Water Specialists' Motion to Dismiss. See Magistrate's Decision, filed October 10, 2008, pages 4-5.

Now, Winelco has objected to the Magistrate's Decision, pursuant to Civ. R. 53. When a party objects to the Magistrate's Decision, the court must make an independent review as to the matters objected to ascertain that the magistrate has properly applied the law. Civ. R. 53(D)(4)(d). In reviewing the objections, this Court has versed itself in the parties' underlying motion briefs, the cases cited by counsel,

some cases not cited, but unearthed in the course of some independent research, and the state and federal statutes involved. While the Court performs an independent review, the Court reiterates the Civ. R. 12(B)(6) standard written in the Magistrate's Decision. In short, a motion to dismiss should be granted "only where the allegations in the complaint show the court to a certainty that the plaintiff can prove no set of facts upon which he might recover." *Slife v. Kundtz Properties* (1974), 40 Ohio App.2d 179.

## II. FACTS ALLEGED

Third-Party Plaintiff Pleasant Acres contracted with, employed, hired, or otherwise retained Winelco to act as its agent for the purposes of managing, supervising, and/or monitoring the wastewater treatment plant located at 6106 London-Greveport Rd. Grove City, OH. Pleasant Acres' Third-Party Complaint ¶¶4, 18. Pleasant Acres alleges that Winelco had a fiduciary duty to act with reasonable care and diligence in carrying out its responsibilities. *Id.* ¶ 19. But, Winelco caused damages through their unreasonable, negligent and or incompetent monitoring, maintenance, or management related to the wastewater treatment plant. *Id.* ¶20. In the event that Pleasant Acres is found liable to the State of Ohio for any of the allegations made in their Amended Counterclaim and Crossclaim related to the permit granted to Pleasant Acres to operate a wastewater treatment plant, it alleges Winelco would be liable to Pleasant Acres for Winelco's negligent and reckless acts, which constituted a breach of its contract and a breach of its fiduciary duties. *Id.* ¶21.

## III. ASSIGNMENTS OF ERROR

Winelco moved to dismiss the claims for indemnification and contribution, but the Magistrate allowed the claims to stand, much like he allowed the claims of Oak Hills against Water Specialists. In the Objections, Winelco set forth seven specific errors. They are:

1. The Magistrate erred when he failed to rule that a claim for indemnification and contribution for violations of R C Chapter 6111 is against public policy.
2. The Magistrate erred when he failed to find that a right of implied indemnity does not exist in this case under the Ohio law.
3. The Magistrate erred when he failed to find that right of contribution does not exist in this case under Ohio law.
4. Magistrate erred when he did not find that Winelco is not liable to Pleasant Acres for failure to hook up with the County sewer-line.
5. Magistrate erred when he did not find that Pleasant Acres failed to plead sufficient facts to withstand a motion to dismiss on the issue of indemnification under the theory of intentional actions.
6. Magistrate erred when he did not find that Winelco is not an employee of Pleasant Acres and thus not subject to master/servant obligations.
7. Magistrate erred when he failed to dismiss the Third Party Complaint for failing to meet the pleading requirements of Civil Rule 14.

#### IV. ANALYSIS

Winelco's assignments of error fall into three basic categories<sup>1</sup>: Indemnification, contribution, and "other" claims. The Court has already analyzed the contribution and indemnification arguments, and issued a Decision on October

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<sup>1</sup> In their Motion to Dismiss, Winelco had four grounds for dismissal, as organized in Sections III C-F.

20, 2008 that adopted the Magistrate's August 26, 2008 Decision that denied Water Specialists' Motion to Dismiss. The arguments presented here do not raise any new points of law. The Court has already determined that *Beerman Realty Co. V. Alloyd Asbestos Abatement Co.* (1995), 100 Ohio App. 3d 270 is not dispositive of the indemnity claim, nor is it binding. Likewise, R. C. 2307.26 does not bar Pleasant Acres' contribution claims.

With respect to Assignment No. 4, "[the] Magistrate erred when he did not find that Winelco is not liable to Pleasant Acres for failure to hook up with the County sewer-line", Winelco argues Pleasant Acres failed to provide supporting factual allegations that support this conclusion. The court disagrees. It finds paragraphs 4, 18, and 19 set forth facts that provide a basis for the liability alleged.

Next, as to Assignment No. 5, "[the] Magistrate erred when he did not find that Pleasant Acres failed to plead sufficient facts to withstand a motion to dismiss on the issue of indemnification under the theory of intentional actions," Winelco complains "Pleasant Acres failed to allege that Winelco specifically desired to injure Pleasant Acres." Objections at 11. The Court again disagrees. It finds that the language in paragraph 19 that refers to the special relationship and Winelco's fiduciary duty to act with reasonable care, and the subsequent paragraph that alleges unreasonable, negligent and or incompetent monitoring, maintenance, or management services supports an allegation for liability from intentional acts. Moreover, the allegation is prefaced on a finding that Pleasant Acres is found to have intentionally violated their permit. Pleasant Acres' Third Party Complaint ¶21.

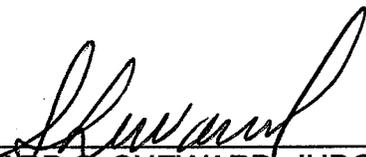
In Assignment No. 6, “[the] Magistrate erred when he did not find that Winelco is not an employee of Pleasant Acres and thus not subject to master/servant obligations,” Winelco argues it cannot be an employee of Pleasant Acres because it does not meet the definition set for tin 29 USCS 203. After a review of Pleasant Acres’ Third-Party Complaint, the Court finds Pleasant Acres does not allege Winelco was its employee as that term is used in the US Code. Rather, Pleasant Acres, for purpose of notice pleading, contends, it “employed, hired or otherwise retained Winelco to act as its agent. Id. ¶4. Thus, the Court finds no error.

Finally, Winelco argues in Assignment No. 7, “[the] Magistrate erred when he failed to dismiss the Third Party Complaint for failing to meet the pleading requirements of Civil Rule 14. Winelco reasons that that the “other” claims, for breach of contract, etc. must fail because the claims for indemnification and contribution fail. The Court has found however that the contribution and indemnification claims do not fail. Thus, the “other” claims, are not beyond the scope of Civ.R. 14.

#### V. CONCLUSION

The Court has undertaken an independent review of the Motion to Dismiss and analyzed the Objections raised by Winelco. The Court finds that the Third-Party Complaint by Pleasant Acres asserts claims for which relief may be granted.

**IT IS SO ORDERED.**

  
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RICHARD S. SHEWARD, JUDGE

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