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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2014-007698
CV 2014-009071

04/28/2015

HONORABLE J. RICHARD GAMA

CLERK OF THE COURT
T. DeRaddo
Deputy

GORDON ACRI, et al.

CRAIG A KNAPP

v.

STATE OF ARIZONA, et al.

BROCK J HEATHCOTTE

MICHAEL L PARRISH

RULING

The Court has had under advisement Defendants' (1) Motion to Dismiss Second Amended Complaint (*Acri*, CV2014-007698) and (2) Motion to Dismiss First Amended (Class Action) Complaint (*Overmyer*, CV 2014-009071).[1] Having read and considered the briefing, and having heard oral argument, the Court issues the following rulings.

On June 28, 2013, a lightning strike caused a wildfire on State trust land near Yarnell (the "Fire"). The ASFD was in charge of the firefighting effort until July 1, 2013. *See* A.R.S. § 37-623(A).[2] Plaintiffs are residents in the Yarnell area who suffered property damage as a result of

[1] "Defendants" collectively references the State of Arizona ("State") and the Arizona State Forestry Division ("ASFD").

[2] A.R.S. § 37-623(A) provides:

> The state forester shall have authority to prevent and suppress any wildfires on state and private lands located outside incorporated municipalities and, if subject to cooperative agreements, on other lands located in this state or in other states, Mexico or Canada. If there is no cooperative agreement, the state forester may furnish wildfire suppression services on any lands in this state if the state forester determines that suppression services are in the best interests of this state and are immediately necessary to protect state lands.

the Fire. They bring these actions to recover damages based on their claim that Defendants negligently failed to protect them from harm that resulted from the Fire.

I. *ASFD.*

The ASFD argues that it should be dismissed because it is a nonjural entity. Whether the ASFD is a jural entity is a threshold issue of this Court's jurisdiction. *Cf. Yamamoto v. Santa Cruz Cnty. Bd. of Supervisors*, 124 Ariz. 538, 539 (App. 1979) (court has no jurisdiction over party that is not legally capable of being sued).

A governmental entity has no inherent power and possesses only those powers and duties delegated to it by its enabling statutes. *Braillard v. Maricopa Cnty.*, 224 Ariz. 481, 487 (App. 2010); *Schwartz v. Super. Ct.*, 186 Ariz. 617, 619 (App. 1996) (powers of state administrative agency limited to those granted by statute); *see also Facilitec, Inc. v. Hibbs*, 206 Ariz. 486, 488 (2003); *Cox v. Pima Cnty. Law Enforcement Merit Sys. Council*, 27 Ariz. App. 494, 495 (1976). Thus, a governmental entity may sue or be sued "only if the legislature has so provided." *Braillard, id.* (dismissing Maricopa County Sheriff's Office as a nonjural entity); *see also Kimball v. Shofstall*, 17 Ariz. App. 11, 13 (1972) (Arizona State Board of Education not an autonomous body with right to sue and be sued).

Plaintiffs have not pointed to an enabling statute that allows the ASFD to sue or be sued.[3] As such, the Court finds that the ASFD is not a jural entity. Accordingly,

IT IS ORDERED dismissing these actions as to the ASFD for lack of jurisdiction.

II. *State*

To establish a claim for negligence, a plaintiff must prove (1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach of that standard of care by the defendant; (3) a causal connection between the defendant's conduct and the injury; and (4) actual damages. *E.g., Gipson v. Kasey*, 214 Ariz. 141, 143 (2007).

The State argues that Plaintiffs fail to state a claim because it owed no duty to them. *See* Ariz. R. Civ. P. 12(b)(6).[4] "The issue of duty is not a factual matter; it is a legal matter to be

[3] *See Acri* Resp. at 14; *Overmyer* Resp. at 14-15 *and compare with* A.R.S. §§ 38-714(A) (Arizona State Retirement System), 30-102(B) (Arizona Power Authority), *and* 41-2253(A) (Greater Arizona Development Authority).

determined *before* the case-specific facts are considered." *Gipson,* 214 Ariz. at 145 (emphasis in original); *Diaz v. Phx. Lubrication Serv., Inc*., 224 Ariz. 335, 338 (App. 2010). Duty is defined as an "obligation, recognized by law, which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." *Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 354 (1985); *Gipson, id.* at 143. Whether a duty exists is a matter of law for the Court. *Gipson, id.*

A. *Special Relationship*.

A duty of care may arise from a special relationship based on "conduct undertaken by the defendant." *Lips v. Scottsdale Healthcare Corp.*, 224 Ariz. 266, 268 (2010), *quoting Gipson,* 214 Ariz. at 145.[5] "For example, the common law imposes a duty of reasonable care on a party who voluntarily undertakes to protect persons or property from physical harm." *Lips, id.* A duty by undertaking is defined by Restatement (2d) of Torts ("Restatement") § 323 (1965), which provides:

> One who undertakes, gratuitously or for consideration, *to render services to another* which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, *if*
>
> (a) *his failure to exercise such care increases the risk of such harm, **or***
>
> (b) *the harm is suffered because of the other's reliance upon the undertaking.*

(Emphasis added).[6]

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[4] In reviewing a motion to dismiss for failure to state a claim, the Court accepts Complaint's allegations as true and resolves all inferences in the plaintiff's favor. *Sw. Non–Profit Housing Corp. v. Nowak*, 234 Ariz. 387, 390–91 (App. 2014). Dismissal is appropriate if, as a matter of law, the plaintiff would not be entitled to relief under any interpretation of the facts. *Coleman v. City of Mesa*, 230 Ariz. 352, 356 (2012), *quoting Fid. Sec. Life Ins. Co. v. State Dep't of Ins*., 191 Ariz. 222, 224 (1998).

[5] A duty of care may also arise from special relationships based on contract, family relations, and various categorical relationships arising under common law. *Gipson,* 214 Ariz. at 145.

[6] *See also* Restatement (3d) of Torts: Physical & Emotional Harm § 42 (2012).

The State argues that it did not owe a duty to Plaintiffs by undertaking to manage and suppress the Fire. The Court agrees.

First, the Court finds that the State's undertaking was not a service rendered *to Plaintiffs*. The ASFD's authority vis-à-vis wildfires is coextensive with the best interest of the State, not persons who own property near State trust land. *See* A.R.S. § 37-623(A); *see generally* A.R.S. § 37-621 *et seq.* To this end, the ASFD worked on firebreaks to contain the Fire on State trust land outside of Yarnell. It was unsuccessful. The Court declines Plaintiffs' oblique invitation to extend Restatement § 323's "render services to another" element to impose a duty owed to private property owners in the context of firefighting efforts on State trust land.

Second, the Court finds that Plaintiffs were not harmed because of reliance on the State's undertaking.[7] "Reliance in the context of § 323 connotes dependence. It bespeaks a voluntary choice of conduct by the person harmed. It infers that the person exercising it can decide between available alternatives." *Barnum v. Rural Fire Prot. Co.*, 24 Ariz. App. 233, 237 (1975). Plaintiffs urge that they could have taken "special emergency measures" (*e.g.*, trimming vegetation, hosing down buildings and vehicles).[8] But they do not allege that the State undertook any of these acts on their behalf. Instead, they allege the State undertook the act of firefighting. Clearly, remedial fire prevention acts are not alternatives for the act undertaken by the State. *See id.* at 238.[9]

[7] Plaintiffs do not argue that the State's undertaking increased the risk of harm that would have existed without the undertaking. *See Barnum*, 24 Ariz. App. at 237 ("Clearly, Rural did not increase the risk of harm by coming to the fire. Indeed, if any conclusion is possible it is that the fire, unchecked, would have progressed faster and with more serious consequences had Rural not tried to put it out. The fact that it might have been fought with greater care does not mean that it increased the risk of harm to Barnum.")

[8] *Acri* SAC at ¶ 447; *Overmyer* FAC at ¶ 286.

[9] Plaintiffs suggest that reliance is no longer a required element of a duty by undertaking. In *Guerra v. State*, the Court of Appeals declined to decide whether Restatement § 323 supported the argument that police assumed a duty by undertaking to perform a next of kin notification. 234 Ariz. 482, 486 n.5 (App. 2014) (rev. granted Dec. 2, 2014). *Guerra* is the last in a line of cases analyzing duty in the context of a municipality that chooses to provide police protection. *See generally Austin v. City of Scottsdale*, 140 Ariz. 579 (1984); *Hutcherson v. City of Phx.*, 192 Ariz. 51 (1998); *Wertheim v. Pima Cnty.*, 211 Ariz. 422 (App. 2005); *see also Vasquez v. State*, 220 Ariz. 304, 314 n.7 (App. 2008) (§ 323 "so clearly inapplicable" when police undertake to investigate identity of decedent that the plaintiff did not cite or rely on it). The Court finds that *Guerra* has no impact in this case. *Cf. Steinberger v. McVey ex rel. Cnty. of Maricopa*, 234 Ariz. 125, 136-38 (App. 2014) (applying § 323 in context of loan modification); *Thompson v. Sun City Cmty. Hosp., Inc.* 141 Ariz. 597, 607-08 (1984) (applying § 323 in context of medical malpractice).

Plaintiffs also allege that they suffered harm because they relied on the State to provide a timely and adequate evacuation notice.[10] But, although Plaintiffs allege that an evacuation of Yarnell "was requested" on June 30,[11] they do not allege that *the State* undertook to provide one. Nor do they offer any law that would impose a pre-existing duty on the State to provide an evacuation notice.

B. *Public Policy*.

Plaintiffs urge a duty of care based on public policy. *See Angnabooguk v. State*, 26 P.3d 447, 452-53 (Alaska 2001) (Forestry Division owed duty as a matter of public policy to persons whose lives and property were threatened by wildfire).[12] Plaintiffs cite to intragovernmental agreements between ASFD and rural communities[13] and to A.R.S. § 37-623(A), which they posit reflect a strong public policy of protecting property in areas endangered by wildfires.

The Court is persuaded that public policy does not support imposition of a duty on the State to protect Plaintiffs' property from wildfires. *See Gipson*, 214 Ariz. at 146 n.4 (public policy found in statutory or common law may determine existence of a duty). "The decisions of how to properly fight a particular fire, how to rescue victims in a fire, or what and how much equipment to send to a fire, are discretionary judgmental decisions which are inherent in this public safety function of fire protection." *City of Daytona Beach v. Palmer*, 469 So. 2d 121, 123 (Fla. 1985).

III. *Abnormally Dangerous Doctrine.*

The Court agrees with the State that the abnormally dangerous doctrine does not apply here. Plaintiffs allege that "[c]ombatting a wildland fire is an abnormally dangerous activity."[14] But the harm they allegedly suffered is the result of the fire itself, not the harm that is within the scope of the abnormal risk inherent in the dangerous activity (i.e., firefighting). *See* Restatement § 519(2) & cmt. e; *see generally Perez v. S. Pac. Transp. Co.*, 180 Ariz. 187 (App. 1993) (discussion abnormally dangerous activity).

[10] *Acri* SAC at ¶ 448; *Overmyer* FAC at ¶ 287.

[11] *Acri* SAC at ¶ 349; *Overmyer* FAC at ¶ 201.

[12] "This conclusion is consistent with our other decisions holding that once the State undertakes to provide a service, it assumes the duty to provide that service non-negligently." *Angnabooguk*, 26 P.3d at 453 n.24 (citing cases).

[13] *See, e.g.*, Resps. at Ex. 1.

[14] Acri SAC at ¶ 435; Overmyer FAC at ¶ 271.

IV. *Conclusion.*

The State seeks dismissal with prejudice. In opposing the Motions, Plaintiffs did not seek leave to amend.[15] *See Wigglesworth v. Mauldin,* 195 Ariz. 432, 439 (App. 1999). A request for leave to amend must be made in a proper motion. *Blumenthal v. Teets,* 155 Ariz. 123, 131 (App. 1997) (trial court did not err by denying plaintiff the opportunity to amend when he requested leave to amend in response to motion to dismiss). Based on the Court's review of the record and the law discussed above, the Court finds that amendment would be futile. *See Wigglesworth, id.*; *see also Bishop v. State Dep't of Corr.,* 172 Ariz. 472, 474-75 (App. 1992); *Matter of Torstenson's Estate,* 125 Ariz. 373, 377 (App. 1980).

Accordingly,

IT IS ORDERED granting the State's Motion to Dismiss Second Amended Complaint (*Acri,* CV2014-007698) and Motion to Dismiss First Amended (Class Action) Complaint (*Overmyer,* CV 2014-009071) with prejudice.

Pursuant to Rule 54(b), Ariz. R. Civ. P., and there being no just reason for delay, the Court directs entry of this Judgment as a final, appealable Order. The Court signs this minute entry as an enforceable Order of the Court effective immediately.

/S/ J. RICHARD GAMA

_____ _____

DATE HONORABLE J. RICHARD GAMA
JUDGE OF THE SUPERIOR COURT

[15] The *Acri* Plaintiffs cited *Young v. Rose,* 230 Ariz. 433, 438 (App. 2012) for the proposition that "[b]efore a trial court dismisses a complaint, it should give the non-moving party a chance to amend the complaint to cure any defects." *Acri* Resp. at 2 n.1.