UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1832

September Term, 2015

ROSEMARIE T. MARTIN, et al.

v.

LEHIGH CEMENT COMPANY, LLC

Eyler, Deborah S.,
Wright,
Beachley,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: November 21, 2016

In the Circuit Court for Carroll County, Rosemarie T. Martin, the appellant, brought wrongful death and survival actions against Lehigh Cement Company, LLC ("Lehigh"), the appellee, the Board of County Commissioners of Carroll County, and the State of Maryland, arising from the death of her husband, Arthur John Martin, Jr. Lehigh filed a motion to dismiss for failure to state a claim for which relief could be granted, which the court granted. After her claims against the remaining defendants were finally disposed of, Mrs. Martin noted the instant appeal. She presents six questions for review, which can be restated as one: Did the court err in granting Lehigh's motion to dismiss?[1] We shall affirm the judgment of the circuit court.

ALLEGATIONS IN THE COMPLAINT

In her complaint, Mrs. Martin made the following allegations.

[1] Mrs. Martin presented the following six questions in her brief:

I. Whether the circuit court erred in granting dismissal, pursuant to Rule 2-322(b)(2), by considering facts and making determinations outside the complaint?
II. Whether the circuit court erred in making a factual determination that a partnership did not exist between Lehigh, the State and Carroll County?
III. Whether the circuit court erred in determining that a private entity cannot have a duty in tort with regard to its participation in the design and construction of the subject intersection?
IV. Whether the circuit court erred in failing to consider a private entity, Lehigh, as a joint tortfeasor with regard to its participation in the design and construction of the subject intersection?
V. Whether the circuit court erred by failing to consider that duties may be voluntarily assumed by conduct or by contract?
VI. Whether governmental entities may delegate their duties to private entities pursuant to a public-private partnership?

On August 24, 2010, at about 3:00 p.m., Mr. Martin was riding his bicycle on Route 75, near its intersection with Shepherd's Mill Road. Both roads are located near the Town of Union Bridge ("Union Bridge"), in Carroll County. Route 75 is a State road, and Shepherd's Mill Road is a County road.

Mr. Martin had the right of way. At the same time he entered the intersection, a tractor trailer travelling on Shepherd's Mill Road also entered the intersection, attempting to turn right onto Route 75 by using a merge/acceleration lane. The tractor trailer did not have the right of way. As it turned onto Route 75, it struck Mr. Martin, killing him.

For many decades, Lehigh has operated a cement plant ("the Plant") on the outskirts of Union Bridge. At the time of the accident, trucks entered and exited the plant using a truck driveway from Shepherd's Mill Road. The truck driveway is located about a mile from the intersection of that road with Route 75. The tractor trailer that struck and killed Mr. Martin had been at Lehigh's plant before the accident. Lehigh did not own the tractor trailer, however, and the driver was not an employee or agent of Lehigh.

In 1990, the Town Council of Union Bridge and Carroll County adopted a Master Plan for Union Bridge and its environs, which included as a key element a redesigned Shepherd's Mill Road. Before then, truck traffic from the Plant would travel through the town itself. Under the Master Plan, the truck traffic would enter and exit the Plant from Shepherd's Mill Road, so the roads in historic Union Bridge would be spared. Also in the 1990s, Lehigh embarked on a plan to greatly expand the Plant, at the cost of about

$260 million dollars. In 1998, the Maryland Energy Finance Administration completed a $125 million dollar revenue bond in favor of Lehigh, to make its expansion affordable.

On June 10, 1998, representatives of Lehigh met with the Mayor of Union Bridge and representatives of Carroll County and of the Maryland Midland Railroad to discuss the alternative access route on Shepherd's Mill Road for the expanded Plant. For that meeting, Lehigh, the County, and the Town of Union Bridge "prepared" a "Parallel Roadway/Railway Transportation System." Lehigh "contributed $300,000 to the engineering costs" of developing such a system.

In the meantime, in 1996, the Maryland Department of Transportation completed a bicycle route map that designated Route 75 in the area of Union Bridge as a "Bicycle Tour [R]oad." On June 9, 1998, Congress enacted the Transportation Equity Act for the 21st Century ("TEA-21"), which among other things called for all new road construction projects to provide for bicycle transportation facilities, except where bicycle use was not permitted. Then, in February 1999, the Federal Highway Administration ("FHA") began to transmit information about the requirements for bicycle facilities to the Maryland Department of Transportation ("DOT").

In March 1999, Lehigh "publicized the Shepherd's Mill Intermodal Facility in Union Bridge Maryland and 'A Parallel Roadway – Railway Transportation System'" as a '*public private partnership*.'" (Emphasis in complaint.) It estimated that, as redesigned, Shepherd's Mill Road would handle 42,000 truck trips per day.

In December 2000, the FHA published the Manual on Uniform Traffic Control Devices Millennium Edition, known as "MUTCD 2000," which includes a section on traffic controls for bicycles.

On March 5, 2001, an engineer with the State Highway Administration ("SHA") reviewed whatever plans had been submitted for the redesign of Shepherd's Mill Road and noted that "Bicycle compatible lanes/shoulders should be provided along MD 75 for the limits of the job." Two months later, representatives of the County Department of Public Works ("DPW") met with SHA staff to discuss Route 75. Three days later, DPW decided to include deceleration lanes and acceleration lanes on Route 75 at each side of its intersection with Shepherd's Mill Road and "acknowledged the need for four foot shoulders on each side of the intersection."

On September 13, 2001, Carroll Land Services, Inc., submitted a proposal to perform engineering, surveying, and land planning services related to "'additional widening, line striping, and traffic control measures necessary for improvements' to Md. Route 75 & Shepherd's Mill Road." On December 3, 2001, the engineering drawings ("prints") for the proposed intersection were completed. They show a bicycle lane running alongside Route 75 at Shepherd's Mill Road.

On May 1, 2002, the County Bureau of Engineering wrote a letter to the County Stormwater Management Agency in which it "indicat[ed]" that the SHA was requiring Carroll County to make certain improvements to Route 75, including the addition of a four foot wide bicycle lane on both sides of Route 75 at Shepherd's Mill Road, for about

1700 feet. A week later, a representative of the SHA wrote to the DPW advising that a minimum four foot shoulder is needed for a bike lane, to provide "*a continuous safe area for bikes*." (Emphasis in complaint.) Two months later, an SHA engineer wrote to the DPW noting that the "'4' BICYCLE LANE" should be changed to a "'4' SHOULDER" because the proposed pavement marking did not fit the MUTCD definition of a bicycle lane, which is "a portion of a roadway that has been designated by signs and pavement markings for preferential or exclusive use by bicyclists." "Various required signs were simply ignored by the parties tasked with developing the subject intersection."

On August 13, 2002, engineering prints were produced "by the Defendants" in which the bicycle lane was re-engineered to a shoulder. However, the shoulder was not built, but was reconfigured into an acceleration lane. "The design change eliminating the bicycle lane, and proposing a shoulder instead, was an intentional design decision by the Defendants." A letter of August 16, 2002 from the DPW to the SHA stated that "we" have changed the "bicycle lane" to a "shoulder."

On October 15, 2002, "the Defendants" attended a preconstruction meeting of "Phase II." The meeting agenda did not include the problem of building an intersection that directs bicyclists into an acceleration lane.

On November 7, 2002, the SHA granted the DPW permission to make improvements to "the road" provided that the County would hold the State harmless. "Lehigh neither sought, nor was granted, indemnification for its role in this public/private partnership developing Md. Route 75 and Shepherd's Mill Road."

The next day, the DPW sent a letter to the SHA stating that citizens felt the intersection would be safer with a traffic light. On December 9, 2002, the SHA opined that it would support the installation of a traffic signal if the criteria under the MUTCD were satisfied. DPW chose not to install the traffic signal. In 2005, the State "re-designated" Route 75 as a bicycle route.

PROCEDURAL POSTURE

On March 15, 2013, Mrs. Martin sued Lehigh, the Board of County Commissioners of Carroll County ("the County"), and the State of Maryland ("the State"), for damages for wrongful death and survival.[2] She alleged that the Route 75 – Shepherd's Mill Road intersection was negligently designed and constructed to funnel the bicycle lane on Route 75 into the acceleration lane for vehicles turning right onto Route 75 from northbound Shepherd's Mill Road. She further alleged that the intersection's design violated the MUTCD and the TEA-21.

On June 7, 2013, Lehigh filed a motion to dismiss for failure to state a claim for which relief could be granted. It argued that the complaint did not identify a "statutory, common law, or contractual duty" it owed to Mrs. Martin or to the decedent with respect to the design or construction of the intersection of Shepherd's Mill Road and Route 75 and did not allege facts to show "any indicia of a partnership to render Lehigh legally responsible for the acts or omissions of the State or County."

[2] She also sought a preliminary and permanent injunction for public nuisance, but not against Lehigh.

On November 22, 2013, the court held a hearing on Lehigh's motion to dismiss. In an opinion and order entered on January 14, 2014, it granted the motion. The court ruled that neither the MUTCD nor the TEA-21 create a private cause of action and that Mrs. Martin had failed to allege facts to support any state law violation. It also concluded that there was "no statutory basis for any duty owed by a private, non-governmental entity over the construction of public roads" and that Mrs. Martin had not pleaded facts to show that Lehigh had "acted in partnership" with the County and State "in the design, construction, and maintenance" of the Route 75 – Shepherd's Mill Road intersection.

On August 27, 2015, Mrs. Martin filed a stipulation of dismissal with prejudice for all claims against the County. The court entered an order dismissing the County and the State on September 15, 2015. On October 8, 2015, Mrs. Martin noted this timely appeal.

STANDARD OF REVIEW

On appeal from the grant of a motion to dismiss for failure to state a claim for which relief can be granted, we review the circuit court's decision for "legal correctness":

> '[W]e must determine whether the complaint, on its face, discloses a legally sufficient cause of action.' In reviewing the complaint, we must 'presume the truth of all well-pleaded facts in the complaint, along with any reasonable inferences derived therefrom.' 'Dismissal is proper only if the facts and allegations, so viewed, would nevertheless fail to afford plaintiff relief if proven.'

Britton v. Meier, 148 Md. App. 419, 425 (2002) (citations omitted) (quoting *Fioretti v. Md. State Bd. Of Dental Exam'rs,* 351 Md. 66, 71-72 (1998); and *Faya v. Almaraz*, 329 Md. 435, 443 (1993)).

Accordingly, we decide *de novo* whether Mrs. Martin's complaint states a legally cognizable cause of action against Lehigh.

DISCUSSION

Mrs. Martin contends the court erred in granting Lehigh's motion to dismiss, for a number of related reasons. She maintains that the court erred in ruling that a private entity cannot owe a duty in tort with regard to its participation in the design and construction of the intersection of State and County roads; that it erred by failing to consider whether governmental entities may delegate their duties to private entities "pursuant to a public private partnership"; that it erred by failing to consider whether private entities may voluntarily assume duties of public entities by conduct or by contract; that it erred in considering facts outside those alleged in the complaint and by making factual findings of its own, in particular that there was no partnership between Lehigh, the County, and the State; and that it erred by failing to address whether Lehigh could be liable as a joint tortfeasor with "[i]nput, [c]ontrol, and [p]articipation" in the design and construction of the intersection. We see no merit in any of these arguments.

In its opinion, the circuit court stated:

> There is no statutory basis for any duty owed by a private, non-governmental entity over the construction of public roads. The State of Maryland, through the State Highway Administration, is tasked with constructing, reconstructing, repairing, and maintaining state highways, such as MD [Route] 75. Md. Code Ann., Transp. § 8-601(a). The Board of County Commissioners has the authority to construct, reconstruct, and relocate county roads in Carroll County. Carroll County Code § 10-104. Under these statutes, Lehigh Cement Company is not empowered to exercise any control over county roads or state highways.

This determination that the power to design, construct, and maintain State highways and County roadways is vested exclusively in the State and County governments is legally correct. It also is correct, as Mrs. Martin points out, that "[u]nless specifically prohibited or non-delegable by statute, public-sector responsibilities may be delegated[.]" The operative word in that sentence is "may." The State and County *may* delegate the design and construction of public roads to private entities. *See* Md. Code (2001, 2015 Repl. Vol.), § 8-204(d) of the Transportation Article ("Transp.") ("The [State Highway] Administration may consult, confer, and contract with any agency or representative of the federal government, this State, or any other state or with any other person in furtherance of the duties of the Administration."). *See also* Carroll County Code (2015), §10-104 ("[E]xcept where made by the County Commissioners themselves, in all cases in which any permanent improvement is made to any of the main county roads, the improvements . . . shall be let out on contract.").

The problem with Mrs. Martin's argument, however, is that the complaint is devoid of factual allegations to support any finding that the State or the County delegated to Lehigh their authority over the design (in reality, the redesign) of the Route 75 – Shepherd's Mill Road intersection. The allegations pertaining to Lehigh are quite limited: 1) in 1998, it participated in a meeting with the Mayor, the County, and Maryland Midland Railroad to discuss the "Shepherd's Mill Road Intermodal Facility"; 2) in preparation for that meeting Lehigh, the County, and Union Bridge "prepared a 'Parallel Roadway/Railway Transportation System" to provide alternate access to the

Plant; 3) Lehigh "contributed $300,000 to the engineering costs" of developing such a system; and 4) in 1999, Lehigh "publicized" the transportation system as a "*public/private partnership*." (Emphasis in complaint.)

A "public-private partnership" is "a long-term, performance-based agreement between a reporting agency and a private entity" for the "deliver[y]" of "public infrastructure assets[,]" in which "appropriate risks and benefits can be allocated in a cost-effective manner between the *contractual partners*[.]"[3] Md. Code (2001, 2015 Repl. Vol.), § 10A-101(f)(1) of the State Finance and Procurement Article ("SFP") (emphasis added). Generally, the private entity "performs functions normally undertaken by the government" and "may be given additional decision-making rights in determining how the asset is financed, developed, constructed, operated, and maintained over its life cycle." *Id.*

"Bald assertions and conclusory statements by the pleader will not suffice." *Bobo v. State,* 346 Md. 706, 708-09 (1997). Mrs. Martin's allegation of a "public/private partnership" between Lehigh and the State and the County is both. It is not supported by any underlying facts to show that Lehigh was a contractual partner with the County or with the State in the design and development of the intersection. *Id.* at 708 ("[T]he facts comprising the cause of action must be pleaded with sufficient specificity."); Rule 2-303(b) ("A pleading shall contain . . . such statements of fact as may be necessary to

[3] Section 10A-101 includes the Maryland Department of Transportation in its definition of a "reporting agency." SFP § 10A-101(g).

show the pleader's entitlement to relief."). It says nothing at all about there being a contractual agreement of any sort between Lehigh, the County, and the State by which Lehigh was delegated "decision-making rights" or authority over the design or construction of the Route 75 – Shepherd's Mill Road intersection.

Indeed, the bulk of the factual allegations in the complaint make clear that the design decisions about the intersection were made by State and County authorities, with no participation and certainly no decision-making by Lehigh. The facts that do not appear in the complaint are telling. The complaint alleges communications between the SHA and DPW in March and May 2001 concerning deceleration and acceleration lanes and shoulders for the intersection; Lehigh is not alleged to have participated. It further alleges that Carroll Land Services made the engineering prints for the intersection, and states nothing about any involvement of Lehigh. It includes numerous allegations about communications in May 2002 between County agencies and the SHA concerning the design of bike lanes on Route 75, with no allegations of any involvement by Lehigh. Its allegations about the permission granted by the SHA to the DPW to make improvements to the intersection, and that the SHA rejected a proposal by the DPW that a traffic signal be placed at the intersection say nothing about any involvement by Lehigh. There simply are insufficient facts alleged by Mrs. Martin to support a finding that Lehigh was by contract or any delegation or assumption of authority given a deciding role in the design and construction of the intersection in question.

As noted, Mrs. Martin complains that the court stepped outside its bounds by "making a factual finding as to the existence of a partnership[.]" This is inaccurate. In its opinion, the court assessed Mrs. Martin's "claim" that Lehigh "acted in partnership with the codefendents in the design, construction, and maintenance of the intersection" and found "no basis" for it in the factual allegations set forth in the complaint:

> Here, there is no indication that [Lehigh], the [County], and the [State] had a partnership agreement, conducted themselves as if there were a partnership, nor implemented the design, construction, and maintenance of the intersection as if [Lehigh] were operating the intersection in partnership with the codefendants.

The court's analysis was well within the scope of its task in ruling on a motion to dismiss, *i.e.*, to determine whether the "well-pleaded facts in the complaint, along with any reasonable inferences derived therefrom[,]" state a cause of action. *Britton,* 148 Md. App. at 425. That the court concluded that the facts alleged could not support a finding of the existence of a partnership does not mean, as Mrs. Martin suggests, that the court itself made a "factual finding" that there was not a partnership.

Finally, and also as noted, Mrs. Martin argues that the court failed to recognize that Lehigh could be liable as a joint tortfeasor. Lehigh responds that this argument was not raised below and therefore has been waived. We disagree. The argument lacks merit however. Lehigh only can be held liable as a joint tortfeasor if it can be found liable as a tortfeasor. For the reasons we have explained, the complaint does not state facts that would support a finding that Lehigh was a tortfeasor, as the State and County have exclusive authority and control over the design and construction of public roads, and

there are no facts alleged to support a delegation of that authority to Lehigh by means of a contract or a partnership, or that Lehigh had any input into the design or construction of the Route 75 – Shepherd's Mill Road intersection. Accordingly, the court did not err in granting Lehigh's motion to dismiss.

JUDGMENT OF THE CIRCUIT COURT FOR CARROLL COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.