IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

ANTHONY J. HUNT, a minor, by his next friend, LISA C. DeSOMBRE, and LISA C. DeSOMBRE, individually,	:	C.A. No. K10C-01-049 WLW
Plaintiffs,	:	
v.	:	
THE CAPE HENLOPEN SCHOOL DISTRICT; THE BOARD OF EDUCATION OF CAPE HENLOPEN SCHOOL DISTRICT; DAVID S. McDOWELL; THE STATE OF DELAWARE; THE DEPARTMENT OF SAFETY AND HOMELAND SECURITY; THE DIVISION OF THE DELAWARE STATE POLICE; AND TROOPER PRITCHETT,	:	
Defendants.	:	

Submitted: May 1, 2012
Decided: August 23, 2012

ORDER

Upon Defendants the State of Delaware, the Department of Safety and homeland Security, the Division of the Delaware State Police and Trooper Pritchett's Motion for Summary Judgment. *Granted.*

William D. Fletcher, Esquire and Noel E. Primos, Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware; attorneys for the Plaintiffs.

Michael F. McTaggart, Esquire, Department of Justice, Wilmington, Delaware; attorney for the State Defendants.

Hunt v. Cape Henlopen School District, et al.
C.A. No. K10C-01-049 WLW
August 23, 2012

James H. McMackin, III, Esquire of Morris James LLP, Wilmington, Delaware; attorney for the School District Defendants.

WITHAM, R.J.

FACTS[1]

In January of 2008, Anthony J. Hunt ("Plaintiff"), who was eight years old at the time, attended Richard A. Shields Elementary School in Cape Henlopen School District. Around that time, the School had been dealing with bullying issues. Specifically, on January 30, 2008, Vice Principal David McDowell ("McDowell") contacted Delaware State Trooper David Pritchett ("Pritchett"), who was the High School's School Resource Officer,[2] to speak with a small group of fifth graders about bullying. Pritchett gave a presentation to the students in McDowell's office.

The following day, January 31, 2008, McDowell received information that there was a new bullying incident in which an autistic student had money taken from him on the school bus. Through a brief investigation, McDowell learned from a student that "AB," a student who sat behind the autistic student on the bus, took the money. McDowell contacted AB's guardian to speak to her about the incident. She agreed to allow Pritchett to speak to AB about the incident. McDowell then contacted Pritchett. After Pritchett arrived at the school, McDowell reported to him that AB had taken the autistic student's money. Upon speaking with AB privately, Pritchett stated that he knew AB had taken the money. At that time, AB did not admit

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[1]These are the facts construed in the light most favorable to the non-moving party as required by the summary judgment standard. Most of these facts are disputed.

[2]A contract between Cape Henlopen School District and the Delaware State Police in effect during the period of time in which the incident occurred states that the School Resource Officer was assigned to the High School. Pl. Resp. to Mot. for Summ. J. Ex. D. Pritchett states that he was the School Resource Officer for the District as a whole.

to taking the money. Instead, AB reported that the person who stole the money sat next to him on the bus.

Although Pritchett was quite sure that AB had taken the money, he decided to investigate the outside possibility that another child had taken the money. Therefore, Pritchett requested the bus seating chart from a District administrative employee and found that Plaintiff sat next to AB. Pritchett questioned Plaintiff about the incident, a process during which McDowell allegedly told Pritchett to "act mad."[3] According to Plaintiff, Pritchett told Plaintiff 11 or 12 times that he had the authority to arrest Plaintiff and put him in jail if he was not truthful. Pritchett discussed how bad children were sent to the Stevenson House. Pritchett spoke about how a child committing a crime upsets siblings and parents. This discussion upset Plaintiff, and he cried. The questioning and discussion with Plaintiff lasted close to one hour. For some period of time, the door to the room was closed, though AB appears to have been present with Plaintiff during some of the questioning.

Plaintiff told his parents about his discussion with Pritchett. Plaintiff's mother, Lisa DeSombre, decided to bring suit on her son's behalf, as well as individually.[4] On May 11, 2012, the Cape Henlopen School District, the Board of Education of Cape Henlopen School District, and David McDowell (collectively "District Defendants") settled the claims against them with Plaintiff. The District Defendants

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[3]Gaffney Dep. at 13.

[4]For the sake of simplicity and coherency, the Court will continue to reference Anthony J. Hunt as Plaintiff, though his mother brought this case as his next friend and individually.

remain in the case on the basis of a cross-claim against them by the State of Delaware, the Department of Safety and Homeland Security, the Division of the Delaware State Police, and Trooper Pritchett (collectively "State Defendants"). This is the Court's disposition of State Defendants' motion for summary judgment filed on March 29, 2012.

Standard of Review

Summary judgment should be granted only if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[5] The facts must be viewed in the light most favorable to the non-moving party,[6] and all reasonable inferences must be drawn in favor of the non-moving party.[7] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.[8] However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.[9] The movant bears the burden of

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[5]Super. Ct. Civ. R. 56(c).

[6]*Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 780 (Del. Super. 1995).

[7]*Lundeen v. Pricewaterhousecoopers, LLC*, 2006 WL 2559855 (Del. Super. Aug. 31, 2006).

[8]*Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

[9]*Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

demonstrating that a genuine issue of material fact does not exist.[10] Should the movant satisfy his burden, then the non-movant must prove that genuine issues of material fact exist.[11] Mere bare assertions or conclusory allegations do not create a genuine issue of material fact for the non-movant.[12] If the non-moving party fails to make a sufficient showing on an essential element of his or her case for which he or she has the burden of proof, the moving party is entitled to judgment as a matter of law.[13]

DISCUSSION

Plaintiff brings the following claims: intentional infliction of emotional distress, false imprisonment, false arrest, assault[14] and battery, and violation of 42 *U.S.C.* § 1983.[15]

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[10]*Lundeen*, 2006 WL 2559855, at *5 (citing *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979)).

[11]*Id.* (citing *Moore* 405 A.2d at 681).

[12]*Id.* (citing *Sterling v. Beneficial Nat'l Bank, N.A.*, 1994 WL 315365, at *3 (Del. Super. Apr. 13, 1994)).

[13]*Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

[14]Plaintiff lists assault along with battery in his response to State Defendants' motion for summary judgment. Plaintiff states, "In both the facts of his Complaint, and throughout the course of this litigation, Plaintiffs have alleged assault and battery perpetrated against Plaintiff Hunt." Pl. Resp. to Mot. for Summ. J. ¶21. However, Plaintiff's complaint does not list assault as a claim.

[15]Claims against State Defendant agencies are based on the theory of *respondeat superior*. Therefore, should any claim fail against Pritchett, that claim would also fail against State Defendant agencies.

Intentional Infliction of Emotional Distress

The Delaware Supreme Court has endorsed § 46 of the Restatement (Second) of Torts in defining intentional infliction of emotional distress.[16] What the Restatement terms "outrageous conduct causing severe emotional distress" is defined as, "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."[17] So long as the conduct is extreme or outrageous, the actor's acts may be reckless and still be recoverable.[18] "Outrageous behavior is conduct that exceeds the bounds of decency and is regarded as intolerable in a civilized community."[19] "The law intervenes when the distress inflicted is so severe that no reasonable [person] could be expected to endure it."[20] Courts must consider intensity and duration in deciding whether the conduct has reached this level.[21] "It is the trial judge's responsibility 'to determine in the first instance, whether the defendant's conduct may reasonably be regarded as

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[16]*See Goode v. Bayhealth Medical Center, Inc.*, 931 A.2d 437, 2007 WL 2050761, at *2 (Del. July 18, 2007) (TABLE).

[17]RESTATEMENT (SECOND) OF TORTS § 46.

[18]*Goode*, 2007 WL 2050761, at *2.

[19]*Id.*

[20]*Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. j.).

[21]*Mandelaka v. Boyd*, 1993 WL 258798, at *1 (Del. Super. June 14, 1993).

so extreme and outrageous as to permit recovery, or whether it is necessarily so.'"[22]

Plaintiff urges the Court to utilize comment "e" to the Restatement (Second) of Torts as a plus factor to find that Pritchett abused a power relationship and that he should be liable for intentional infliction of emotional distress on these facts as a result.[23] The Court, however, finds that the alleged conduct in this case is not sufficiently severe and outrageous to permit recovery.

Reviewing the facts in the light most favorable to the non-moving party, Pritchett discussed the Stevenson House as a place where delinquent children go, and he stated that he had his handcuffs and could arrest Plaintiff.[24] Pritchett allegedly expressed his ability to arrest and put Plaintiff in jail if he did not tell the truth 11 or 12 times in the first five minutes of questioning.[25] Plaintiff implied that Pritchett had a mean-spirited demeanor.[26] Further, it is alleged that McDowell told Pritchett to "act mad."[27]

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[22]*Goode*, 2007 WL 2050761, at *2 (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. h).

[23]Pl. Resp. to Mot. for Summ. J. ¶16.

[24]The alleged statement regarding the handcuffs appears to arise from two sources: facts stated by Plaintiff's father on a WGMD radio show and from Plaintiff's deposition in which Plaintiff noted the officer's alleged statement, "I have the authority to arrest you." WGMD Tr. at 10; Pl. Dep. at 28.

[25]Pl. Dep. at 20.

[26]*See id.* at 21-28.

[27]Gaffney Dep. at 13.

As the Restatement (Second) of Torts notes:

> [L]iability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt.[28]

Mere conditional threats and a mean-spirited demeanor for an hour long period in the course of an investigation that upset Plaintiff, an eight year old, are not sufficiently extreme or outrageous to permit recovery. It is certainly possible that the techniques used, if performed in a more gentle fashion, could have achieved the same result. The Court, however, will not substitute its discretionary actions for Officer Pritchett. State Defendants' motion for summary judgment is hereby granted on this claim.

False Imprisonment/False Arrest

The elements of false imprisonment are: "(a) a restraint which is both (b) unlawful and (c) against one's will."[29] "This restraint to be protected against may be effected by physical force, by threats of force or intimidation or by assertion of legal

[28] § 46 cmt. d; *see also id.* at cmt. e ("Even in such cases [of abuse of a position], however, the actor has not been held liable for mere insults, indignities, or annoyances that are not extreme or outrageous.").

[29] *Harrison v. Figueroa*, 1985 WL 552279, at *2 (Del. Super. Mar. 6, 1985).

authority. The [latter] denotes the concept of false arrest . . . ."[30] Whether there was a restraint exercised by a legal authority is intertwined with the question of whether, legally speaking, Plaintiff was "in custody." If Plaintiff was not in custody, then he was not restrained.[31]

The Court must determine whether Plaintiff was in custody under the standard announced by the United States Supreme Court:

> Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve "the ultimate inquiry": "[was] there a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."[32]

The United States Supreme Court recently supplemented this standard in *J.D.B. v. North Carolina*:

> [S]o long as the child's age was known to the officer at the time of

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[30] *Tyburski v. Groome*, 1980 WL 333070, at *6 (Del. Super. Jan. 28, 1980) (citation omitted).

[31] Based on the facts of the case, the only restraint threatened was arrest, which constitutes a restraint by legal authority. The Court notes that the very nature of compulsory attendance laws for schooling and direction of student movements by teachers and administrators involves some restraint. *Shuman ex rel. Shertzer v. Penn Manor Sch. Dist.*, 422 F.3d 141, 149 (3d Cir. 2005). For the purposes of this case, the Court only needs to analyze restraint with reference to Pritchett's actions.

[32] *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457, 465 (1995) (footnote omitted) (citations omitted).

> police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test. That is not to say that a child's age will be determinative, or even a significant, factor in every case. It is, however, a reality that courts cannot simply ignore.[33]

With regard to the circumstances surrounding the interview, Plaintiff admitted that Pritchett told him before he entered the room that he was not in trouble.[34] While AB was also present, Pritchett tapped the back of each of the boy's hand to indicate that there were no consequences to the discussion they were having.[35] Plaintiff stated, however, that Pritchett said he was going to put Plaintiff in jail if he lied, and he had the authority to arrest Plaintiff.[36] If the officer did not know Plaintiff's exact age, it would have been objectively apparent to a reasonable officer that Plaintiff was an elementary school-aged child. Plaintiff was not in handcuffs. He was not at a police station. He was not told that he was restricted in his movements. Plaintiff freely walked from one part of the school to another part of the school. Plaintiff, however, was eight years old at the time of questioning, was intimidated, justifiably so or not, by Pritchett, and ultimately began to cry. The other student questioned, who was also an elementary-aged student, (although a year to two older) did not have

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[33]2011 U.S. LEXIS 4557, 131 S.Ct. 2394, 2406, 180 L.Ed.2d 310 (U.S. June 16, 2011).

[34]Pl. Dep. at 27. For a fuller explanation, see *infra* note 47.

[35]Pritchett Dep. at 56.

[36]*Id.*

the adverse reaction that Plaintiff did.

Moving to the second step, the Court must determine whether, in light of the child's age, the objective reasonable person would believe he or she was not free to leave. Plaintiff fails this step. Plaintiff's subjective beliefs do not form the basis for answering the "in custody" inquiry.[37] The objective circumstances are viewed as a whole, not one by one.[38] In reviewing all of these facts and the law, the Court finds that Plaintiff was not in custody, and therefore, was not restrained. The Court further finds that, even if Plaintiff was restrained, the restraint was not unlawful.[39] Plaintiff has failed to provide sufficient evidence on essential elements for which he bears the burden of proof. As such, State Defendants are entitled to judgment as a matter of law on this claim. The claim for false imprisonment/false arrest is dismissed.

Assault and Battery

The tort of assault requires that the actor act with the intent of causing a

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[37]*J.D.B.*, 131 S.Ct. 2394, 2402 (quoting *Stansbury v. California*, 511 U.S. 318, 323, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994)).

[38]*Id.* at 2407 (citing *Keohane*, 516 U.S. at 113, 116 S.Ct. 457).

[39]Although Cape Henlopen School District's contract with the Delaware State Police states that the School Resource Officer was assigned to the High School, the facts before the Court objectively demonstrate that the District utilized Pritchett at Shields Elementary with some frequency. He had been to the elementary school at the behest of McDowell on the previous day and was there on the day of the incident at McDowell's request. Pritchett was acting as an agent of the District in investigating the incident. Therefore, his investigation, including the questioning of Plaintiff, would be subject to a reasonableness standard. *See Shuman*, 422 F.3d at 148-49. In light of AB's allegation regarding Plaintiff, a hypothetical seizure by Pritchett would have been reasonable.

harmful or offensive contact with the person of another, or an imminent apprehension of such contact, and the person is thereby put in imminent apprehension of such contact.[40] "In essence, the tort of battery is the intentional, unpermitted contact on the person of another which is harmful or offensive."[41] The Court observes that there is no mention of an assault claim or count in the complaint.[42]

According to Plaintiff's response to State Defendants' motion for summary judgment, the assault claim arises out of Pritchett's discussion of the Stevenson House as a place where delinquent children go, and the alleged statement by Pritchett that he had his handcuffs and could arrest Plaintiff.[43] On the wording provided by Plaintiff in his response, it is clear to this Court that this alleged statement does not rise to the level of an assault. The Court turns to two bedrock cases in common law tort to reach this conclusion. In *Tuberville v. Savage*, the party accused of assault uttered the words, "[i]f it were not assize-time, I would not take such language from you."[44] In *Commonwealth v. Eyre*, the defendant stated, "If it were not for your gray hairs, I would tear your heart out."[45] In both cases, the party accused of assault was

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[40]RESTATEMENT (SECOND) OF TORTS § 21 (1965); *see Liggett Group, Inc. v. Affiliated FM Ins. Co.*, 2001 WL 1456811, at *6 (Del. Super. Sept. 12, 2001).

[41]*Brzoska v. Olson*, 668 A.2d 1355, 1360 (Del. 1995).

[42]*See supra* note 13.

[43]WGMD Tr. at 10; Pl. Dep. at 28.

[44]1 Mod.Rep. 3, 86 Eng.Rep. 684 (1669).

[45]1 Serg. & Rawle 347 (Pa. 1815).

determined to be not guilty as their words explained away apparent intent. A statement from an officer that he has handcuffs and that he could use them does not rise to the level of assault because his words are conditional and there is no action with the intent of causing a harmful or offensive contact. As Plaintiff's claim for assault lacks an essential element for which he bears the burden of proof, State Defendants are entitled to summary judgment on this claim.

Plaintiff's battery claim is problematic as well. Although Plaintiff does not remember any contact by Pritchett at all,[46] Pritchett admitted to a tap of the back of Plaintiff's hand to indicate that there were going to be no consequences for the discussion they were having.[47] Pritchett intended to contact Plaintiff. There is no allegation that the contact caused harm. Therefore, the Court must analyze the offensiveness prong.

> In order for a contact to be offensive to a reasonable sense of personal dignity, it must be one which would offend the ordinary person and as such one not unduly sensitive as to his personal dignity. It must, therefore, be a contact which is unwarranted by the social usages

[46]*See* Pl. Dep. at 28.

[47]Pritchett Dep. at 56. "I said okay. Here's the consequence, (indicates). Bad boy, don't do that again. Bad boy, don't do that again. And they started laughing. I said now – so that broke the ice." *Id.* Plaintiff asks the Court to construe the contact in the light of his overall storyline of threats and intimidation. Pl. Resp. to Mot. for Summ. J. ¶23. Regardless of whether Plaintiff's account of events is correct, the contact only arises in Pritchett's account of events. Even viewing the facts in the light most favorable to the non-moving party, the Court cannot ignore the facts in Pritchett's account of the contact when Pritchett is the only person who says any contact occurred.

prevalent at the time and place at which it is inflicted.[48]

Although the Court is reluctant to wade into concepts of what will or will not be offensive to an ordinary person as these are matters typically best left up to the jury, "where there can be no reasonable difference of opinion as to the conclusion to be reached on the question . . ." the Court may intervene to determine the question as a matter of law.[49] It is clear to the Court that these facts fail to meet the second aspect of the prima facie case for battery. In an attempt to get to the bottom of who stole money from an autistic child, Pritchett was trying to get Plaintiff and AB to be completely truthful. As a way of emphasizing the lack of consequences for telling the truth, Pritchett tapped the back of each boy's hand in jest, indicating that this would be the only punishment for any transgression revealed. The contact between Pritchett and Plaintiff, which was so inconsequential that Plaintiff does not remember it,[50] is not offensive to an ordinary person. Plaintiff failed to present sufficient evidence on an essential element for which he bears the burden of proof. Therefore, State Defendants are entitled to summary judgment on this claim.

Violation of 42 *U.S.C.* § 1983

To establish a claim pursuant to § 1983, "the plaintiff must demonstrate that

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[48] *Brzoska*, 668 A.2d at 1361 (quoting RESTATEMENT (SECOND) OF TORTS § 19 cmt. a (1965)).

[49] *Duphily v. Delaware Elec. Coop., Inc.*, 662 A.2d 821, 831 (Del. 1995). The Court was discussing intervening cause. The principle, nonetheless, is equally applicable here.

[50] AB mentions no contact by Pritchett either. *See* AB Interview.

the defendants, while acting under color of state law, deprived him of a right secured by the Constitution or the laws of the United States."[51] Plaintiff alleges that Pritchett violated his rights, privileges, and immunities secured under the laws of the United States and the Constitution in three ways. First, Pritchett deprived Plaintiff of liberty without due process secured by the Fifth Amendment to the U.S. Constitution. Second, Pritchett deprived Plaintiff of the right to be free from government occasioned violence and injury to bodily integrity, as provided by substantive liberty guarantees of due process. Third, Pritchett deprived Plaintiff of his right to be free from unreasonable search and seizure as guaranteed by the Fourth Amendment to the U.S. Constitution.

Simply put, the facts construed in the light most favorable to the non-moving party, do not bear out these constitutional claims. As noted above, Plaintiff was not in custody at any time, nor was he searched or seized. As one preeminent constitutional scholar stated succinctly, "If there is not a denial of life, liberty, or property, then the government does not have to provide procedural or substantive due process."[52] The Court can find no deprivation sufficient to meet any of Plaintiff's claims under § 1983. As there is insufficient evidence, State Defendants are entitled to judgment on this claim.

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[51] *Shuman*, 422 F.3d at 146 (citing *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1141 (3d Cir. 1995)).

[52] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES, 547 (3d ed. 2006).

CONCLUSION

For the reasons above, the Court grants summary judgment on all claims in favor of State Defendants. The remaining motions *in limine* and the cross-claim are rendered moot.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh