

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY
COURTHOUSE
GEORGETOWN, DE 19947

Michael F. McGroerty, Esquire
110 Pine Street
Seaford, DE 19973

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Delaware Department of Justice
102 W. Walter Street, Suite 2
Dover, DE 19904

RE: *Barnett v. Terrence D. Smith and Delaware State Police*
C.A. No. 04C-10-017 RFS
Submitted: September 21, 2005
Decided: December 15, 2005

Dear Counsel:

The motion of the Defendant, Delaware State Police for partial summary judgment under the doctrine of sovereign immunity is granted. The motion of Plaintiff to amend the complaint to allege an additional direct ground against the Delaware State Police for alleged recklessness in training is denied for the same reasons.

BACKGROUND

Plaintiff filed a complaint against TFC Terrence D. Smith alleging negligence or willful and wanton recklessness which caused injury to the Plaintiff during his arrest in October of 2002. Specifically, Plaintiff alleges that TFC Terrence D. Smith was reckless in his use of a knife to cut away the plastic tie Defendant used to restrain the Plaintiff following his arrest. Plaintiff also sued the Delaware State Police, alleging that Smith was in the scope of

employment. Plaintiff sought to make the Delaware State Police liable on a theory of *respondeat superior*.

In May of 2005, Plaintiff filed an Amended Complaint alleging an additional ground that “The Defendant, The Delaware State Police, with willful and wanton reckless disregard for Plaintiff and the citizens of Delaware[,] and other persons visiting Delaware[,] issued flexi-cuffs to the [Defendant], Terrance Smith, without issuing him proper equipment to cut the flexi-cuffs from the Plaintiff safely[,] without proper training[,] and without an appropriate policy in place for the use and removal of flexi-cuffs, or without properly advising [Defendant], Terrance Smith of the policy.”¹

Defendant, Delaware State Police, opposed the amendment and moved for Partial Summary Judgment in Favor of the Delaware State Police. In this motion, Defendant cites Delaware case law in support of its position that any suit of this nature is barred by the doctrine of sovereign immunity.

DISCUSSION

¹ Motion to Amend Complaint filed May, 2 2005

The pertinent case law on this issue is laid out in Defendant's motion for Partial Summary Judgment. The Division of State Police is an agency of the State of Delaware and as such, it has sovereign immunity from law suits against it, unless there is a "clear and specific act of the General Assembly."² Any claims of liability against the Delaware State Police based on the doctrine of *respondeat superior* are barred by sovereign immunity. "[T]o the extent Plaintiff is arguing that the [State] is liable for failing to adequately train police officers in the use of handcuffs, or that the [State] is liable under the doctrine of *respondeat superior*, Plaintiff has not suggested any applicable exception to the general rule of sovereign immunity."³

Indeed, Plaintiff concedes that the current Delaware law supports a ruling in favor of the Defendant. Plaintiff notes that in 2003 in *Pauley ex rel Pauley v. Reinoehl*, our Supreme Court stated unequivocally, in an opinion written by Chief Justice Steele, that "the Doctrine of sovereign immunity protects the State from suit unless a law enacted by the General Assembly waives the State's immunity. All parties agree that the State is protected by the doctrine of sovereign immunity unless a waiver has occurred."⁴ Plaintiff also agrees with Defendant that *Doe v. Cates* is controlling precedent. In that case, our Supreme Court stated that, "the doctrine of sovereign immunity precludes the existence of a cause of action against the State unless the State has chosen to waive that immunity. In the present cases, the State, by choosing not to insure against the risks in question, has chosen not to waive sovereign immunity under 18 *Del.*

² *Turnbull v. Fink*, 668 A.2d 1370, 1376 (Del. Supr. 1995)

³ *White v. Crowley*, 1986 WL 5850 at p.4 (Del. Super., May 8, 1986) (Balick, J). *See also, Steelman v. Williams*, C.A. No. 99C-06-001, 1999 WL 1442001, at p.1 (Del. Super., Nov. 15, 1999) (Cooch, J.) and *Turnbull v. Fink*, 668 A.2d 1370, 1376 (Del. Supr. 1995).

C. ch. 65. *Therefore a right of action against the State never came into existence.*⁵ (emphasis added).

⁴ 848 A.2d 561 (2003)

⁵ *Doe v. Cates*, 499 A.2d 1175, 1182 (Del. Supr. 1985)

In this case, the State has produced evidence, by way of an affidavit of Debra Lawhead, the Insurance Coverage Administrator of the State of Delaware, which shows that the State has no insurance policy which would be applicable in this complaint or to the proposed amended complaint. This assertion has not been challenged by the Plaintiff. Instead, Plaintiff argues that the Delaware Constitution waives sovereign immunity. This exact argument has already been made to, and rejected by, our Supreme Court. The Court explicitly rejected Plaintiff's argument in *Shellhorn & Hill, Inc. v. Kwiatkowski*, 187 A.2d 71, 73 (1962), stating "that the precise argument made in this case, that Article I, Section 9 of the Constitution in itself is a waiver of sovereign immunity, has never apparently been made. The question technically, therefore, is one of first instance....We think, however, that sovereign immunity is not judicially created in the State of Delaware. It was established initially by our first Constitution and has been continued thereafter by successive Constitutions." The Court further found that "[u]nder the circumstances, we think the doctrine of sovereign immunity is a part of the basic law of this State which may be waived solely by law enacted by the General Assembly."⁶

Plaintiff has offered no evidence that the General Assembly has enacted any statute intended to waive the defense of sovereign immunity for the original claim, or the one sought in the proposed amendment. As *Doe* clearly states, "unless there is a statute by which the General Assembly can be said to have waived the defense of sovereign immunity, the applicants' suits must fail."⁷ Further, the State Tort Claims Act 10 *Del. C.* § 4001 *et seq.* is not itself a legislative waiver of sovereign immunity. It becomes relevant only after Plaintiff shows a waiver "by an

⁶ *Shellhorn & Hill*, 187 A.2d at 74

⁷ 499 A.2d at 1176-7

act of the General Assembly that expressly manifests an intention to do so.”⁸ *Shepard* also found a direct claim of damages could not be made against the State as it is not a person for 42 U.S.C. § 1983 purposes.

⁸ *Shepard*

Here, Plaintiff argues that many of the issues in this case were addressed by our Supreme Court in *Pauley*. Plaintiff's argument rests on the notion that *Pauley*, and likewise, *Shellhorn*, *Doe*, and their progeny, relied on by Justice Steele in his decision in *Pauley*, are wrongly decided.⁹ Admitting that there is no case law to support his position in this case, Plaintiff states in his response to the Defendant's Motion for Partial Summary Judgment, that the "recent decisions of our Supreme Court are controlling and although the make up of the Court has changed slightly, it is doubtful the Court will agree with Plaintiff that these decisions and the precedents relied on by the Supreme Court in those decisions are wrongly decided, it is highly unlikely that this Court will rule in Plaintiff's favor, but the arguments must be made to this Court first and then to our Supreme Court."¹⁰ Plaintiff is correct in his assumption that the relief he seeks may only be granted by our Supreme Court. The controlling precedent demands a judgment for the Defendant on this issue.

CONCLUSION

Considering the foregoing, the Defendant's Motion for Partial Summary Judgment in Favor of the Delaware State Police must be granted. Accordingly, Plaintiffs Motion for Leave to Amend the Complaint is denied for the same reasons.

IT IS SO ORDERED.

Richard F. Stokes, Judge

⁹ Plaintiff's Response to Defendant's Opposition to Plaintiff's Motion for Leave to Amend Complaint, and Plaintiffs Opposition Motion for Partial Summary Judgment in Favor of the State Police. June 30, 2005. P. 1.

¹⁰ *Id.*

cc: Prothonotary