

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Christopher L. Marquardt d/b/a :  
T&C Towing & Recovery, LLC, :  
Appellant :  
v. : No. 1316 C.D. 2012  
: Submitted: December 10, 2012  
Daniel Miller :

BEFORE: HONORABLE DAN PELLEGRINI, President Judge  
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge (P.)  
HONORABLE P. KEVIN BROBSON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY  
PRESIDENT JUDGE PELLEGRINI FILED: January 4, 2013

Christopher L. Marquardt (Marquardt), d/b/a T&C Towing & Recovery, LLC, appeals from an order of the Court of Common Pleas of York County (trial court) sustaining Daniel Miller's (Officer Miller) preliminary objections and dismissing Marquardt's amended complaint alleging conversion and intentional infliction of emotional distress on the basis of governmental and official immunity. For the reasons that follow, we affirm the trial court.

Marquardt filed a two-count complaint in the trial court, later amended, alleging, *inter alia*, that on April 18, 2011, Officer Miller arrived at the site of Marquardt's business in police uniform driving a police vehicle in response to a complaint made by a truck driver that his vehicle was being held for failing to pay a

\$2,000.00 towing fee. Officer Miller informed Marquardt that he spoke with the Police Chief and the District Attorney and ordered Marquardt to release the vehicle to the driver. If he did not, Officer Miller informed Marquardt that he would obtain a search warrant for the business and the District Attorney would conduct an investigation for fraudulent business practices. Officer Miller told Marquardt that he felt that he was “charging too much and...ripping off this trucker.” (Reproduced Record (R.R.) at 4a). Officer Miller ultimately directed the vehicle’s driver to enter the impound yard and retrieve his vehicle. Marquardt claimed trespass by conversion because he was deprived of his possessory lien against the vehicle for towing and storage. He also sought damages for intentional infliction of emotional distress because Officer Miller’s “words and conduct were extreme and outrageous and intentionally caused severe emotional distress to [Marquardt] who was frightened, angry, chagrined, sleep deprived, disappointed and worried.” (R.R. at 7a).

Officer Miller filed preliminary objections to Marquardt’s amended complaint in the nature of a demurrer contending that the action should be dismissed because he was entitled to official and governmental immunity under what is commonly known as the Political Subdivision Tort Claims Act (Tort Claims Act), 42 Pa. C.S. §§8541-8542. The preliminary objections claim that this case falls within the ambit of the Tort Claims Act because the allegations in the amended complaint confirm that Officer Miller was at all times acting as a police officer within the scope of his official duties and that his conduct could not constitute willful misconduct because he only acted after consulting with his supervisors and the District Attorney. Even if he was not immune from liability, Officer Miller’s preliminary objections

claim that Marquardt's factual allegations were legally insufficient to sustain a claim for conversion or intentional infliction of emotional distress.

In response, Marquardt filed preliminary objections to Officer Miller's preliminary objections arguing that the amended complaint simply alleged that Officer Miller informed Marquardt that he spoke with his supervisors and the District Attorney prior to taking action, but did not allege that those statements by Officer Miller were true. Marquardt's preliminary objections also alleged that his claims of willful misconduct by Officer Miller abrogate any immunity of Officer Miller, and that Officer Miller improperly raised the official and governmental immunity defenses by preliminary objection.

In its Memorandum Order, the trial court explained:

The Amended Complaint makes clear that [Officer Miller] responded to a call in uniform in a marked police vehicle and thus was at all times acting within the scope of his official duties. The Amended Complaint also confirms that [Officer Miller] did not take the alleged actions until after consulting with his supervisors and the York County District Attorney's Office. Although [Marquardt] claims that [Officer Miller] committed intentional torts, the facts as alleged do not support or allege that [Officer Miller] acted with the requisite intent necessary to sustain a cause of action for either conversion or intentional infliction of emotional distress.

(Trial Court's December 27, 2011 Memorandum Order at 3). The trial court further explained that it can consider the merits of an immunity defense raised by preliminary objections in circumstances where it can be determined on the face of the

allegations of the complaint that the defense of immunity applies. Accordingly, the trial court determined that the facts as alleged were legally insufficient to overcome Officer Miller's immunity defense, sustained Officer Miller's preliminary objections and dismissed the amended complaint. This appeal by Marquardt followed.<sup>1</sup>

On appeal, Marquardt initially contends<sup>2</sup> that Officer Miller improperly raised the defense of governmental and official immunity by preliminary objections and, therefore, the trial court erred in considering Officer Miller's immunity claims.

Pennsylvania Rule of Civil Procedure (Pa. R.C.P.) No. 1030<sup>3</sup> provides that immunity from suit is an affirmative defense that must be raised in a responsive

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<sup>1</sup> Our review from a trial court's order sustaining preliminary objections and dismissing a complaint is limited to determining whether the trial court committed an error of law or abuse of discretion. *Joloza v. Department of Transportation*, 958 A.2d 1152, 1153 n.1 (Pa. Cmwlth. 2008). When reviewing dismissal of an action on preliminary objections, we must accept as true all well-pled facts set forth in the complaint as well as all inferences reasonably deducible therefrom. *In re Estate of Bartol*, 846 A.2d 209, 213 (Pa. Cmwlth. 2004).

<sup>2</sup> Marquardt also contends that Officer Miller violated Pa. R.C.P. No. 1024 by making unverified fact allegations in his preliminary objections in support of his claims of official and governmental immunity. However, Marquardt fails to specifically identify in his brief any such improper averments made by Officer Miller. Therefore, we will not address that argument.

<sup>3</sup> Pa. R.C.P. No. 1030, relating to New Matter, provides, in relevant part:

- (a) Except as provided by subdivision (b), all affirmative defenses including but not limited to the defenses of accord and satisfaction, arbitration and award, consent, discharge in bankruptcy, duress, estoppel, failure of consideration, fair comment, fraud, illegality, immunity from suit, impossibility of performance, justification, laches, license, payment, privilege, release, res judicata, statute of frauds, statute of limitations, truth and waiver shall be pleaded in a responsive pleading under the heading "New Matter." A party may

**(Footnote continued on next page...)**

pleading under the heading of “new matter.” However, a limited exception to this rule has been created allowing parties to raise the affirmative defense of immunity as a preliminary objection where it is clearly applicable on the face of the complaint. *Sweeney v. Merrymeade Farm, Inc.*, 799 A.2d 972, 975 (Pa. Cmwlth. 2002). Where a party erroneously asserts substantive defenses in preliminary objections rather than raising same by answer or in new matter, the failure of the opposing party to file preliminary objections to defective preliminary objections waives the procedural defect and allows the trial court to rule on the preliminary objections. *Heinrich v. Conemaugh Valley Memorial Hospital*, 648 A.2d 53, 57 (Pa. Super. 1994). *See also Nicholson v. M&S Detective Agency, Inc.*, 503 A.2d 1106, 1106 n.1 (Pa. Cmwlth. 1986) (“While we do not condone a disregard of the Pennsylvania Rules of Civil Procedure, we will again consider the [immunity] defense as here raised inasmuch as the appellee did not file a responsive pleading directed to this procedural issue...”).

Marquardt argues that this limited exception is *only* available where the opposing party does not object to the defective preliminary objections and, because he filed preliminary objections to Officer Miller’s preliminary objections in this case, the exception should not apply. However, in *Iudicello v. Commonwealth, Department of Transportation*, 383 A.2d 1294 (Pa. Cmwlth. 1978), in which the Commonwealth raised the affirmative defense of immunity from suit in its preliminary objections to the plaintiffs’ complaint, this Court explained:

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**(continued...)**

set forth as new matter any other material facts which are not merely denials of the averments of the preceding pleading.

[I]t is plaintiffs' position that immunity from suit is an affirmative defense and can be raised only by way of answer and new matter under Pa. R.C.P. No. 1030. They agree that this Court has, in a number of recent cases, disposed of immunity matters on preliminary objections. ... However, plaintiffs distinguish these cases saying that no objection was made by the plaintiffs in those cases and objection is being raised here. Recognizing considerable merit in plaintiffs' position on this procedural point, we can see no possible benefit to anyone in dismissing these preliminary objections and requiring an answer to be filed and having this matter more appropriately raised as new matter. When it is transparently clear on the face of the complaint, as it is here from plaintiffs' own allegations, that the Commonwealth is immune, we will consider the matter in its present posture and thus expedite the disposition of the case.

*Id.* at 1295 (citations omitted).

While this presents an interesting issue of how strict we should be in applying the technical pleading requirements where an immunity defense is raised, we need not address this issue because whether Officer Miller is entitled to immunity, as we will explain later, is conflated with the issue of whether the conversion and/or intentional infliction of emotional distress claims survive the demurrer.

As to the merits, 42 Pa. C.S. §8541, relating to governmental immunity, generally provides:

Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person.

Section 8545 of the Judicial Code, 42 Pa. C.S. §8545, relating to official liability, generally provides:

An employee of a local agency is liable for civil damages on account of any injury to a person or property caused by acts of the employee which are within the scope of his office or duties only to the same extent as his employed local agency and subject to the limitations imposed in this subchapter.

One exception for which liability can be imposed against an employee of a governmental agency is when the employee engages in willful misconduct.<sup>4</sup> *See Lancie v. Giles*, 572 A.2d 827, 830 (Pa. Cmwlth. 1990) (official immunity cannot protect police officers from an action alleging an intentional tort). Willful misconduct in this context is synonymous with “intentional tort.” *Schnupp v. Port Authority of Allegheny County*, 710 A.2d 1235, 1238 (Pa. Cmwlth. 1998).

Marquardt’s amended complaint alleges that Officer Miller committed the intentional torts of conversion and intentional infliction of emotional distress. If either claim survives the demurrer based on the allegations contained in the

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<sup>4</sup> 42 Pa. C.S. §8550, relating to willful misconduct, provides:

In any action against a local agency or employee thereof for damages on account of an injury caused by the act of the employee in which it is judicially determined that the act of the employee caused the injury and that such act constituted a crime, actual fraud, actual malice or willful misconduct, the provisions of sections 8545 (relating to official liability generally), 8548 (relating to indemnity) and 8549 (relating to limitation on damages) shall not apply.

complaint, then necessarily we would find that Officer Miller purportedly engaged in willful misconduct and is not immune from liability.

To sufficiently plead a cause of action for conversion, a plaintiff must allege facts to support that a defendant intentionally acted to deprive plaintiff of his right of property in, or use or possession of, a chattel, or other interference therewith, without the owner's consent and without lawful justification. *Stevenson v. Economy Bank of Ambridge*, 413 Pa. 442, 451, 197 A.2d 721, 726 (1964). In order to prevail on a claim of intentional infliction of emotional distress, the plaintiff must demonstrate intentional outrageous or extreme conduct by the defendant which causes severe emotional distress to the plaintiff. *Hoy v. Angelone*, 554 Pa. 134, 151, 720 A.2d 745, 754 (1998). A court has the authority to evaluate on the basis of "outrageousness" and intent whether a plaintiff can sustain a claim of intentional infliction of emotional distress. *McNeal v. City of Easton*, 598 A.2d 638, 640 (Pa. Cmwlth. 1991). When it is clear from the facts of the case that the defendant did not act with the requisite intent, an intentional infliction of emotional distress claim cannot be sustained. *Id.* at 641. In addition, a plaintiff must suffer some type of resulting physical harm due to the defendant's outrageous conduct. *Fewell v. Besner*, 664 A.2d 577, 582 (Pa. Super. 1995).

With respect to conversion, Marquardt does not allege any facts demonstrating that Officer Miller acted without lawful justification. The allegations of the amended complaint clearly demonstrate that Officer Miller conferred with his supervisors and the District Attorney before making the alleged statements to Marquardt and ordering the release of the vehicle. With respect to Marquardt's



intentional infliction of emotional distress claim, the amended complaint fails to allege facts to support that Officer Miller acted with the requisite intent to inflict emotional distress upon Marquardt. Again, the amended complaint, on its face, clearly demonstrates that Officer Miller acted on the orders of his superiors, and makes no allegation that Officer Miller deviated from those orders or misrepresented the communications he had with his superiors. Moreover, there is no claim that Marquardt suffered any bodily injury as a result of the actions of Officer Miller.

Because Marquardt failed to make out the necessary elements of either conversion or intentional infliction of an emotional distress, the trial court properly sustained Officer Miller's preliminary objections and dismissed the amended complaint. Accordingly, the trial court's order is affirmed.

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DAN PELLEGRINI, President Judge

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Christopher L. Marquardt d/b/a :  
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 :  
Daniel Miller :

**ORDER**

AND NOW, this 4<sup>th</sup> day of January, 2013, the order of the Court of Common Pleas of York County, dated December 27, 2011, at No. 2011-SU-002073-74, is affirmed.

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DAN PELLEGRINI, President Judge