

Pennsylvania Constitution and various state tort claims. Appellees removed the case to the U.S. District Court for the Western District of Pennsylvania and filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). On March 16, 2007, U.S. District Court Judge Joy Flowers Conti granted the motion as to the federal claim (Count 11) and remanded the state claims to the trial court. Appellees filed their preliminary objections, which the trial court sustained by order of June 20, 2007.¹

The following is an abbreviated version of the facts that for purposes of review must be accepted as true.² Gagliardi is an author and inventor of the Multi-stage Liquid Elevator and operates from office and warehouse space located in the USI Industrial Park in Jefferson Hills (hereafter, the Premises). Gagliardi became involved in litigation with AT&T/Bell System in 1979 (AT&T lawsuit) over allegations of a scheme to generate false labor hours and to fraudulently increase telephone bills. In 2002 a typist working for Gagliardi discovered a letter from State Senator Albert V. Belan (Belan letter) announcing discovery of 5,000

¹Gagliardi has filed a petition entitled "Petition for Leave of Court to File Miscellaneous Documents," which appears to have been granted by the Superior Court prior to its transfer of the case to this Court by order dated June 25, 2008. His second petition, entitled "Petition for Leave of Court to File Second Affidavit of Facts," concerns allegations of bias directed toward Judge Conti. As the statements and documents contained in that petition do not concern issues properly before this Court, the Petition for Leave to File Second Affidavit of Facts is denied.

²The Court's review of the trial court's order is limited to determining whether the trial court committed a legal error or abused its discretion. *Boyd v. Rockwood Area School District*, 907 A.2d 1157 (Pa. Cmwlth. 2006). In ruling on preliminary objections in the nature of a demurrer, the Court must accept as true all well-pleaded facts and all inferences reasonably deducible therefrom, but it need not accept conclusions of law. *McGill v. Pennsylvania Department of Health, Office of Drug & Alcohol Programs*, 758 A.2d 268 (Pa. Cmwlth. 2000). A demurrer will be sustained only where it is clear and free from doubt that the law will not permit recovery under the alleged facts. *Id.*

shares of AT&T stock being held in Gagliardi's name by the Bureau of Unclaimed Property pursuant to a 1981 settlement of the AT&T lawsuit.

On March 31, 2003, Special Agent Frattare applied for a warrant to search the Premises and to seize computers and documents related to the Belan letter. The affidavit of probable cause concluded that the letter must be a forgery because a former assistant to Senator Belan had indicated that the letter was not prepared by their office. The search was conducted on April 1, 2003 by Frattare and Special Agent O'Brien along with two agents not named as parties, Shawn Murphy (Murphy) and Dennis Dansak (Dansak). The agents removed all copies of the Belan letter, plus two computers and several floppy discs. They extensively photographed and videotaped the Premises, including Gagliardi's Multi-stage Liquid Elevator. After the search, Gagliardi wrote letters to the agents explaining why he believed the Belan letter was authentic but received no reply. Gagliardi filed a motion requesting return of his computers and documents and complained that photographing and videotaping the Premises was outside the scope of the warrant. He subpoenaed Frattare, Murphy and Dansak for the hearing. Within one day of receiving legal process, Frattare and Murphy confronted Gagliardi's typist in an effort to extract a confession that she had prepared the Belan letter at Gagliardi's direction. When she refused, they "counseled her on the perils of prosecution for conspiracy." (Complaint at ¶39). The agents dismissed the typist's alternate theory as to the origins of the Belan letter.

On July 21, 2003, Frattare filed criminal charges against Gagliardi for forgery and attempted theft by unlawful taking. Gagliardi was arrested and held in the Allegheny County Prison for two days in lieu of \$30,000 cash bail. Charges were dismissed on October 27, 2003, after a preliminary hearing, when the District

Justice found no evidence connecting Gagliardi to the forgery. Frattare re-charged Gagliardi at the behest of Special Agent Nye, but charges were again dismissed.³

The trial court dismissed Gagliardi's complaint because of sovereign immunity granted to the Commonwealth and its agencies, officials and employees acting within the scope of their employment. In very limited areas, the legislature has chosen to waive sovereign immunity as to Commonwealth parties but only where the legislature has set forth an explicit exception to immunity, with such waivers to be strictly construed. *Mullin v. Department of Transportation*, 582 Pa. 127, 870 A.2d 773 (2005). The trial court noted that the two entities being sued (Office of Attorney General and Treasury Department) were "Commonwealth parties" within the meaning of Section 8501 of the Judicial Code, 42 Pa. C.S. §8501. *See Yakowicz v. McDermott*, 548 A.2d 1330 (Pa. Cmwlth. 1988) (holding that the Treasury Department is a Commonwealth agency); *Piehl v. City of Philadelphia*, 930 A.2d 607 (Pa. Cmwlth. 2007) (holding that the Office of Attorney General is a Commonwealth agency), *appeal granted*, 596 Pa. 460, 944 A.2d 751 (2008). The trial court found that the individual Appellees were at all relevant times employees of one of the agencies and acted within the scope of their employment as outlined in the Restatement (Second) of Agency.⁴ Each individual

³Documents attached to the complaint indicate that the criminal attempt charges were dismissed at the preliminary hearing, and the common pleas court granted Gagliardi's motion for habeas corpus relief, dismissing the forgery charges. (Complaint, Exhibit G, p. 113; Exhibit I).

⁴Conduct is within an employee's "scope of employment" if:

- (a) it is of the kind he is employed to perform;
- (b) it occurs substantially within the authorized time and space limits;
- (c) it is actuated, at least in part, by a purpose to serve the master; and
- (d) if force is intentionally used by the servant against another, the use of the force is not unexpected by the master.

Restatement (Second) of Agency §228(1).

Appellee therefore was entitled to sovereign immunity unless it had been specifically waived for the claims alleged.

Initially, the trial court recognized that the legislature has only waived immunity for negligent acts but not for intentional torts. 42 Pa. C.S. §8522(a). Therefore, any Commonwealth employee acting within the scope of his or her employment would be immune from any intentional tort claims. *See LaFrankie v. Miklich*, 618 A.2d 1145 (Pa. Cmwlth. 1992). Using this rationale, the trial court dismissed the following intentional tort claims: Count 1, False Arrest & False Imprisonment; Count 2, Malicious Prosecution; Count 3, Bad Faith Prosecution; Count 4, Vindictive Prosecution; Count 5, Abuse of Process Prosecution; Count 6, Selective Prosecution; Count 7, Retaliatory Prosecution; Count 9 as it relates to Intentional Infliction of Emotional Distress; Count 13, Conspiracy; and Count 15, Invasion of Privacy. The trial court then addressed the nine enumerated exceptions to sovereign immunity under 42 Pa. C.S. §8522(b), summarized by the Court in *Smith v. Cortes*, 879 A.2d 382, 388 n4 (Pa. Cmwlth. 2005), as follows:

- 1) the operation of a motor vehicle in the possession or control of a Commonwealth party; 2) acts of health care employees of Commonwealth agency medical facilities or institutions or by a Commonwealth party who is a doctor, dentist, nurse or related health care personnel; 3) the care, custody or control of personal property in the possession or control of Commonwealth parties; 4) a dangerous condition of Commonwealth real estate, highways, and sidewalks; 5) a dangerous condition of Commonwealth highways caused by potholes or sinkholes subject to some limitations; 6) the care, custody or control of animals in the possession or control of a Commonwealth party; 7) the sale of liquor at Pennsylvania liquor stores by employees of the Pennsylvania Liquor Control Board to a minor, a person visibly intoxicated, to an insane person, or to any person know as an habitual drunkard, or of known intemperate

habit; 8) acts of a member of the Pennsylvania military forces; and 9) the administration, manufacture and use of a toxoid or vaccine not manufactured in the Commonwealth under certain conditions.

The trial court examined the claims of negligent infliction of emotional distress; failure to train, supervise and discipline; respondeat superior; and deprivation of civil rights secured by the Pennsylvania constitution and found that none of them fell within the exceptions to sovereign immunity. The final claim for "spoliation of evidence" was not a proper cause of action under civil law. It declined to grant Gagliardi leave to amend his complaint, noting that he did not advise the court of additional facts that he could allege to overcome immunity. The trial court decided that leave to amend would have been fruitless, citing *Feingold v. Hill*, 521 A.2d 33 (Pa. Super. 1987), for the proposition that if the defects in the complaint are so substantial that amendment is not likely to cure them, and prima facie elements of the claim will not be established, the right to amend is properly withheld.⁵

Gagliardi first argues that the trial court erred by dismissing his complaint because sovereign immunity cannot protect state actors who violate the state and federal constitutions. He claims that only those performing policymaking functions and responsible for administrative policy over a sovereign function of the state government are entitled to the designation of "officer" of the Commonwealth. Gagliardi cites *Jones v. Peterman*, 743 A.2d 537 (Pa. Cmwlth. 1999), dealing with

⁵In a footnote responding to issues raised by Gagliardi on appeal, the trial court determined that the Commonwealth parties had not waived their immunity defense by removing the case to federal court because the defense of sovereign immunity is absolute and cannot be waived. See *Doughty v. City of Philadelphia*, 596 A.2d 1187 (Pa. Cmwlth. 1991). Also, the trial court ruled it did not have jurisdiction to review the federal district court's dismissal of the civil rights claims, as the district court's order was final and appealable in the federal courts pursuant to 28 U.S.C. §1291. The Court adopts the reasoning of the trial court and rejects Gagliardi's arguments on these issues at the outset.

the issue of which state employees are deemed to be "officers" for purposes of the original jurisdiction of the Commonwealth Court over claims against them. No argument has been made that this Court had original jurisdiction over Gagliardi's claims, and he offers no further explanation as to how *Jones* applies to this matter. Gagliardi disputes the trial court's finding that he never alleged that any individual acted outside the scope of employment, noting that the record should be corrected if he implied that any of the individuals acted within the parameters of their official duties. He adds that Nye "exceeded the scope of his employment by excluding examination of explanations exculpatory for [Gagliardi]." Gagliardi's Brief at 12.

In his closely related second argument, Gagliardi claims that state actors can be liable in their individual capacities for incompetent or malicious acts despite the immunity doctrine. In his additional arguments, Gagliardi asserts again that sovereign immunity is not designed to insulate government agencies from claims arising under the state constitution. He notes that in the case of *In re PVI Associates*, 181 B.R. 210 (Bankr. E.D. Pa. 1995), the bankruptcy court allowed claims for inverse condemnation against a Redevelopment Authority to survive a motion to dismiss despite the Authority's plea of sovereign immunity. Much of Gagliardi's arguments in support of his other claims are in the context of actions under 42 U.S.C. §1983 and consequently do not apply here. To the extent that he does cite state law, the crux of Gagliardi's argument is that the fact that all charges against him were dismissed for failure to state a *prima facie* case establishes that there was no probable cause for his arrest, which raises at least a genuine issue of material fact as to all or most of his claims.

Appellees respond that the federal court dismissed Gagliardi's claims under the federal constitution, and they cite *Jones v. City of Philadelphia*, 890 A.2d

1188 (Pa. Cmwlth. 2006), holding that no cause of action for money damages exists under the Pennsylvania constitution. They agree with the trial court that each of them qualify as "Commonwealth parties" entitled to sovereign immunity because there is no allegation that any individual acted outside the scope of his/her employment. Alternatively, they argue that any conduct complained of falls within the criteria set forth in the Restatement (Second) of Agency, such that immunity applies even if malice is alleged. Appellees note that in his second argument, Gagliardi cites only cases related to qualified immunity in the context of civil rights claims under 42 U.S.C. §1983. They point out that there is no exception to sovereign immunity for intentional torts or "willful misconduct" by a state actor, such as the one that exists for local government officials. *See* 42 Pa. C.S. §8550 (immunity shall not apply when the act of a local government employee causing the injury constituted a crime, actual fraud, actual malice or willful misconduct).

From its review of the issues presented, the Court's decision is that the trial court did not err in sustaining Appellees' demurrer as sovereign immunity precludes Gagliardi's claims. Each entity sued is a Commonwealth party, and the conduct alleged on the part of each individual Appellee fits within the scope of his respective employment. The only example offered by Gagliardi of conduct outside the scope of Appellees' employment is the fact that Nye did not consider alternate theories for the origin of the Belan letter. Accepting as true Gagliardi's allegation that Nye failed to explore exculpatory theories, the Court cannot agree that this failure amounts to conduct outside the scope of Nye's official duties. *See Pyeritz v. Commonwealth*, 956 A.2d 1075 (Pa. Cmwlth. 2008).

The trial court properly determined that intentional acts committed by a state actor within the scope of his/her employment are covered by sovereign

immunity. *LaFrankie*. Waiver of sovereign immunity only applies to negligent acts for which recovery would be available but for the immunity defense and which fall within one of the nine enumerated exceptions to immunity. *Id.* The trial court observed that Gagliardi's claim for deprivation of civil rights under the Pennsylvania Constitution merely recites rights guaranteed by the constitution. To the extent that it can be interpreted as raising civil claims, they do not fall within any of the exceptions to immunity. In addition, Gagliardi's claim for spoliation of evidence does not set forth a cause of action. *Pyeritz*.

The remaining issue is whether the trial court erred by dismissing Gagliardi's complaint with prejudice without granting him the opportunity to amend. Gagliardi cites to Pennsylvania Rules of Civil Procedure 126 (Liberal construction of rules) and 1033 (Amendment), and he argues that amendments to pleadings should be liberally allowed so that cases are decided on their merits and not on mere technicalities. Appellees note that a trial court does not abuse its discretion when it refuses to permit an amendment where the amendment could not circumvent a defendant's immunity, citing *Holt v. Northwest Pa. Training P'ship Consortium, Inc.*, 694 A.2d 1134 (Pa. Cmwlth. 1997). Gagliardi set forth detailed facts in his complaint, but there is nothing to suggest that any amendment could overcome Appellees' immunity here. Because the trial court committed no error of law or abuse of discretion, the Court affirms the order of the trial court.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John Gagliardi, :
Appellant :
v. : No. 1679 C.D. 2008
D. Michael Fisher, former Attorney :
General; and Kenneth Nye, Supervisory :
Special Agent; David K. Frattare, :
Special Agent; Jack O'Brien, Special :
Agents Bureau of Criminal Investigation; :
and Commonwealth of Pennsylvania :
Office of Attorney General; and Barbara :
Hafer, Treasurer; and Michael Chapel, :
Treasury Investigator; and :
Commonwealth of Pennsylvania Office :
of the Treasurer :

ORDER

PER CURIAM

AND NOW, this 16th day of December, 2008, the order of the Court of Common Pleas of Allegheny County is affirmed. The Court also denies the "Petition for Leave of Court to File Second Affidavit of Facts" filed by John Gagliardi.