Davidonis v. Protzman, No. 174-9-05 Oecv (Teachout, J., Feb. 5, 2009)

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**STATE OF VERMONT**
**ORANGE COUNTY**

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| **THERESA DAVIDONIS** | ) | |
| **Plaintiff,** | ) | **Orange Superior Court** |
| | ) | **Docket No. 174-9-05 Oecv** |
| **v.** | ) | |
| | ) | |
| **TODD PROTZMAN et al.** | ) | |
| **Defendants.** | ) | |

## DECISION

**Plaintiff's Motion to Amend the Complaint, filed May 6, 2008**

**State's Motion for Summary Judgment on Count One of the First Amended Complaint (Revised), filed February 29, 2008**

**State's Motion to Dismiss Count Three of the First Amended Complaint (Revised), filed June 2, 2008**

Plaintiff Theresa Davidonis seeks damages based on claims that she was injured as a result of excessive force by the State Police as they were taking her into protective custody during an incident in which she appeared to be on the verge of suicide. The Plaintiff is represented in this action by Attorney Tim A. Clark. The Defendant State Police Troopers and the Defendant State of Vermont are all represented by Assistant Attorney General Michael Donofrio. Before the court are (1) the Plaintiff's motion to amend her complaint, (2) the Defendant Troopers' motion for summary judgment on the Plaintiff's §1983 claim, and (3) the State's motion to dismiss the Plaintiff's claims directly against the State for negligence and intentional and negligent infliction of emotional distress.

Many facts are undisputed:

On September 5, 2002, State Troopers Todd Protzman and Jacob Zorn responded to a report that the Plaintiff, whose husband had recently been killed in a motor vehicle accident, had been drinking and was threatening suicide. The report was made by the Plaintiff's daughter, who stated that the Plaintiff had a knife and that she had taken some Xanax pills. When the Troopers

arrived at the Plaintiff's house, no one answered the door. The Troopers were informed by others on the scene that the Plaintiff had taken only one pill, but that she was threatening to stab herself with the knife if the police entered the house. The Troopers contacted their superiors to inform them of the situation. The superior officers decided that the Troopers should leave the scene, which they did. Shortly thereafter, the Troopers met with the Plaintiff's daughter. The meeting ended with the Troopers asking the daughter to call them back if her mother "took any action" toward committing suicide.

Not too much later, the daughter called the Troopers and reported that her mother had ingested four additional Xanax pills. The Troopers went to the home a second time, where they were told that the Plaintiff no longer had a knife. The Troopers proceeded up the stairs to the kitchen, where the Plaintiff was sitting at the kitchen table. They approached the Plaintiff from behind, and within seconds, the two Troopers performed an "arm-bar takedown," which involved both Troopers, one on each arm, bringing the Plaintiff to a standing position and causing her to fall face first onto the wooden kitchen floor, whereupon her nose was broken as she was taken into protective custody.

There are other facts, specifically concerning the information the Troopers had at the time of the takedown and the manner in which the arm-bar takedown occurred, that are in dispute, as referenced in the analysis below.

The Plaintiff claims that she suffered injury to her face, a broken nose and herniated discs in her back that required surgery.

### Plaintiff's Motion to Amend the Complaint filed May 6, 2008

On May 6, 2008, the Plaintiff moved to amend her complaint and submitted a proposed First Amended Complaint. Subsequently, on June 12, 2008, the Plaintiff filed her First Amended Complaint (Revised), apparently pursuant to an agreement between the parties. The intent of the amendment appears to be to tailor the complaint to the issues that remain in the case. The court views the Plaintiff's May 6, 2008 motion as seeking permission to file the June12, 2008 First Amended Complaint (Revised), and that motion is granted.

### Procedural Posture of the Case

Since the time of the original complaint, some claims and some defendants have been dismissed, dropped, or revised. What remain at this time are Count One and Count Three of the First Amended Complaint (Revised). Count One sets out a deprivation of civil rights claim against State Troopers Protzman and Zorn pursuant to 42 U.S.C. § 1983. The Defendant Troopers have moved for summary judgment on this count. In Count Three, the Plaintiff seeks to hold the State of Vermont liable for the Troopers' alleged negligence and for their alleged

intentional or negligent infliction of emotional distress. The State has moved to dismiss this count.

**Defendants Protzman and Zorn's Motion for Summary Judgment on Count One, filed February 29, 2008**[1]

**Excessive Force**

The plaintiff brought suit under 42 U.S.C. § 1983,[2] claiming that the Defendants violated her Fourth Amendment right to be free from unreasonable seizure by using excessive force against her.[3]

The Defendants claim they are entitled to summary judgment on the merits of the Plaintiff's excessive force claim. Additionally, they claim that in the event the court finds they are not entitled to judgment on the merits, they nevertheless are entitled to summary judgment based on qualified immunity.

**"**To be granted summary judgment, the moving party must demonstrate the absence of a genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. V.R.C.P. 56(c). In the trial court's consideration of the motion, the party opposing the motion benefits from all reasonable doubts and inferences." *Morais* v. *Yee*, 162 Vt. 366, 370 (1994). In this case, there is a factual dispute about the degree to which the Plaintiff offered resistance to the Troopers, or presented a realistic probability of resistance based on the information available to them. This dispute of fact precludes summary judgment for the Defendants on the merits of the Plaintiff's claim.

> Where a plaintiff charges that the police have used excessive force … 'the question is whether the officers' actions are 'objectively reasonable' in light of the

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[1] **A**lthough this motion was initially directed to Count One of Plaintiff's original complaint, Troopers Protzman and Zorn have asked the court to consider it as applying, in pertinent part, to Count One of the First Amended Complaint (Revised).

[2] That section provides, in relevant part, that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ..., subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[3] The Plaintiff cited both the Fourth and Fourteenth Amendments in her complaint. In her opposition to the summary judgment motion, she does not state whether she is making a separate Fourteenth Amendment claim or whether her reference is to the fact that the Fourth Amendment was made applicable to the states by the Fourteenth Amendment. The Fourteenth Amendment does not provide a proper framework for an excessive force claim. In *Graham* v. *Connor*, 490 U.S. 386, 395 (1989), the Supreme Court held that all excessive force claims are properly analyzed under the Fourth Amendment and not as claims of denial of substantive due process under the Fourteenth Amendment.

> facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor,* 490 U.S. 386, 397, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989). …. The reasonableness of the use of force should be viewed from the perspective of a reasonable officer at the scene. *Id.* at 396, 109 S.Ct. at 1871.

*Coll* v. *Johnson,* 161 Vt. 163, 164-165 (1993).

In their Statement of Undisputed facts, the Defendants claim that they believed the Plaintiff was likely to be combative and that she might still have access to a weapon. They state that they decided, before they entered the house, to take her into protective custody for the purpose of treating her for the reported overdose of pills.[4] They say that once in the kitchen, Trooper Protzman approached the Plaintiff, grasped her left wrist, and told her to come with him. They allege that she then immediately tensed and raised her left arm while putting her arm back. They say that Trooper Protzman then ordered her to get on the ground, and Trooper Zorn took her right arm and they took her to the floor with an arm-bar takedown technique.

The Plaintiff agrees that Trooper Protzman said, "Theresa, come," but she disagrees with the Troopers about what happened next. She says that as Trooper Protzman spoke, he immediately started the arm-bar takedown. The Plaintiff states that Trooper Protzman "admitted that Ms. Davidonis [never] made any move toward any weapon or any other move of evasion or resistance whatsoever as he approached her from the stairs." In his deposition, Trooper Protzman testified he did not remember any evasive action. He also testified that if the Plaintiff had taken any evasive action, he would have noted it in his report, if he remembered it.

The Defendants rely heavily on the case of *Flanigan* v. *Town of Colchester,* 171 F.Supp.2d 361 (D.Vt. 2001). In that case, the court granted summary judgment for the defendant police officers in a situation where the police took into protective custody an intoxicated person who reportedly had earlier been brandishing a firearm. *Flanigan* is different from the present case in several important respects. In that case, it was undisputed that the officers spoke with the subject and concluded that he was incapacitated and in need of protective custody. They then informed him he was being taken into custody as an incapacitated person and asked him to put his hands behind his back. The subject became uncooperative, telling the officers "no," shaking his hands free from the officer who was holding his right arm, and taking a few steps away from the officers and toward his house. At this point, the officers "took him to the ground." In the *Flanigan* case, there was undisputed evidence at a point prior to the takedown that the subject,

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[4] 33 V.S.A. § 708(b) provides: "When a law enforcement officer encounters a person who, in the judgment of the officer, is incapacitated as defined in section 702 of this title, the person shall be taken into protective custody by the officer." Section 702(9) defines "incapacitated" as the state of intoxication in which an individual "appears to need medical care or supervision by approved substance abuse treatment personnel ... to assure his or her safety; or ... appears to present a direct active or passive threat to the safety of others. 33 V.S.A. 702(13) defines "protective custody" as "a civil status in which an incapacitated person is detained by a law enforcement officer for the purposes of "assuring the safety of the individual or the public or both; and … assisting the individual to return to a functional condition."

who was drunk, "was actively evading the officers' attempt to place him in protective custody." *Id. At 365*. In this case, the information the Troopers had at the time of the takedown about Plaintiff's likelihood of resistance or combativeness is not clear, and important facts are disputed.

There is no established, undisputed fact that the Plaintiff was seeking to resist or move toward a weapon or anything dangerous. Therefore, the court cannot conclude, as a matter of law, that the Troopers' actions were 'objectively reasonable' in light of the facts and circumstances confronting them. The Troopers' motion for summary judgment is denied as to the §1983 claim.

**Qualified Immunity**

The Defendant Troopers claim that even if they are not entitled to summary judgment on the merits of the §1983 claim, they are entitled to qualified immunity, which bars the pursuit of any claim against them. In *Saucier v. Katz,* 533 U.S. 194, 199, 121 S.Ct. 2151 (2001), the Supreme Court affirmed the established two-step test for determining whether a law enforcement officer is entitled to qualified immunity. Under that test, the questions a court must answer are: "first ... whether a constitutional right would have been violated under the facts alleged; second, assuming the violation is established, ... whether the right was clearly established." *Id.* As to the second step, the court held that "clearly established" requires that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* "Generally, an officer's actions are considered objectively unreasonable "when no officer of reasonable competence could have made the same choice in similar circumstances." *Lennon v. Miller,* 66 F.3d 416, 420-421 (2d Cir.1995).

*Saucier* sets clear rules for a court's approach to a claim of qualified immunity:

> A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry. *Siegert v. Gilley,* 500 U.S. 226, 232, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991). In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.

With this guidance in mind, the two-step analysis must be made.[5]

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[5] On October 14, 2008, in the case of *Pearson* v. *Callahan*, Docket No. 07-751, the Supreme Court heard argument on the issue of whether it should overrule the above-quoted approach required by *Saucier.* In granting certiorari, the Court stated: "In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: 'Whether the Court's decision in *Saucier v. Katz,* 533 U.S. 194 (2001) should be overruled."

Question 1: *Would a constitutional right have been violated if the facts are as Plaintiff alleges?*

To address this question, under *Saucier,* the court is obliged to declare the scope of a person's constitutional right in the context presented by the case, viewing the allegations in the light most favorable to the Plaintiff. Because a person has a Fourth Amendment right to be free from the use of excessive force when seized, it makes sense that when the police are taking a person into protective custody, that person has a Fourth Amendment right to be free from being subjected to personal injury unless the subject engages in overt behavior in the presence of the police that shows that he or she is likely to evade the seizure or cause imminent harm to self or others without the police conduct that resulted in the injury, or unless the police have reliable information that such is the case.

33 V.S.A. § 702 (13)[6] demonstrates that the purpose of protective custody is to protect the safety of the individual and restore that person to a functioning condition. Given these purposes, it does not make sense that the only way that they can be accomplished is through a police maneuver that can be expected to cause personal injury. Because the police had been told that Plaintiff had swallowed 4-5 Xanax pills and had previously been wielding a knife and appeared to be contemplating suicide, the Troopers could reasonably believe that there were grounds to take her into protective custody for the protection of both herself and others (see footnote 4). However, it is apparent from the Defendant's Statement of Undisputed Facts, ¶ 25, that an arm-bar takedown is not a necessary component of taking a person into protective custody, as there are other levels of force on the "ladder of force" available, and the selection of a level depends on the circumstances of each unique situation. There are no established facts showing that an arm-bar takedown was called for in this situation, and that an arm-bar takedown necessarily results in risk of a broken nose and back injury.

When the facts alleged in this case are taken in the light most favorable to the Plaintiff—that Plaintiff was not resisting or threatening harm and the police had no basis to believe that she was likely to do so--the Plaintiff would be entitled to claim a violation of a constitutional right.

Question 2: *Would it be clear to a reasonable law enforcement officer that the use of the force applied to Plaintiff in this case would amount to excessive force under the circumstances?*

There are disputes of fact as to what the Troopers knew and/or had been told about the risk that Plaintiff would respond to their attempt to take her into protective custody with combativeness, resistance, or risk of harm. Plaintiff's facts suggest that while she may have previously presented such a risk because a knife had been within her reach, that was no longer

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[6] 33 V.S.A. § 702(13) states: "Protective custody" means a civil status in which an incapacitated person is detained by a law enforcement officer for the purposes of:
(A) assuring the *safety of the individual* or the public or both; and
(B) *assisting the individual to return to a functional condition*. (Emphasis added).

the case at the time of the incident, and she represented no such risk. On the other hand, there is also evidence that the Troopers were told that she had been combative with other troopers in the past, even without a knife or other weapon at hand. Essential facts are not established. This is unlike the circumstances in *Woodward v. Town of Brattleboro,* 2006 WL 36906 (D.Vt.), in which the court ruled that officers had qualified immunity because although there were differing versions of some facts, there was no dispute that the subject was armed, agitated or psychotic, disobedient to orders to drop his weapon, and in a position to injure others in his proximity suddenly and without warning.

In addition, there are facts to be established about what amount of force the Troopers could expect to be involved in the use of an arm-bar takedown or other available techniques on the "ladder of force", and the likely effect of the amount of force involved in an arm-bar takedown and other alternatives on the "ladder of force."

Thus, there are factual issues that must be decided by the jury in order for the court to rule on qualified immunity. *Cowan ex rel Estate of Cooper v.Breen,* 352 F. 3d 756 (2d Cir. 2003). Such fact finding can be accomplished by the jury at trial. *Id.* At 764. Specific interrogatories on the facts pertinent to qualified immunity may be submitted to the jury for factual determinations. The court will then use these factual findings as the basis for a ruling of law on qualified immunity. If grounds for qualified immunity are not shown, the trial will continue on the § 1983 claim. If, based on the specific facts found by the jury, the court rules that the Troopers are entitled to qualified immunity, the claim will be dismissed.

For the above reasons, the Motion for Summary Judgment filed by Troopers Protzman and Zorn must be denied.

## State's Motion to Dismiss Count Three

In Count Three of the Amended Complaint, the Plaintiff claims that the State of Vermont is vicariously liable for the Troopers' negligent failure to follow their training, or for their negligent administration of that training. She also claims that the State is liable for the Troopers' intentional and negligent infliction of emotional distress. On June 26, 2008, the State moved to dismiss these claims.

### Negligence

The alleged negligent conduct that the Plaintiff complains of in Count Three is, essentially, that the Troopers used force in excess of that which their training indicated would be appropriate under the circumstances of this case. The Plaintiff argues that this claim is permitted under the Vermont Tort Claims Act, which permits claims of injury caused by the negligent or wrongful act of a State employee to be brought against the State. The State argues that dismissal of this claim is required because it is barred by 12 V.S.A. § 5601(e)(6), which states that the waiver of sovereign immunity found in the Vermont Tort Claims Act does not apply to "any claim arising out of alleged assault [or] battery."

On the issue of whether suit can be brought against the government for claims of its employee's negligence, the U.S. Supreme Court has held, with respect to the federal analog of the Vermont Tort Claims Act, that a plaintiff

> cannot avoid the reach of [28 U.S.C.] § 2680(h) [the assault and battery exception to the Federal Tort Claims Act] by framing her complaint in terms of negligent failure to prevent the assault and battery. Section 2680(h) does not merely bar claims for assault or battery; in sweeping language it excludes any claim arising out of assault or battery. We read this provision to cover claims … that sound in negligence but stem from a battery committed by a Government employee. Thus "the express words of the statute" bar respondent's claim against the Government.

*U.S.* v. *Shearer*, 473 U.S. 52, 55, 105 S.Ct. 3039 (1985).

As one court has noted, *Shearer* "seem[ed] to indicate that any case arising out of assault or battery by a Government employee is barred from the courts by § 2680(h) no matter how negligent the Government was in its supervision of the employee or how derelict it was in its duty to others." *Miami North, Inc.* v. *U.S. Dept. of Labor Penobscot Job Corps Center*, 939 F.Supp. 53, 56 (D.Me.1996). The breadth of the rule that seemingly had been articulated in *Shearer* was later called into question by the decision in *Sheridan* v. *United States*, 487 U.S. 392, 108 S.Ct. 2449 (1988). In that case, the claim was that the government was negligent in failing to prevent an off-duty serviceman from shooting a third person, where the shooting was foreseeable. The Court, in a decision where *Shearer* was not cited, allowed the claim against the government to proceed under Federal Tort Claims Act.

Courts have harmonized *Shearer* and *Sheridan* by holding that the government does not owe a duty to the world to prevent employees from committing foreseeable illegal or violent acts, but liability may attach where the government owes an independent duty to the victim. See cases discussed in *Miami North, Inc.*, supra, 939 F. Supp. 55-56.

Under the present facts, the State has a duty to protect its citizens from crime and violence by hiring and training police officers in proper police procedures, but it does not owe an independent duty to the citizenry such that it can be sued whenever a citizen alleges that he or she has been harmed by a policeman's negligent failure to follow the State's training. Here, the Plaintiff has framed, as negligence, a claim whose true nature is assault or battery; as such, the claim is an impermissible attempt to avoid the assault and battery exception of the Vermont Tort Claims Act. For this reason, the claim must be dismissed.

**Intentional Infliction of Emotional Distress (IIED)**

The Plaintiff maintains that suit against the State for IIED inflicted by its employees is allowed under the Vermont Tort Claims Act, and, here again, the State argues that the claim is barred by the assault and battery exception.

In support of her position, the Plaintiff asserts that IIED and assault are separate torts with different elements, and she claims, on that basis, that the IIED claim does not fall within the

assault and battery exception. Although IIED claims are actionable against the State in some circumstances; see *Sabia v. State,* 164 Vt. 293, 306, n.6 (1995); there appears to be no Vermont case in which an IIED claim against the State has been allowed where the underlying facts supported a claim of assault or battery committed by a State employee. In the present case, the factual underpinning of the IIED claim is the claimed assault by the state troopers, i.e., the Plaintiff's claim that the troopers used excessive and unwarranted force against her. Under these circumstances, the IIED claim arises out of an alleged assault or battery, and it is barred by 12 V.S.A. 5601(e)(6). Accordingly, the IIED claim must be dismissed. *Accord*, *Metz* v. *U.S.*, 788 F.2d 1528, 1534 (11th Cir. 1986) (holding that a cause of action that is distinct from one of those excepted under Federal Tort Claims Act will be deemed to "arise out of" an excepted cause of action if the underlying governmental conduct would constitute an excepted cause of action and that conduct is "essential" to plaintiff's claim.)

**Negligent Infliction of Emotional Distress**

The general rule is that "[t]o establish a claim for negligent infliction of emotional distress, a plaintiff must make a threshold showing that he or someone close to him faced physical peril. …. If there has been [a physical impact], the plaintiff may recover for emotional distress stemming from the incident during which the impact occurred. *Brueckner* v. *Norwich University***,** 169 Vt. 118, 125 (1999). In the present case, the impact complained of was in the nature of assault or battery. Because the injury sustained as a result of the assault or battery is an element of the alleged tort, the court concludes that the claim of negligent infliction of emotion distress is one arising out of an alleged assault or battery. For this reason, the claim is barred by V.S.A. 5601(e)(6), and it must be dismissed.

**ORDER**

For the foregoing reasons,

The Plaintiff's Motion to Amend the Complaint, filed May 6, 2008, is *granted.*

The Defendant State of Vermont's motion to Dismiss Count Three of the First Amended Complaint (Revised), filed June 26, 2008, is *granted.*

The Motion for Summary Judgment filed by Defendants Protzman and Zorn on February 8, 2008 is *denied*.

Dated at Chelsea, Vermont this _____ day of February, 2009.

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Mary Miles Teachout
Superior Court Judge