

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CARL J. HASKINS, JR.)	CIVIL ACTION NUMBER
)	
Plaintiff)	06C-10-112-JOH
)	
v.)	
)	
JEFF KAY)	
)	
Defendant)	

Submitted: December 12, 2007

Decided: February 5, 2008

MEMORANDUM OPINION

Upon Motion of Defendant Kay to Dismiss (Supplemental) - GRANTED

Appearances:

Carl J. Haskins, Jr., SBI #211803, P. O. Box 9561, Wilmington, Delaware, *Pro Se*

Linda M. Carmichael, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, attorney for defendant

HERLIHY, J.

Defendant Jeff Kay has supplemented his motion to dismiss plaintiff Carl Haskins claim against him. Haskins has sued Kay in his role as a probation officer in connection with a search of Haskins' residence. Kay's initial motion argued that as a state employee he was immune from suit and that Haskins had not met the threshold showing that one or more of three bars providing immunity was absent. Haskins had also sued several other state employees and officials.

In an earlier decision, this Court dismissed with prejudice Haskins' action against all those other employees and officials. But the Court found Haskins had shown the absence of one of the three bars to his suit against Kay, namely his complaint sufficiently pled gross or wanton negligence.¹ In his opening motion to dismiss, Kay argued Haskins had not sufficiently pled allegations to overcome any of the three bars; a burden which Haskins would have to meet to survive a motion to dismiss.²

But, in its earlier decision, this Court noted that Kay had not presented any information on the other potential immunity to Haskins' action against him; particularly, whether or not the State carries insurance coverage for this kind of claim. The Court asked for input from Kay on the presence/absence of insurance.

¹ *Haskins v. Kay*, 2007 WL 4662114 (Del. Super.); 10 *Del. C.* § 4001.

² *Smith v. New Castle County Vocation-Technical School Dist.*, 574 F.Supp 813, 820 (D.C. Del. 1983).

In the supplement to his original motion, Kay has now supplied that information. Attached to his supplement is an affidavit from Debra Lawhead, Insurance Administrator for the State of Delaware. The affidavit states: (1) she, as Insurance Coverage Administrator for the State Insurance Program, is familiar with all State insurance policies under the Insurance Determination Committee; (2) she has read Haskins' complaint; (3) there is no insurance coverage for the State and Department of Correction for the activities alleged; and (4) the General Assembly has not appropriated any money for such insurance nor otherwise enacted any legislation removing immunity for the acts alleged.

A

In his supplemental motion, Kay also asks this Court to address another ground he had earlier sought as a basis for dismissal of Haskins' action. Then and now, Kay argues that Haskins cannot pursue a civil rights action, 42 U.S.C.A. § 1983, against him. His reason is that a suit against him in his official capacity is a suit against the State. Such a suit would be barred.³ That particular proposition is correct, but the issue is whether it applies here.

The Court must back up a bit to answer that question. In its earlier decision, the Court determined Haskins has not made a "1983" claim. Based on that, the Court declined to address Kay's argument in that original motion that such a claim could not be maintained.

³ *Lapides v. Bd. of Regents*, 535 U.S. 613, 122 S. Ct. 1640, 152 L.Ed.2d 806 (2002).

Simply put, the Court has re-examined that position; primarily, because Kay raises it again by re-raising it in the supplement to his motion. By doing so, and thereby enabling Haskins to respond to its supplemental motion to dismiss, the Court has been prompted to examine the merits of Haskins' complaint, using tests applicable to a motion to dismiss, to see if a "1983" claim has been sufficiently alleged. Fairness compels the Court to also state that in its earlier decision, it said that for various reasons it would not allow Haskins to move to amend his complaint to make one. But again, Kay has re-opened that door.

The re-examination of Haskins' complaint, as now supplemented in his response to Kay's supplemental motion, must be undertaken with a view that *pro se* pleadings should be held to a less stringent standard.⁴ Kay entered Haskins' residence, he alleges, on two occasions. Both times he did so while acting as a probation officer. Haskins alleges Kay "trashed" his residence, stole items, and committed various crimes in the process.

With the exception of the alleged criminal activity, Haskins' complaint boils down to a series of assertions Kay violated Department of Correction rules for administrative searches. In its earlier opinion, this Court said Kay was acting as a probation officer, Haskins was on parole as a sex offender and had special parole (probation) conditions applicable to sex offenders and Kay was insuring compliance with those conditions.

⁴ *Alley v. Taylor*, 2001 WL 337245 (Del. Super.)

Haskins had argued he was not under such conditions. This Court rejected that argument. He had used this argument to further assert Kay, therefore, had no authority to even do an administrative search. This Court rejected that argument, too.

The allegations of criminal activity are bogus, even accepting them as “well-pled.” This Court is compelled to view the allegations in that favorable light on a motion to dismiss.⁵

Kay is wrong that a “1983” action cannot be brought against him individually. It can.⁶ But even with a more lax approach to considering Haskins’ allegations, he still does not make a claim that his *constitutional* rights were violated. He does cite various constitutional provisions which he contends were violated, but his complaint and its supplement do not in *substance* make a “1983” claim which can survive a motion to dismiss.

Insomuch as Haskins’ complaint and supplement fail to meet that threshold, any claim or cause founded on a “1983” basis is **DISMISSED with prejudice**.

B

That disposition means the Court turns to the next issue, the one on which it sought further information and briefing: insurance coverage for a tort action.

⁵ *Browne v. Robb*, 583 A.2d 949, 950 (Del. 1990).

⁶ *Hafer v. Melo*, 502 U.S. 21, 25, 112 C. Ct. 358, 362, 116 1.Ed.2d 301, ???(1991); *Hall v. McGuigan*, 743 A.2d 1197 (Del. Super. 1999).

Haskins was also given the opportunity to address the insurance coverage issue. He did not. Nowhere in his nine page supplemental response does he address the issue. His response is primarily a rehash, with added allegations and embellishments, of his original complaint. He seeks to re-enforce the claims that he made a sufficient showing to overcome the gross or wonton negligence loss of immunity element. The trouble is the Court already found in his favor on that point. It is why the Court sought additional information on the insurance coverage factor.

The centrality of the presence or absence of insurance coverage arises in this fashion. The State cannot be sued without its consent.⁷ The Delaware Constitution provides that the only way to limit or waive that immunity is by legislation.⁸ One such potential is the enactment of the State Insurance Coverage Program⁹ and the establishment of the Insurance Determination Committee.¹⁰ But these enactments alone are not enough to show waiver of immunity. As noted, the affiant to Kay's supplement, Debra Lawhead, is the Administrator of that Program. She swears there is no coverage for the actions Haskins alleges against Kay. That statement is enough to demonstrate that the State has

⁷ *Masten v. State*, 626 A.2d 838, 842 (Del. 1991).

⁸ *Del. Const.*, art. I, § 9.; *Shellhorn & Hill, Inc. V. State*, 187 A.2d 71 (Del. 1972).

⁹ 18 *Del. C.* § 6511.

¹⁰ 18 *Del. C.* § 6502.

not waived its immunity for an action brought under the Tort Claims Act.¹¹ So even if Haskins got over one bar, the absence of insurance shows, nevertheless, immunity remains.

It is important to note that in the Court's analysis of whether immunity exists or not there are two steps for a plaintiff, such as Haskins, to show: (1) the State has waived sovereign immunity for his or her claims, and (2) the State Tort Claims Act does not bar the action.¹² Further, however, consideration of the second factor, the Tort Claims Act, is only to be undertaken *after* it has been shown that there is an express legislative intent to waive immunity.¹³

Kay's original motion to dismiss did not address the insurance coverage issue. Nor did Haskins' address it. Therefore, this Court's analysis in the two opinions undertook in reverse order the analytical process the Supreme Court has said should exist, but the result reached is the same. The State has not waived immunity for the type of actions brought against Kay in his official capacity.

The result, therefore, is that Haskins' action against Kay under the Tort Claims Act is dismissed with prejudice.

¹¹ See *Doe v. Cates*, 499 A.2d 1175 (Del. 1985).

¹² *Pauley v. Reurochl*, 848 A.2d 569, 573 (Del. 2004).

¹³ *State v. Sheppard*, 2004 WL 2850086 (Del.).

Conclusion

For the reasons stated herein, plaintiff Carl Haskins' (1) action against defendant Jeff Kay is **DISMISSED with prejudice**, (2) 1983 action is **DISMISSED with prejudice**.

J.