### IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

## IN AND FOR KENT COUNTY

LEE ROYAL FISHER, :

C.A. No. K11C-01-040 WLW

Plaintiff, :

:

V.

SERGEANT WILFRED BECKLES, :

.

Defendant.

Submitted: November 26, 2013 Decided: February 10, 2014

### **ORDER**

Upon Plaintiff's Motions in Limine.

Granted in part; Denied in part.

And

Court's Decision on Sovereign Immunity and the Collateral Source Doctrine.

Patrick C. Gallagher, Esquire of Curley & Benton LLC, Dover, Delaware; attorney for Plaintiff.

Marc P. Niedzielski, Esquire and Michael F. McTaggart, Esquire, Department of Justice, Wilmington, Delaware; attorneys for Defendant.

WITHAM, R.J.

### **INTRODUCTION**

Before the Court are two outstanding legal issues in this civil action involving the alleged intentional beating of an inmate by a prison guard. First, Defendant has belatedly raised the defense of sovereign immunity. Second, Plaintiff argues that the collateral source rule should allow him to recover the value of his medical treatment, which was paid for by the Department of Correction. Also before the Court are two motions *in limine* filed by Plaintiff in regards to prior convictions of Plaintiff and one of Plaintiff's witnesses.

Pursuant to this Court's request, the parties have filed legal memoranda in support of their positions on the above issues. The Court has carefully considered the arguments and filings of both sides, and has set forth its decision below.

### FACTUAL AND PROCEDURAL BACKGROUND

On July 25, 2011, Plaintiff Lee Royal Fisher (hereinafter "Plaintiff") filed a complaint with this Court alleging various causes of action—including assault, battery, intentional infliction of emotional distress, and a violation of Plaintiff's civil rights under 42 *U.S.C.* § 1983—against Defendant Sergeant Wilfred Beckles (hereinafter "Defendant"), a correctional officer at James T. Vaughn Correctional Center in Smyrna, where Plaintiff was incarcerated in 2009 on robbery and weapons charges.¹ Plaintiff alleges that in January of 2009, Defendant intentionally and viciously beat Plaintiff because Plaintiff had previously filed a grievance against Defendant for

<sup>&</sup>lt;sup>1</sup> Sergeant Beckles is the only defendant. Plaintiff did not name the Department of Correction, the State, or any other correctional officer or prison official as a party to this action.

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another incident. Plaintiff alleges that Defendant beat Plaintiff while other correctional officers held Plaintiff down. Plaintiff was treated for his injuries at the prison infirmary, and was ultimately transported to Kent General Hospital for further treatment. The Department of Correction, through Correctional Medical Services, paid for Plaintiff's medical care without cost to Plaintiff. Plaintiff was ultimately released from prison later in 2009.

On March 7, 2012, Defendant moved for summary judgment on grounds of collateral estoppel and on Plaintiff's § 1983 claim. By memorandum opinion dated July 2, 2012, this Court denied Defendant's motion. Defendant made no mention of sovereign immunity in his motion for summary judgment.

Plaintiff filed four motions *in limine* on March 28, 2012. On October 15, 2013, Plaintiff filed a motion to partially renew two of his motions *in limine*, and withdrew the other two motions. In his first renewed motion *in limine*, Plaintiff seeks to prevent Defendant from referring to Plaintiff's criminal history preceding his Delaware conviction for robbery and weapons charges and from referring to Plaintiff's "other activities." Plaintiff's second renewed motion *in limine* concerns Otto Gary Gibbs (hereinafter "Gibbs"), Plaintiff's former cell mate and one of Plaintiff's anticipated trial witnesses. Plaintiff seeks to prohibit Defendant from making any reference to the nature of Gibbs' conviction for unlawful sexual intercourse or any reference to Gibbs' status as a registered sex offender.

A pretrial conference was held on November 12, 2013. At the conference, counsel for Defendant raised the defense of sovereign immunity for the first time.

Defendant's counsel also expressed opposition to Plaintiff's recovery of any medical expenses relating to Plaintiff's injuries in January of 2009, on the grounds that the collateral source rule does not permit Plaintiff to recover the value of treatment that was paid for by the Department of Correction. Based on how late Defendant invoked sovereign immunity, the Court continued the trial date and requested memoranda from the parties on: (1) whether sovereign immunity applies; and (2) whether Plaintiff can recover the cost of the medical expenses paid for by the Department of Corrections under the collateral source rule. The Court also reserved decision on Plaintiff's motions in limine.

### **DISCUSSION**

### Sovereign Immunity

This Court has observed that sovereign immunity only applies to the State and its officials and agencies sued in their official capacities; the doctrine "does not apply to state employees sued for their own conduct." When a state employee is sued in his individual capacity, the Court "goes directly to the State Tort Claims Act" and determines whether qualified immunity shields the state employee from liability.<sup>3</sup> Section 4001 of the State Tort Claims Act provides that a state employee shall be entitled to qualified immunity from liability when the following elements are present: (1) the act or omission arose out of the employee's exercise of a discretionary

<sup>&</sup>lt;sup>2</sup> Parker v. Wireman, 2012 WL 1536943, at \*1 (Del. Super. Apr. 30, 2012).

<sup>&</sup>lt;sup>3</sup> See id.

function; (2) the "act or omission was done in good faith and in the belief that the public interest would best be served thereby"; and (3) the act or omission was done "without gross or wanton negligence. . . ."<sup>4</sup> Qualified immunity is an affirmative defense.<sup>5</sup> The Delaware Supreme Court has held that "failure to raise an affirmative defense may constitute a waiver, if that defense is not raised in a timely fashion."<sup>6</sup>

The State is not a party to this action; only the Defendant, in his individual capacity, is a party to these proceedings. Accordingly, sovereign immunity does not apply. As to whether qualified immunity applies to shield Defendant from liability, there is no need to analyze whether the requirements of § 4001 have been satisfied, because Defendant has waived qualified immunity. Defendant had prior opportunities to raise qualified immunity as an affirmative defense, including when Defendant filed his earlier motion for summary judgment, but failed to do so. Defendant's counsel first raised immunity at the November 12, 2013 pretrial conference, without prior notice to Plaintiff. Defendant did not avail himself of the defense of qualified immunity in a timely manner. Accordingly, the Court considers the defense waived, and Defendant shall not be permitted to raise or otherwise reference sovereign immunity or qualified immunity at trial.

<sup>&</sup>lt;sup>4</sup> 10 Del. C. § 4001(1)-(3).

<sup>&</sup>lt;sup>5</sup> Hall v. McGuigan, 743 A.2d 1197, 1206 (Del. Super. 1999).

<sup>&</sup>lt;sup>6</sup> Ratcliffe v. Fletcher, 690 A.2d 466, 1996 WL 773003, at \*3 (Del. Dec. 24, 1996) (TABLE) (citing Cannelongo v. Fidelity Am. Small Bus. Inv. Co., 540 A.2d 425, 440 (Del. 1988)).

### Collateral Source Rule

Under the collateral source rule, "a tortfeasor may not benefit from any money the injured party may receive from sources other than the tortfeasor." When the Delaware Supreme Court officially recognized the rule nearly fifty years ago as being "firmly embedded" in Delaware law, the Supreme Court explained: "[t]he collateral source doctrine is predicated upon the theory that a tortfeasor has no interest in, and therefore no right to benefit from, monies received by the injured person *from sources unconnected with the defendant.*" Subsequent cases have explained that "when an injured person has insurance which pays for the cost of treatment and hospitalization, in whole or in part, those payments inure to the benefit of the insured rather than the tortfeasor." The reasonable value of discounts for medical services, and even the value of medical services provided gratuitously, are recoverable under the collateral source rule.

The Supreme Court has stressed that "[d]ouble recovery by a plaintiff is acceptable so long as the source of such payment is unconnected to the tortfeasor." 11

<sup>&</sup>lt;sup>7</sup> *Onusko v. Kerr*, 880 A.2d 1022, 1024 (Del. 2005) (citing *Farrell v. Gordon*, 770 A.2d 517, 520 (Del. 2001)).

<sup>&</sup>lt;sup>8</sup> Yarrington v. Thornburg, 205 A.2d 1, 2 (Del. 1964) (emphasis added).

<sup>&</sup>lt;sup>9</sup> Mitchell v. Haldar, 883 A.2d 32, 38 (Del. 2005).

<sup>&</sup>lt;sup>10</sup> Onusko, 880 A.2d at 1024; Mitchell, 883 A.2d at 38 (citing Hueper v. Goodrich, 314 N.W.2d 828, 830 (Minn. 1982)).

<sup>&</sup>lt;sup>11</sup> Onusko, 880 A.2d at 1024 (citing Farrell, 770 A.2d at 520) (emphasis added).

Analysis of the collateral source itself, and whether there is any connection between the collateral source and the defendant, is critical to determining whether double recovery should be allowed under the collateral source rule. Indeed, in *Yarrington v. Thornburg*, the aforementioned case in which the Supreme Court officially recognized the collateral source rule for the first time, the Supreme Court denied double recovery by the plaintiff on the grounds that the collateral source was in fact connected to an insurance policy purchased by the defendant. The *Yarrington* Court explained: It he doctrine. . .does permit the tortfeasor to obtain advantage of payments made by himself or from a fund created by him; in such an instance the payments come, not from a collateral source, but from the defendant himself.

Before the Court is a situation unique from the scenarios presented in the foregoing cases. At all times relevant to this case, Plaintiff was a prisoner within the custody of the Delaware Department of Correction. Defendant was a correctional officer employed by the Department of Correction. Plaintiff was injured while he was incarcerated, and the injuries occurred during Defendant's performance of his official duties. <sup>15</sup> Pursuant to 11 *Del. C.* § 6536, the Department of Correction must provide

<sup>&</sup>lt;sup>12</sup> See Miller v. State Farm Mut. Auto. Ins. Co., 993 A.2d 1049, 1053 (Del. 2010) ("[b]ecause State Farm contributed nothing to the fund that created the collateral source and had no interest in that fund, State Farm should not have been allowed to benefit from it.").

<sup>&</sup>lt;sup>13</sup> *Yarrington*, 205 A.2d at 2-3.

<sup>&</sup>lt;sup>14</sup> *Id.* at 2.

<sup>&</sup>lt;sup>15</sup> Plaintiff's allegation is that Defendant's beating of Plaintiff was the result of Defendant's personal vendetta against Plaintiff. Defendant admits that he struck Plaintiff at least once but denies

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reasonable health and medical services for prisoners at each facility.<sup>16</sup>

When Plaintiff sustained his injuries as a result of the altercation with Defendant, he was treated at the prison infirmary, and the treatment was paid for by the Department of Correction. Plaintiff did not pay for his treatment, nor was the treatment paid for by any insurance policy held by Plaintiff. Further, this was not the mere gratuitous provision of medical services; the services were provided pursuant to the Department of Correction's statutorily mandated duty. While Defendant or his insurance did not personally pay for any portion of Plaintiff's medical treatment, it cannot be said that the collateral source here—i.e., the Department of Correction—is wholly independent of or otherwise unconnected to Defendant. Plaintiff was injured as an inmate in the custody of the Department of Correction, and Defendant was working as a Department of Correction employee when he struck Plaintiff. Even though the Department of Correction is not a party to this action, the Department is still connected to Defendant as Defendant's employer. As such, the requirement of the collateral source rule that the collateral source be unconnected to the defendant is not met here.

It follows that Plaintiff should not be allowed to recover medical expenses paid

all other aspects of Plaintiff's allegations. The Court reaches no conclusion on this allegation as to the nature of the altercation between Plaintiff and Defendant, as whether that allegation is true would be a determination for the finder of fact to make at trial. The parties seem to agree, however, that the incident between the parties occurred during Defendant's performance of his official duties—namely, escorting Plaintiff to the prison infirmary for reasons unrelated to this case.

<sup>&</sup>lt;sup>16</sup> 11 *Del. C.* § 6536(a).

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for by the Department of Correction, when Plaintiff paid no consideration for that coverage whatsoever, the coverage was statutorily mandated, and the Department of Correction employed the Defendant. The Court notes the possibility of a chilling effect on correctional officers' use of force against inmates were the Court to hold otherwise. If correctional officers, sued in their individual capacity, were to be found liable for the value of medical services that the Department of Correction is statutorily mandated to pay for, that were received by prisoners as a result of force inflicted upon them by correctional officers, such correctional officers might very well hesitate to use force against inmates in the future in fear of incurring liability, even when presented with a dangerous situation. The Court recognizes that the collateral source rule is a broad doctrine that is firmly established in Delaware's jurisprudence. But if a line can be drawn to mark the boundaries of the rule, for policy reasons and the reasons noted *supra*, that line should be drawn at the prison gates.

Based on the foregoing, Plaintiff shall not be permitted to recover the expense of any medical service provided by the State that was paid for by the Department of Correction. Accordingly, Plaintiff cannot present any evidence of these expenses at trial.

# Plaintiff's prior convictions

The Court now turns to Plaintiff's two motions *in limine*. In his first motion, Plaintiff seeks to prohibit Defendant from referencing Plaintiff's prior convictions and Plaintiff's "other activities."

Rule 609 of the Delaware Uniform Rules of Evidence provides that evidence

that a witness has been convicted of a crime is admissible for purposes of impeaching the witness' credibility if: (1) the conviction was for a felony, and the Court "determines that the probative value of admitting this evidence outweighs its prejudicial effect"; or (2) the crime involved dishonesty or a false statement. No balancing test is required if the underlying crime involves dishonesty or a false statement. Robbery is a crime involving dishonest conduct. Rule 609(b) provides that if more than 10 years have elapsed since the date of conviction or the witness' release from incarceration—whichever is later—evidence of a conviction is not admissible unless "the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect."<sup>20</sup>

At the time of the events underlying this case, Plaintiff was incarcerated based on his 1993 Delaware conviction for robbery in the first degree and possession of a deadly weapon during the commission of a felony. Plaintiff was released from incarceration for these convictions in 2009. Plaintiff also has a 1974 New Jersey conviction for robbery, for which he served a sentence until 2000; a prior 1975 conviction for robbery and disorderly conduct (it is unclear where this conviction

<sup>&</sup>lt;sup>17</sup> D.R.E. 609(a)(1)-(2).

<sup>&</sup>lt;sup>18</sup> *Morris v. State*, 795 A.2d 653, 665 (Del. 2002) (citing *Gregory v. State*, 616 A.2d 1198, 1203 (Del. 1992)).

<sup>&</sup>lt;sup>19</sup> *Id*.

<sup>&</sup>lt;sup>20</sup> D.R.E. 609(b).

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arose and when this sentence terminated); and a 1965 New York conviction for possession of a weapon (it is also unclear when this sentence terminated).

In a letter to the Court dated November 25, 2013, Plaintiff concedes that his robbery convictions are admissible under Rule 609(a)(2), because robbery is a crime involving dishonesty. This concession broadly applies to all of Plaintiff's robbery convictions. While Plaintiff is correct, this concession fails to account for the tenyear rule of Rule 609(b). Plaintiff's sentence for the 1974 robbery conviction ended in 2000, and it is unclear from the record when Plaintiff's sentence for the 1975 conviction ended. The record is also devoid of specific details as to either conviction, even though Rule 609(b) requires a showing of specific facts and circumstances for convictions older than ten years in order to allow the Court to effectively balance probative value of a conviction against its prejudicial effect. Because the 1974 and 1975 convictions implicate the ten-year rule of Rule 609(b), and because Defendant has failed to offer specific facts and circumstances in support of these convictions, Defendant is prohibited from introducing evidence as to the 1974 and 1975 robbery convictions. For the same reasons, Defendant is also prohibited from introducing evidence of the 1965 weapons conviction and the 1975 disorderly conduct conviction. As to the 1993 possession of a deadly weapon during commission of a felony conviction, for which Plaintiff was released from incarceration in 2009, the Court finds that the probative value of this conviction outweighs its prejudicial effect. Evidence of this conviction is admissible for impeachment purposes.

Finally, Plaintiff also moves to prohibit any reference to his "other activities."

The only example Plaintiff gives of these "other activities" is Plaintiff's past involvement in the Black Panthers organization. The Court fails to see how this is relevant to any issue in this case, thus Defendant is prohibited from referencing Plaintiff's involvement with the Black Panthers. However, Plaintiff's vague allusion to "other activities" does not provide the Court with enough information to exclude anything else. Thus, to the extent that Plaintiff is moving to exclude any reference to other activities besides Plaintiff's involvement with the Black Panthers, Plaintiff's motion is denied.

### Nature of Gibbs' Conviction

As to Plaintiff's second motion *in limine*, Defendant has acknowledged that he is not seeking to introduce evidence of Gibbs' status as a registered sex offender. Because Gibbs' sex offender designation is irrelevant to this case, Defendant is prohibited from referencing it.

Gibbs was convicted for unlawful sexual intercourse in 1996 and was released from incarceration in 2011. Plaintiff's argument regarding Gibbs' conviction is inconsistent. In his motion to renew this motion *in limine*, Plaintiff acknowledges that Gibbs' "credibility could possibly be impeached with his conviction [under] D.R.E. 609." Plaintiff further argues that Defendant should not be permitted to inquire into the type of crime for which Gibbs was convicted, and argues that Defendant "should be limited to only impeaching Mr. Gibbs with the fact he was convicted of a felony and the date and place of conviction." Yet in his November 25 letter to the Court, Plaintiff seems to argue that Gibbs' conviction should be excluded

in its entirety under the balancing test of Rule 609(a)(1). In *Archie v. State*, the Delaware Supreme Court explained that when a cross-examiner seeks to introduce evidence of a witness' prior conviction pursuant to Rule 609(a), the lawyer is allowed to "inquire into the type of crime and the date and place of convictions, without releasing the prejudicial details of the events. . . ."<sup>21</sup>

Unlawful sexual intercourse is not a crime involving dishonesty, thus the Court must balance the probative value of the conviction against its prejudicial effect. The Court finds that the impeachment value of Gibbs' conviction outweighs its prejudicial effect under Rule 609(a)(1). Further, under *Archie*, Defendant is permitted to introduce evidence of the nature of the conviction—*i.e.*, that Gibbs was convicted of unlawful sexual intercourse—as well as the date and place of the conviction. However, Defendant must stop there. Any further details as to Gibbs' conduct that provided the basis for the conviction would be too prejudicial.

### **CONCLUSION**

Based on the foregoing, Defendant is prohibited from raising sovereign immunity or qualified immunity. Pursuant to the Supreme Court's decision in *Yarrington v. Thornburg*, Plaintiff is prohibited under the collateral source rule from recovering the value of his medical treatment that was paid for by the Department of Correction.

Plaintiff's first renewed motion in limine is **GRANTED** in part as to Plaintiff's

<sup>&</sup>lt;sup>21</sup> Archie v. State, 721 A.2d 924, 928 (Del. 1998).

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past affiliation with the Black Panthers, as well as Plaintiff's 1965 weapons

conviction, 1974 robbery conviction, and 1975 conviction for robbery and disorderly

conduct, and is **DENIED** in part as to Plaintiff's 1993 convictions for robbery and

possession of a deadly weapon during commission of a felony.

Plaintiff's second renewed motion in limine is **GRANTED** in part as to Gibbs'

sex offender status and is **DENIED** in part as to Gibbs' 1996 conviction for unlawful

sexual intercourse and as to the date, place and nature of that conviction. Defendant

is prohibited from introducing specific details of Gibbs' conviction.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

Resident Judge

WLW/dmh

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