

IN THE SUPERIOR COURT OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

ROBERT ANDERSON, )  
)  
Plaintiff, )  
)  
v. ) C.A. No. N14C-01-177 WCC  
)  
STATE OF DELAWARE, ) JURY OF 12 DEMANDED  
and DEPARTMENT OF CORRECTION )  
OFFICER #1 (Name Currently Unknown) )  
individually and in his official capacity )  
and DEPARTMENT OF CORRECTION )  
OFFICER MYRON S. AMAR )  
individually and in his official capacity. )  
)  
Defendants. )

Submitted: April 28, 2014  
Decided: July 25, 2014

**Defendant's Motion for Summary Judgment or,  
in the Alternative, for Dismissal – DENIED**

**MEMORANDUM OPINION**

Bartholomew J. Dalton, Esquire and Andrew C. Dalton, Esquire, Dalton & Associates, P.A., 1106 West 10<sup>th</sup> Street, Wilmington, DE 19806. Attorneys for Plaintiff.

Joseph C. Handlon, Esquire, State of Delaware Department of Justice, 820 N. French Street, Wilmington, DE 19801. Attorney for Defendants.

**CARPENTER, J.**

Before the Court is the State's Motion for Summary Judgment or, in the Alternative, for Dismissal. The Court finds that the Plaintiff is entitled to conduct further discovery to ascertain potentially applicable policies and the Court is not in a position to conclude at this time as a matter of law that the State has not purchased any applicable coverage. Accordingly, the Motion for Summary Judgment is hereby denied.<sup>1</sup>

### **FACTUAL BACKGROUND**

Plaintiff brought this suit alleging excessive force by two Department of Correction officers while he was in custody. Plaintiff alleges that, while incarcerated at the Howard Young Correctional Facility ("Howard Young") on or about June 21, 2013, he was beaten by two officers; one unknown and the other, Defendant Amar.

Plaintiff states that he was originally incarcerated on June 1, 2013, for a capias warrant stemming from his failure to pay a fine for inattentive driving. He remained in custody at Howard Young until June 21, 2013, however, because he was unable to post bail. The night prior to his release on June 21, 2013, Plaintiff was moved to a holding cell where he spent his final night. It was in this cell where Plaintiff alleges he was subject to verbal and physical assaults by the two

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<sup>1</sup> Although the Motion offers the alternative of dismissal, because the Court is considering the affidavit of Debra Lawhead, which is outside the pleadings, the appropriate review is summary judgment.

officers, which severely injured Plaintiff. After the incident, Plaintiff was transported to Saint Francis Hospital for treatment. Plaintiff further asserts that Defendant Amar has been criminally charged in relation to the incident.

Plaintiff's Complaint alleges that the incident on June 21, 2013 amounts to excessive force in violation of 42 U.S.C. § 1983 by the officers (Count I); excessive force in violation of the Delaware Constitution by the State and the officers (Count III);<sup>2</sup> vicarious liability of the State under *respondeat superior* for the acts of the officers (Count IV); assault and battery by the officers (Count V); and intentional infliction of emotional distress by the officers (Count VI).

### **STANDARD OF REVIEW<sup>3</sup>**

In reviewing a motion for summary judgment pursuant to Rule 56, the Court must determine whether any genuine issues of material fact exist.<sup>4</sup> Specifically, the moving party bears the burden of showing that there are no genuine issues of material fact so that he is entitled to judgment as a matter of law.<sup>5</sup> Further, the Court must view all factual inferences in a light most favorable to the non-moving party.<sup>6</sup> Therefore, summary judgment will not be granted if it appears that there is

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<sup>2</sup> Count II was deleted in Plaintiff's First Amended Complaint and the subsequent counts were not renumbered.

<sup>3</sup> See n.1.

<sup>4</sup> Super. Ct. Civ. R. 56(c); *Wilm. Trust Co. v. Aetna*, 690 A.2d 914, 916 (Del. 1996).

<sup>5</sup> *Moore v. Sizemore*, 405 A.2d 679 (Del. 1979).

<sup>6</sup> *Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1361 (Del. 1990).

a material fact in dispute or that further inquiry into the facts would be appropriate.<sup>7</sup>

## DISCUSSION

The State, in the Motion for Summary Judgment, argues that it cannot be liable for the alleged actions because (1) the State is not a “person” as required for Plaintiff’s § 1983 claims; (2) there is no *respondeat superior* liability under § 1983; and (3) the State is entitled to sovereign immunity for the remainder of the claims. Plaintiff concedes that the State cannot be liable under § 1983 and does not challenge the State’s first or second arguments. Therefore, the only issue in dispute is whether the State is entitled to sovereign immunity and, therefore, entitled to summary judgment on Plaintiff’s remaining counts of excessive force under the Delaware Constitution and vicarious liability for the officers’ assault and battery and intentional infliction of emotional distress.

“For plaintiffs to prevail in a suit against the State, they must show that: (1) the State has waived the defense of sovereign immunity for the actions mentioned in the complaint; and, (2) the State Tort Claims Act does not bar the action.”<sup>8</sup> As to the first prong, “[c]arrying insurance coverage for risks or losses acts as a

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<sup>7</sup> *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. Super. 1962), *rev’d in part* on procedural grounds and *aff’d in part*, 208 A.2d 495 (Del. 1965).

<sup>8</sup> *Pauley v. Reinoehl*, 848 A.2d 569, 573 (Del. 2004).

waiver on behalf of the State to the extent of the coverage available.”<sup>9</sup> The State has provided an affidavit of Debra Lawhead, the Insurance Coverage Administrator for the State, which sets forth that neither the State, nor the Department of Correction, has purchased insurance which would cover Plaintiff’s claims. Plaintiff argues that this affidavit is insufficient and that, at a minimum, Plaintiff should be allowed to conduct a discovery deposition of Ms. Lawhead to ascertain the extent of insurance.

The Court appreciates that it is customary for the State to submit affidavits from state officials indicating that the State has not obtained insurance for the litigated loss.<sup>10</sup> However, when there is a reasonable dispute about the affidavit provided, discovery is still prudent. The Court finds in this case and at this early stage of the litigation, Plaintiff’s arguments support providing him an opportunity to investigate the affidavit’s claims further. The Court will deny the Motion for Summary Judgment without prejudice to the State, who may re-file once insurance-coverage discovery has occurred.

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<sup>9</sup> See *Smith v. Christina Sch. Dist.*, 2011 WL 5924393, at \*2 (Del. Super. Nov. 28, 2011).

<sup>10</sup> *Estate of Williams v. Corr. Med. Servs., Inc.*, 2010 WL 2991589, at \*4 (Del. Super. July 23, 2010) (“Generally, defendants asserting sovereign immunity often submit affidavits from state officials indicating that the State has not obtained insurance to cover the litigated loss. While such documentation had not been provided to the Court prior to the hearing on these motions, it was provided during the hearing to counsel and there appears to be no dispute that the State has not contracted for insurance to cover these risks. As such, sovereign immunity will prevent this action from proceeding against DOC and the motion for judgment on the pleadings as to DOC is granted.”) (internal citations omitted).

**CONCLUSION**

For the aforementioned reasons, Defendant's Motion for Summary Judgment is hereby DENIED.

**IT IS SO ORDERED.**

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/s/ William C. Carpenter, Jr. \_\_\_\_\_  
Judge William C. Carpenter, Jr.