EFiled: Oct 22 2012 01:55PM EDT
Filing ID 47208254
Case Number 488,2012

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTHONY J. HUNT, a minor, by his next friend, LISA C. DeSOMBRE, and LISA C. DeSOMBRE, individually,	*	No. 488, 2012
Plaintiffs Below, Appellants,	*	Court Below: Superior Court of Delaware, Kent County, C.A. No. K10C-01-049 (WLW)
v.	*	
THE STATE OF DELAWARE; THE DEPARTMENT OF SAFETY AND HOMELAND SECURITY; THE DIVISION OF THE DELAWARE STATE POLICE; and TROOPER PRITCHETT,	*	
Defendants Below, Appellees.	*	

APPELLANTS' OPENING BRIEF

SCHMITTINGER & RODRIGUEZ, P.A.

WILLIAM D. FLETCHER, JR.
Bar I.D. No. 362
NOEL E. PRIMOS
Bar I.D. No. 3124
414 S. State Street
P.O. Box 497
Dover, DE 19903-0497
(302) 674-0140
Attorneys for Anthony J. Hunt & Lisa C. DeSombre, Plaintiffs Below-Appellants

Dated: October 22, 2012
WDF/NEP/ljo

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

PAGE

CASES

STATUTES

OTHER AUTHORITIES

NATURE OF PROCEEDINGS

Plaintiffs-Below Appellants Anthony J. Hunt, a minor, and Lisa C. DeSombre filed this action for civil rights violations and state tort claims against Defendants The State of Delaware; The Department of Safety and Homeland Security; The Division of The Delaware State Police; and Trooper Pritchett on January 28, 2010.[1] After completion of discovery, Defendants filed a (joint) Motion for Summary Judgment, and Plaintiffs filed an opposition thereto.

On August 23, 2012, the Kent County Superior Court granted the Defendants' Motion for Summary Judgment, on all counts. Thereafter, Plaintiffs timely appealed the Superior Court's decision, as to all counts. This is Appellants' Opening Brief supporting their appeal.

For purposes of simplification, "Defendants" refers to all the Defendants in this litigation, whereas "the State Defendants" refers to the State of Delaware and its agencies, but does not include Trooper Pritchett. Anthony Hunt and Lisa DeSombre will be referenced as "Plaintiffs" and reference to solely Anthony Hunt will be titled as "Plaintiff" or "Plaintiff Hunt."

[1] Three additional Defendants, The Cape Henlopen School District; The Board of Education of Cape Henlopen School District; and David S. McDowell were also Defendants in this matter. An out-of-court settlement was reached among Plaintiffs and these three Defendants prior to the summary judgment stage of this litigation. Accordingly, these Defendants are not involved in this appeal.

SUMMARY OF ARGUMENT

I. The Superior Court erred in granting summary judgment as to Plaintiffs' 42 U.S.C. §1983 claims, as Plaintiffs demonstrated that Defendant Pritchett is not shielded by qualified immunity and has violated Plaintiff's clearly established constitutional right to be free from unreasonable seizures, pursuant to the Fourth Amendment of the United States Constitution.

II. The Superior Court erred in granting summary judgment as to Plaintiffs' state law claims of Intentional Infliction of Emotional Distress, False Arrest & False Imprisonment and Battery, as Defendant Pritchett's tortious conduct is not protected by state law, pursuant to 10 Del. C. §4001.

STATEMENT OF FACTS

On January 31, 2008, Plaintiff Anthony J. Hunt was eight years old and in the third grade at Richard A. Shields Elementary School in Cape Henlopen School District ("the School"). (A-36 – A-37) At this time, David McDowell was the Assistant Principal of Richard Shields Elementary. McDowell was responsible for the majority of discipline for the School, including events that occurred on the school buses. (A-39)

On January 30, 2008, McDowell contacted Defendant Delaware State Trooper Pritchett ("Defendant Pritchett") and asked him to come to the School to talk to some fifth grade students about bullying. (A-42 – A-43) Defendant Pritchett was on a four-month assignment as the School Resource Officer ("SRO") for Cape Henlopen School District. (A-54) Pritchett had no training and little experience in interrogating elementary school students; in fact, Pritchett testified that based on their age, "**an elementary student can't commit a crime**." (A-58 – A-59) Despite Pritchett's belief to the contrary, the contract between the Delaware State Police and Cape Henlopen School District states the SRO was assigned only to the high school. (A-55 – A-58; A-89 – A-90)

McDowell had requested that Pritchett come to the School to talk to these particular students because the parents, grandparents and/or guardians of these students had directly requested McDowell have a detective give their children a talk about bullying. (A-60 – A-62; A-40 – A-41) On January 30, 2008, Pritchett gave a presentation to these students about bullying, together as one group, in McDowell's office, with McDowell present the entire time. (A-60 – A-62; A-42 – A-43)

The next day, January 31, 2008, McDowell found out that a bullying incident had allegedly occurred when Student "AB" stole one dollar from an autistic student on the school

bus.[2] (A-60; A-65 – A-67) Upon learning this, McDowell promptly contacted AB's mother[3] to tell her about this incident, and asked if she would approve of an officer speaking with her son about the alleged bullying. (A-44 – A-49; A40 – A42) AB's mother consented. (A-44 – A-49; A40 – A42) It was only subsequent to receiving the mom's consent that McDowell then contacted Pritchett and asked him to come to the School to investigate the alleged bullying event between AB and the autistic child. (A-44 – A-45) Upon arrival at the school, McDowell informed Pritchett that he knew it was AB who had stolen the money, and that Pritchett should question only AB, whose mother had consented. (A-68 – A-70, A-47 – A-49)

Pritchett spoke with AB, who admitted he had the stolen $1 at his house, but claimed that it was another student who had stolen the money from the autistic boy, although he did not know this child's name. (A-71) Despite AB agreeing to return the money the next day, McDowell's statements that he knew AB stole the money, and AB's inability to give the name of the alleged thief, Pritchett decided to take matters into his own hands. Without seeking approval or consulting with McDowell—who was in charge of discipline for both school and bus events—Pritchett requested a bus seating chart from a secretary. (A-72 – A-75) He saw Plaintiff's name on the chart and decided—without a shred of evidence, and, in fact, evidence to the contrary—to interrogate Plaintiff. Pritchett emphatically stated twice in his deposition that he was 99% sure that Plaintiff had no involvement in stealing the money. (A-76; A-86)

During the first five minutes of the interrogation, Pritchett told Plaintiff Hunt 11-12 times that he (Pritchett) had the authority to arrest him (Plaintiff) and put him in jail if he did not tell the truth. (A-92) Pritchett told Plaintiff he had his handcuffs with him, and Pritchett was in full

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[2] For purposes of confidentiality, students are not being named. The student who stole the money is referred to as "AB," and the autistic student as "autistic student."

[3] McDowell refers to her as AB's "mom, or grandparent, the guardian." 'Mother' is used herein solely to simplify the reference, and is not intended as a conclusive fact of the legal relationship.

uniform, with his gun. (A-95) Plaintiff was crying and very upset, as Pritchett was talking "in a really like mean voice." (A-93) Even Pritchett readily admitted that he talked in depth about how children who are bad have to go to a bad place—Stevenson House—where people are mean, and the kids are treated like criminals, just waiting to go to the "real prison for kids." (A-78 – A-80; A-88) Pritchett told Plaintiff that if Plaintiff were at Stevenson House his siblings would be upset and could not see him and his parents would say he was bad. (A-81) As a result, Plaintiff got a very serious look on his face and had tears in his eyes. (A-81 – A-82) Pritchett also admitted that he touched Plaintiff Hunt during his interrogation, although Pritchett stated that it was only to "break the ice." (A-77)

This interrogation lasted nearly one hour. "I remember when I went to the office it was around 9:00. And when we left, it—when I was in my classroom, it was like 9:55." (A-93) A clock was in the room in which Plaintiff was interrogated, which assisted Plaintiff in knowing the length of the interrogation. (A-93 – A-94) During the questioning of Plaintiff, Pritchett shut the door to the room. (A-83 – A-84) Only after the completion of the interrogation, when Pritchett opened the door and allowed Plaintiff to leave the room, did Pritchett offer to call Plaintiff's parents. (A-94) Plaintiff declined, as the interrogation had ceased, and returned to his classroom. (A-95) Pritchett told Plaintiff "sorry," as he knew Plaintiff had played no role in the alleged bullying or theft. (A-95)

Plaintiff advised his parents what occurred, and the next day, February 1, 2008, Dan Gaffney, radio show host of WGMD, 92.7, a station out of Lewes, Delaware, received a call from Plaintiff's father, Anthony Hunt, who described the interrogation, as relayed to him by his son. (A-97 – A-98; A-103 – A-120) While off the air, Gaffney received a call from a man who identified himself as the officer (Defendant Pritchett) involved in the incident with the minor

Plaintiff. (A-99 – A-100; A-107) (The audio recording of the relevant portions of Mr. Gaffney's program were electronically recorded by Mr. Gaffney, and counsel for Plaintiff had the audio transcribed into a typed document, *see* Affidavit, A-103.) According to Gaffney, Pritchett stated that the details of the events, as earlier described in the interview broadcast with Mr. Hunt (father), were accurate. (A-99 – A-100; A-107, A-114) This included the fact that Pritchett had "interrogated" Plaintiff, that Plaintiff was crying, and that the allegation that Plaintiff was involved in any sort of misconduct was false. (A-99 – A-100; A-107, A-114) Pritchett also told Gaffney that the School's Principal (no specific name was given) instructed Pritchett to scare Plaintiff and to "act mad." (A-102; A-114) Pritchett admitted to Gaffney in this phone call, "**if you're going to *interrogate* someone [versus just talking], or you know, if there's an investigation going on, then yes, absolutely. Then you have to contact them [the interrogated student's parents]**." (A-85, emphasis added)

Subsequent to the Gaffney broadcast, Plaintiff Hunt's mother, Plaintiff Lisa DeSombre, contacted the School regarding the incident. McDowell profusely apologized to DeSombre, advising that he only became aware of the incident when he heard the Gaffney radio broadcast. (A-50 – A-52) McDowell stated that he had no idea Plaintiff Hunt was involved in the investigation by Trooper Pritchett and that McDowell would have promptly called DeSombre had he known Pritchett was going to speak with the minor Plaintiff. (A-50 – A-52) Pritchett also called DeSombre, and apologized for the entire incident, stating that in hindsight he should have contacted her. (A-87) As a direct result of this traumatic incident, eight-year old Plaintiff Hunt withdrew from the School and began alternative education.

Plaintiffs brought claims against Defendants State of Delaware, The Department of Safety and Homeland Security, The Division of the Delaware State Police and Trooper Pritchett.

Plaintiffs' civil rights violations were made against Defendant Pritchett, per 42 U.S.C. §1983 ("§1983"). Plaintiffs' state tort claims of intentional infliction of emotional distress; false imprisonment & false arrest; and battery were made against all Defendants. These common law state claims were brought against the State and its agencies based on the theory of *respondeat superior*, as it relates to Defendant Pritchett's wrongful conduct.

ARGUMENT I

THE SUPERIOR COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO PLAINTIFFS' 42 U.S.C. §1983 CLAIMS, AS PLAINTIFFS DEMONSTRATED THAT DEFENDANT PRITCHETT IS NOT SHIELDED BY QUALIFIED IMMUNITY AND HAS VIOLATED PLAINTIFF'S CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT TO BE FREE FROM UNREASONABLE SEIZURES, PURSUANT TO THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

(1). QUESTION PRESENTED

Did the Superior Court err in granting summary judgment as to Plaintiffs' claim pursuant to 42 U.S.C. §1983? Plaintiffs preserved the right to appeal this issue in their Opposition to the State Defendants' Motion for Summary Judgment, dated April 13, 2012. (A-28 – A31)

(2). SCOPE OF REVIEW

"In an appeal from a trial court's decision to grant summary judgment, this Court's scope of review is *de novo*, not deferential, as to both the facts and the law." *Lapoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 191 (Del. 2009).

(3). MERITS OF ARGUMENT

In its Opinion, the Superior Court did not provide any independent analysis or reasoning for its dismissal of Plaintiffs' §1983 claims. It only stated, "Plaintiff was not in custody at any time, nor was he searched or seized." *See* Exh. A, p. 16. There was some explanation of these issues within the discussion of Plaintiffs' state law claims of false imprisonment and false arrest. Plaintiffs assert that the Superior Court erred in not independently evaluating the arguments set forth by Plaintiffs regarding their §1983 claim, especially with regard to the unreasonable seizure involving an eight year old child within a public school setting.

To state a §1983 claim, a plaintiff must establish (1) that the defendant, acting under color of state law, (2) deprived plaintiff of a right secured by the Constitution or the laws of the United States. *Chainey v. Street*, 523 F.3d 200, 219 (3d Cir. 2008). In determining whether a

§1983 claim is viable, the plaintiff must first overcome the burden of a qualified immunity defense. The determination of a qualified immunity defense no longer mandates the two-part test of *Saucier v. Katz*, 553 U.S. 194 (2001), which required a court to first determine whether a constitutional violation occurred before addressing whether the constitutional right at issue was clearly established. *Pearson v. Callahan*, 129 U.S. 808, 821-23 (2009). However, a qualified immunity defense still involves the two issues addressed in the *Saucier* test, and courts are free to use the test.

> The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted... If the officer's mistake as to what the law requires is reasonable, the officer is entitled to qualified immunity.

Saucier, 553 U.S. at 202, 205. "In deciding whether a right is clearly established, the inquiry must be undertaken in light of the specific context of the case, and not as a broad general proposition." *Id.* at 201. Here, it is clear that Defendant Pritchett was acting under color of state law, as he was a uniformed, fully armed and equipped Delaware State Police Trooper in his interaction with Plaintiff Hunt. This element is not in dispute.

As to the specific constitutional protection, Plaintiff Hunt has the Fourth Amendment right to be free from an unreasonable seizure. Generally, "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v. Ohio*, 392 U.S. 1, 16 (1968). A seizure is reasonable only when it is justified by a warrant or probable cause. *Shuman ex. rel. Shertzer v. Penn Manor Sch. Dist.*, 422 F.3d 141, 147 (3d Cir. 2005). An officer may "constitutionally seize" a person without a warrant or probable cause to conduct a *Terry* stop, which is a "brief, investigatory stop when the officer has reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000), citing *Terry*, 392 U.S. at 30. "The reasonable suspicion standard requires the officer to point to specific

and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." *Couden v. Duffy,* 446 F.3d 483 (3d Cir. 2006), citing *Terry*, 392 U.S. at 21. "There are limits... to how far police training and experience can go towards finding latent criminality in innocent acts." *Johnson v. Campbell*, 332 F.3d 199, 208 (3d Cir. 2003).

Another exception to the need for probable cause when conducting a search and seizure under the Fourth Amendment is the "special needs exception," which arises in the context of a public school setting. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). In *T.L.O.*, a teacher caught a female student smoking in a school bathroom, and promptly reported this to the principal. *Id.* at 328. The principal then questioned the student, who denied the allegation that she was smoking. The principal searched the student's purse and found cigarettes, along with marijuana and other drug paraphernalia. *Id.* At issue in the trial court was whether the evidence of the drug and drug paraphernalia found on the student could be suppressed based on whether the search was reasonable. *Id.* at 329. The Supreme Court held that while probable cause is not required to conduct a lawful search within the public school setting, the search by a teacher or other school official must be "justified at its inception." *Id.* at 341-42. This means that there are reasonable grounds for suspecting that the search will result in evidence that the student violated or is violating the law or a rule of the school. *Id.* "Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the *age* and sex of the student and the nature of the infraction." *Id., emphasis added.*

The Third Circuit has recognized "the unique responsibilities public schools bear, particularly with regard to disciplinary matters," and has provided a lengthy explanation of the reasonableness factor of a child's age. *Shuman*, 422 F.3d at 148. *Shuman* considered the seizure

of a student in a public school setting. *Id.* *Shuman* pointed out that the U.S. Supreme Court had never addressed the *seizure* of a person within the public school setting, and that most courts borrow the "reasonableness standard" as set forth in *T.L.O.*, which the *Shuman* Court also did. *Id.*

In *J. D. B. v. North Carolina*, 131 S. Ct. 2394 (U.S. 2011) the Court addressed the significance of a child's age in determining whether the child is in custody, within a school setting.

> In many cases involving juvenile suspects, the custody analysis would be nonsensical absent some consideration of the suspect's age... Were the court precluded from taking [child]'s youth into account, it would be forced to evaluate the circumstances present here through the eyes of a reasonable person of average years. In other words, how would a reasonable adult understand his situation, after being removed from a seventh-grade social studies class by a uniformed school resource officer; being encouraged by his assistant principal to 'do the right thing'; and being warned by a police investigator of the prospect of juvenile detention and separation from his guardian and primary caretaker? To describe such an inquiry is to demonstrate its absurdity. Neither officers nor courts can reasonably evaluate the effect of objective circumstances that, by their nature, are specific to children without accounting for the age of the child subjected to those circumstances... A student—whose presence at school is compulsory and whose disobedience at school is cause for disciplinary action—is in a far different position than, say, a parent volunteer on school grounds to chaperone an event... Without asking whether the person 'questioned in school' is a 'minor,' the coercive effect of the schoolhouse setting is unknowable.

Id. at 2405. In *J. D. B.*, a uniformed police officer escorted a thirteen year-old, seventh grade student from his classroom to a closed-door conference room and questioned the student for at least half of one hour. *Id.* at 2399. The minor confessed to involvement in some home break-ins. *Id.* As the student had not been *Mirandized*, the minor filed a motion to suppress the confession. *Id.* at 2400. The state supreme court denied the motion to suppress because it found the student was not in custody, and that a consideration of age was largely irrelevant to the analysis. *Id.* at 2396. The U.S. Supreme Court overturned the state court's decision, holding that

the state court should have extended the test for determining custody to include a consideration of the age of the individual subjected to police questioning. *Id.* at 2408.

In the present matter, ample evidence demonstrates that a constitutional violation has occurred in the form of an unreasonable seizure. The right to be free from an unreasonable seizure is a clearly established constitutional right. The seizure by Pritchett was not based on any recognized exception to the Fourth Amendment protection from an unreasonable seizure, even in a school setting as set forth in *T.L.O.* Pritchett has also failed to demonstrate that his actions were reasonable. He admitted he had no training in criminal law enforcement for elementary-aged children, as an SRO did not anticipate the need for this in the elementary school setting. (A-58-59) He was not assigned to perform law enforcement at the School, as demonstrated in the contract between DSP and Cape Henlopen and the document outlining the scope of his SRO duties. (A-89-90) Even assuming he did have the right to be at the School, Pritchett had no probable cause or reasonable suspicion upon which to justify his interrogation of Hunt. (A-76, A-86) In fact, the evidence points to the exact opposite. Pritchett blatantly disregarded the clear instructions of McDowell—who was in charge of discipline at the School—to speak only with student AB, as McDowell knew that he was the thief and that no other student was involved. (A-66 – A-68; A47 – A49) McDowell became very upset and profusely apologized to Plaintiff DeSombre when he became aware that Pritchett had interrogated Hunt, in disregard of McDowell's express instructions. (A-50 – A-52)

Pritchett's actions were further unreasonable in light of Plaintiff's age. Plaintiff was eight years old. This tender age cannot be ignored, nor can Plaintiff be compared to a high school student. To do so would completely disregard the U.S. Supreme Court's warning that the effects of the interrogation of a child, even in the school setting, are largely unknown and

unpredictable, and certainly cannot be judged based upon how a reasonable adult would respond. *Id.* at 2405-06. In their summary judgment motion, Defendants' citations to cases involving school searches and seizure of property proved unavailing. Each refers to "students" who are well over eight years old, most of whom are in high school. The few that do involve elementary school children involve children who had committed crimes, and not an interrogation conducted without a shred of evidence, like the one to which Plaintiff Hunt was subjected.[4]

Plaintiff has demonstrated that Pritchett can be held liable pursuant 42 U.S.C. §1983, since he is not shielded by qualified immunity, and has violated Plaintiff Hunt's constitutional right to be free from unreasonable seizure, pursuant to the Fourth Amendment. The determination of whether liability exists is based upon whether the seizure of Plaintiff was reasonable. Such an evaluation necessarily requires a consideration of Plaintiff's young age, which the lower court did not seem to view as a significant or important factor. Reasonableness is a fact-specific inquiry that should be determined by a jury. Hence, the lower court decision to dismiss Plaintiff's claim pursuant to §1983 should be reversed and remanded, so that a jury can decide the issue.

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[4] For example, *see, In the Matter of L.A.*, 21 P.3d 952 (Kan. 2001) (sixteen year old student searched based on tip from school librarian that student had marijuana on his person; search resulted in finding marijuana and unprescribed valium on student); *J.A.R. v. State*, 689 So. 2d 1242 (Fla. Dist. Ct. App. 1997) (fourteen year old searched upon tip from a classmate that student had a firearm in his possession; search revealed firearm on his person); *In re D.E.M.*, 727 A.2d 570 (Pa. Super. 1999) (middle school student searched based on tip from classmate that student had gun; student admitted to possession of gun, stashed in a school locker, along with a knife); and *State v. Baccino*, 282 A.2d 869 (Del. Super. 1971) (principal searched high school student's coat, when student was found wandering in hallways; search resulted in student having large quantity of hashish in his coat).

ARGUMENT II

THE SUPERIOR COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO PLAINTIFFS' STATE LAW CLAIMS OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, FALSE ARREST & FALSE IMPRISONMENT AND BATTERY, SINCE DEFENDANT PRITCHETT'S TORTIOUS CONDUCT IS NOT PROTECTED BY STATE LAW, PURSUANT TO 10 DEL. C. §4001.

(1). QUESTION PRESENTED.

Did the Superior Court err in granting summary judgment as to Plaintiffs' state law claims of Intentional Infliction of Emotional Distress, False Arrest & False Imprisonment and Battery and is Defendant Pritchett protected by state law, pursuant to 10 Del. C. §4001? Plaintiffs preserved the right to appeal these issues in their Opposition to the State Defendants' Motion for Summary Judgment, dated April 13, 2012. (A-31 – A-34)

(2). SCOPE OF REVIEW

"In an appeal from a trial court's decision to grant summary judgment, this Court's scope of review is *de novo*, not deferential, as to both the facts and the law." *Lapoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 191 (Del. 2009).

(3). MERITS OF ARGUMENT

Plaintiffs have brought common law tort claims against Defendant Pritchett for his wrongful actions perpetrated against Plaintiff Hunt. As explained below, Defendant Pritchett's conduct is not protected by Delaware law, thus the State Defendants are liable for Pritchett's tortious conduct under the doctrine of *respondeat superior.*

(a). DEFENDANT PRITCHETT'S TORTIOUS CONDUCT IS NOT PROTECTED BY DEL. C. §4001

Pursuant to 10 Del. C. §4001, State officials' liability is limited in any civil suit or proceeding if the three criteria enumerated in this statute are satisfied. Protection from liability applies if the act or omission complained of (1) arose out of and in connection with the

performance of an official duty involving the exercise of discretion on the part of a public officer; (2) was performed in good faith and in the belief that the public interest would best be served thereby; and (3) was performed without gross or wanton negligence. *Vick v. Haller*, 512 A.2d 249 (Del. Super. 1986). Plaintiff has the burden of proving the absence of **only one** of these elements to pursue a tort claim against a State actor under this statute. *Id.* at 252.

Here, Plaintiffs can show that all three of these criteria were absent. Pritchett was acting in the scope of his official police duties, and not as a School Resource Officer when at Richard A. Shields Elementary School. While the State Defendants and Pritchett allege he was the SRO for the School, the contract between DSP and Cape Henlopen did not provide for an SRO at this elementary school. (A-89 – A-90) Accordingly, Pritchett should not have interrogated Plaintiff, as this was not part of his official duty as a DSP officer, which is limited to reasonable seizures of the person.

As to the second criteria, Pritchett did not perform his acts in good faith and in the belief the public interest would best be served thereby. There is no public interest that is being served in the interrogation of a knowingly innocent victim. Pritchett was not acting in good faith, as he interrogated the minor Plaintiff, in contravention to McDowell's instructions. (A-45 – A-46) Pritchett was 99% sure Plaintiff had not stolen any money, yet interrogated the Plaintiff, threatened to arrest Plaintiff, and threatened to take Plaintiff to jail. (A-68 – A-70, A-74 – A-75; A-92) Pritchett had no training in elementary school children interrogations, nor any instruction from DSP or Cape Henlopen regarding the same. (A-58 – A-59) Pritchett also failed to contact the minor's mother, admitting later that he should have, and apologizing to Plaintiff DeSombre for not doing so after the incident. (A-87) Certainly such behavior is not an exercise of good faith.

As to the third criteria, Pritchett did not perform his actions without gross or wanton negligence, as demonstrated by all of the above facts. The acts perpetrated against Plaintiff Hunt—intentional infliction of emotional distress, battery, false arrest and false imprisonment—are are all *intentional* torts. Hence, Pritchett's actions go beyond mere negligence, and he is not shielded by 10 Del. C. §4001, permitting Plaintiffs to seek relief for his tortious conduct, as outlined more thoroughly below.

(b). INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Delaware has adopted the Restatement (Second) of Torts §46 that states intentional infliction of emotional distress occurs when one, who by extreme and outrageous conduct, intentionally or recklessly causes severe emotional distress to another. *Mattern v. Hudson*, 532 A.2d 85 (Del. 1987). No bodily harm needs to occur for this claim to be actionable; there may be a legal predicate of an award of damage in the absence of bodily harm. *Cummings v. Pinder*, 574 A.2d 843 (Del. 1990), *see also,* Restatement (Second) of Torts §46.

The Superior Court correctly pointed out that the Restatement explicitly precludes recovery for mere insults, or conduct that causes 'hurt feelings.' *See* Summary Judgment Order, Exh. "A," p. 9; *see also,* Restatement (Second) of Torts §46, cmt. d. However, Plaintiffs have not and do not assert that Pritchett's actions were mere insults or unkind and inconsiderate conduct. Rather, Plaintiffs assert that Pritchett's actions towards the eight-year old Hunt induced extreme fear and anxiety, to include ideas that Hunt would not be able to see his parents or siblings if he is taken to 'kids jail.' (A-81) This is not a case of an overly-sensitive child feeling upset towards a harsh comment; this is a child being intimidated and threatened by a fully uniformed and equipped police officer conducting an interrogation in closed quarters, who reminds Plaintiff he is armed and ready to used his handcuffs. (A-92; A-95)

The lower court dismissed, without consideration, Plaintiff's contention that the special relationship between Plaintiff and Pritchett was a "plus factor" to the analysis. *See* Summary Judgment Order, Exh. "A," p. 8. A "plus factor" that will render behavior outrageous or extreme is present when there is an abuse of a power relationship, which gives the actor actual or apparent authority over the other. Restatement (Second) of Torts §46, cmt. e. Police officers and school authorities are two specifically enumerated types of persons listed as having this superior power relationship, which enhances susceptibility to liability for intentional infliction of emotional distress. *Id.*

Here, Defendant Pritchett's position as a uniformed officer, equipped with a gun and handcuffs, puts him in an obvious position of dominion and control. Pritchett accused Plaintiff of being involved in bullying and/or theft; threatened Plaintiff with his ability to take Plaintiff to jail; told Plaintiff he had handcuffs that he could use on Plaintiff; and told him his family could not see him if he was taken away. (A-92; A-95) This was all done to a scare Plaintiff, an eight year old boy, who was sobbing and scared, even though Pritchett was "99% sure" that Plaintiff had had no involvement in the inappropriate conduct. (A-76, A-86) All of this was certainly an abuse of Pritchett's power as a law enforcement officer, causing extreme emotional distress to Plaintiff. This behavior was at least reckless in nature, if not completely intentional. Using a reasonable child standard, it can only be deduced that any reasonable eight year old would be intimidated and scared.

Whether Trooper Pritchett's conduct towards Plaintiff Hunt rose to the level of extreme and outrageous conduct is a fact-specific determination for a jury, since a reasonable person could find such conduct to be extreme and outrageous. In light of the various circumstances surrounding the events, including Hunt's age and the "plus factor" of Pritchett's position as a

police officer, Plaintiffs have demonstrated that liability may exist for intentional infliction of emotional distress. Moreover, as Pritchett's conduct was reckless or intentional, 10 Del. C. §4001 does not afford Pritchett any protection from liability. The lower court erred in dismissing it without submitting this claim to the trier of fact, and should be reversed.

(c). FALSE ARREST & FALSE IMPRISONMENT

The common law tort of false imprisonment occurs when (1) one acts intending to confine another person within boundaries fixed by the actor; (2) the act directly or indirectly results in such a confinement of the other; and (3) the other is conscious of the confinement or is harmed by it. Restatement of Torts (Second) §35. If one is confined due to an arrest under a valid process, false imprisonment has not occurred. The person being falsely imprisoned must have no reasonable means of escape, as judged by a reasonable person. *Id.* at §35, cmt. a. If a reasonable person under the circumstances would not feel free to leave, it is not relevant whether that person could *actually*, physically leave.

There is no doubt that Plaintiff did not feel free to leave, and assumed he was under arrest. This is exemplified by the fact that Defendant Pritchett told Plaintiff, "You have to tell the truth or you will go to jail." (A-92) A basic interpretation of this statement would lead any reasonable person—child or adult—to believe that he must remain confined until the officer is satisfied with his statement, and releases him. Further, Pritchett closed the door, also leading a reasonable person to believe that he was not free to leave. (A-83 – A-84) Pritchett further informed Plaintiff, at the outset, that Pritchett had handcuffs and could use them if he chose to. (A-95) It is immaterial that Pritchett did not tell Plaintiff "you must stay here"; his actions spoke louder than any words.

Pritchett further falsely imprisoned and arrested Plaintiff, in that Pritchett had no probable cause, reasonable suspicion, or scintilla of credible evidence that Plaintiff did anything wrong (99% sure). (A-76, A-86) McDowell specifically told Pritchett that only student AB had been involved in the theft of the autistic boy's money. (A-68 – A-70, A-47 – A-49) McDowell told Pritchett to speak only with AB about the theft; this was the only reason McDowell asked Pritchett to come to the School on January 31, 2008. (A-68 – A-70, A-47 – A-49)

The lower court erred in dismissing Plaintiffs' claim of false imprisonment and false arrest. Moreover, as Pritchett's conduct was intentional, 10 Del. C. §4001 does not afford Pritchett any protection from liability. This ruling should be reversed and remanded for a jury to consider the facts and determine whether liability exists.

(d). BATTERY

Civil claims of assault and battery are often conflated, as they tend to overlap. Delaware follows the common law rule of battery, which permits recovery for intentional harmful or offensive contact of another. The parties agree that no harmful contact occurred that constitutes battery; rather, Plaintiffs assert that *offensive* contact occurred, constituting a battery. Plaintiffs are not pursuing a separate assault claim and address only battery in the instant appeal.

Battery occurs when (1) an actor intends to cause a harmful or offensive contact with the person of another or a third person, or an imminent apprehension of such a contact; and (2) an offensive contact with the person of the other directly or indirectly results. Restatement (Second) of Torts §18. Lack of consent is, thus, an essential element of battery. *Prosser and Keeton on Torts,* §§ 9, 18 (5th ed.) 1984. The intent necessary for battery is the intent to make contact with the person, not the intent to cause harm. *Id.*, §8 at 36. The contact need not be harmful; it is sufficient if the contact offends the person's integrity. *Id.*, §9 at 40.

There need not even be personal hostility on the part of the actor; an intended practical joke or humorous gesture can constitute battery.

> It is immaterial that the actor is not inspired by any personal hostility to the other, or a desire to injure him. Thus the fact that the defendant who intentionally inflicts bodily harm upon another does so as a practical joke, does not render him immune… This is true although the actor erroneously believes that the other will regard it as a joke. **One…takes the risk that his victims may not appreciate the humor of his conduct.**

Restatement of Torts (Second) §13, cmt. c (emphasis added). "Proof of the technical invasion of the integrity of the plaintiff's person by even an entirely harmless, yet offensive, contact entitles the plaintiff to vindication of the legal right by the award of nominal damages." *Prosser and Keeton on Torts,* §§ 9, 18. "The fact that a person does not discover the offensive nature of the contact until after the event does not, *ipso facto*, preclude recovery." *Brzoska v. Olson*, 668 A.2d 1355, 1361 (Del. 1995), *citing* Restatement (Second) of Torts, §18 cmt. d.

Here, Defendant Pritchett admitted that he touched Plaintiff Hunt during his interrogation of him. (A-77) Plaintiff did not recall, in his deposition, being touched by Pritchett, but it is undisputed by Pritchett that this occurred. It is immaterial whether Pritchett touched Plaintiff without any malice. Using a reasonable person standard, such touching by a uniformed, armed police officer, of the eight-year-old Plaintiff, behind closed doors, could only serve to intimidate and frighten Plaintiff to do whatever Pritchett instructed him to do, with threats of being sent to Stevenson House, not being able to see his siblings, and his family's being upset with him. (A-92; A-78 – A-81, A-83 – A-84) Moreover, as Pritchett's conduct with the child was intentional, 10 Del. C. §4001 does not afford Defendant Pritchett any protection from liability.

Only a jury should determine whether the touching of Plaintiff would be considered offensive to an eight year old of reasonable sensibility. Plaintiff has demonstrated the elements

of battery and the lower court erred in not allowing a jury to determine if Pritchett committed a battery to this child.

CONCLUSION

For the aforementioned reasons, the Superior Court's order granting Summary Judgment on behalf of Defendants should be reversed, on all counts, and the case remanded to Superior Court for trial by jury.

SCHMITTINGER & RODRIGUEZ, P.A.

BY: _____
WILLIAM D. FLETCHER, JR.
Bar I.D. No. 362

BY: _____
NOEL E. PRIMOS
Bar I.D. No. 3124
414 S. State Street
P.O. Box 497
Dover, DE 19903-0497
(302) 674-0140
Attorneys for Anthony J. Hunt
& Lisa C. DeSombre,
Plaintiffs Below-Appellants