Circuit Court for Frederick County
Case No. 10-C-15-000875

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1262

September Term, 2016

LARRY J. PETT

v.

STEPHEN T. MOYER

Nazarian,
Reed,
Krauser, Peter B.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Krauser, J.

Filed: May 11, 2018

Larry J. Pett, appellant, filed a complaint, in the Circuit Court for Frederick County, initially against the Maryland Department of Public Safety and Correctional Services ("DPSCS"), and various state and local officials, requesting his removal from the Maryland Sex Offender Registry and damages for what he maintained was his unlawful retention on the registry after his term of registration had, allegedly, lapsed. His current retention on the registry, Pett alleged, was due to the negligence, gross negligence, recklessness, and maliciousness of the DPSCS and those officials and it violated, according to Pett, the due process provisions of the federal constitution and the Maryland Declaration of Rights. The state and local officials named in his complaint were Stephen T. Moyer, the Secretary of the DPSCS; Elizabeth Bartholomew, Manager of the Sex Offender Registry; Allison Gilford, Supervisor of the Sex Offender Registry; and Charles Jenkins, Sheriff of Frederick County, Maryland, all of whom, but the DPSCS and Sheriff Jenkins, are parties to this appeal.

After Pett was subsequently removed from the registry, he amended his complaint twice: First he deleted his request for injunctive relief, as that request had been rendered moot by his removal from the registry, and then he removed Sheriff Jenkins from his complaint. Thereafter, appellees Moyer, Bartholomew, and Gilford, filed successive motions to dismiss each of Pett's two amended complaints on the grounds that, as government officials, they were granted immunity from civil liability for damages under § 5-522(b) of the Courts & Judicial Proceedings Article of the Maryland Code and § 11-719 of the Criminal Procedure Article of the Maryland Code, in the absence of gross

negligence, bad faith, or malice, which, they claimed, Pett had failed to sufficiently plead in his complaints. The circuit court ultimately agreed and granted the latter of the two motions to dismiss.

Appealing that dismissal, Pett raises a single issue: "whether the trial court erred in holding that [he] failed to plead sufficient facts of malice and gross negligence." For the reasons that follow, we affirm.

Background

After pleading guilty in the Circuit Court for Montgomery County, on August 5, 1997, to a fourth-degree sex offense, unnatural or perverted sex practices, and sexual child abuse, Pett was required to register for ten years on the Maryland Sex Offender Registry. That ten-year period began, Pett claims, in 1997. Eight years later, Pett, in 2005, entered an *Alford* plea[1] in the Circuit Court for Frederick County to another fourth-degree sex offense.[2] Then, "on about August 2007," he "was directed," alleged Pett's complaint, "to

[1] An *Alford* plea "is 'a guilty plea containing a 'protestation of innocence.'" *Jackson v. State*, 207 Md. App. 336, 361 (2012) (quoting *Bishop v. State*, 417 Md. 1, 18-19 (2010)). *See also North Carolina v. Alford*, 400 U.S. 25, 37 (1970). That is to say, the "defendant does not contest or admit guilt." *Jackson*, 207 Md. App. at 361 (quotation omitted).

[2] While his 2005 *Alford* plea is not noted in Pett's second amended and final complaint, it is mentioned in the attachments to that complaint. And, while Pett does not state if he was required to register for this offense, the attachments to his complaint suggest that, if he was so ordered, he should not have been. The State maintains, in its brief, however, that this offense required that his initial registration be extended to life.

continue registration, and [was] maintained on the registry[,]" despite his having "related to officials of the Frederick County Sheriff's Department . . . that his registration requirement ha[d] expired. . . ."

Seven years passed before Pett raised the issue of his registration again. That occurred on April 24, 2014, when his counsel, in the words of Pett's complaint, "forwarded a letter to the Sex Offender Registry Unit requesting copies of documents in his file, and indicating that [his] retention on the Registry was being evaluated." Eight days later, appellee Allison Gilford, Supervisor of the Sex Offender Registry, provided Pett with "copies of documents in his file."[3] Then, according to Pett's complaint, two months later, his counsel "forwarded" a request for his "immediate removal" from the registry to appellee Gilford. That message cited the then-recently issued Court of Appeals decision in *Doe v. Department of Public Safety*, 430 Md. 535 (2013) ("*Doe I*"), but provided no explanation as to why or how *Doe I* was applicable to Pett's claims.[4]

Eight months later, on March 12, 2015, Pett's counsel "was forwarded an e-mail acknowledging that [Pett] should be removed from the Registry." That message, which

[3] We assume "his file" is a reference to a file relating to his registration, kept by the registry.

[4] In *Doe I*, the Court held that to compel Doe, who had been convicted of having committed certain sex offenses, prior to the enactment of the sex offender registration statute, to register, as a sex offender, violated the State constitution's prohibition against ex post facto laws. *See Doe v. Department of Public Safety*, 430 Md. 535 (2013).

was the product of an email exchange between Lindell Angel, Assistant State's Attorney for Frederick County, and appellee Bartholomew, Manager of the Sex Offender Registry, was attached to his complaint.

The initial email of that exchange was sent on the morning of March 12, 2015, by Angel to appellee Bartholomew. In that email, Angel stated that she was "inquiring about LARRY PETT[,]" (emphasis in original), whom, she said, was "currently on the registry as a Tier I offender for a 4th deg sex offense conviction." She advised Bartholomew that if "that offense is from our jurisdiction," that is, Frederick County, then Pett "should not be registered." She explained that she had "the transcript from that plea," apparently referring to the 2005 *Alford* plea hearing, in the Frederick County circuit court. It indicated, according to Angel, that Pett "was specifically NOT ordered to register for that offense." (Emphasis in original). She concluded her email with the request: "Please advise."

Bartholomew emailed a response to Angel approximately an hour later, stating that Pett was "actually still on the registry because of his 1997 conviction" and opined that "he falls under the new 'Rodriquez' [sic] decision[,]" presumably a reference to *Rodriguez v. State*, 221 Md. App. 26 (2015), a decision of this Court, issued on January 28, 2015.[5]

[5] In *Rodriguez*, this Court held that the amendments to the sex offender registry act, retroactively requiring homeless registrants to register once a week, did "not violate the Maryland constitutional prohibition against ex post facto laws." 221 Md. App. 26, 44 (2015). The legislature had, the Court declared, a "legitimate regulatory purpose for (continued)

Bartholomew suggested that, as "the Public Defender's Office has file[d] for cert in the Court of Appeals for Rodriquez [sic]," this "may clear up the matter of Pett's registration obligation." Shortly thereafter, Pett was "required to report to the Frederick County Sheriff's Department . . . and sign a Notice of Sexual Offender Registration."

Pett asserts that, the next day, March 13, 2015, he forwarded a "Tort Claim notice to [the] State Treasurer's Office," in which he demanded his immediate removal from the registry. But, ten days later, having not yet received a response to his request for removal, he filed his initial complaint in the Circuit Court for Frederick County, naming, as defendants: Stephen T. Moyer, the Secretary of the Maryland DPSCS; Elizabeth Bartholomew, Manager of the Sex Offender Registry; Allison Gilford, Supervisor of the Sex Offender Registry; Charles Jenkins, Sheriff of Frederick County; and the DPSCS. In that suit, he sought "*ex parte*, preliminary, and final injunctions prohibiting Defendants from maintaining" him on the registry, and monetary damages for his continued maintenance on the Maryland Sex Offender Registry. Then, two weeks after Pett filed his Tort Claim notice with the State, Pett was sent a letter, from the registry, informing him that, in light of the Court of Appeals' recent decision in *Dep't of Pub. Safety & Corr.*

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enacting the additional requirement for homeless registrants," as, absent "frequent" in-person registration, "law enforcement would be unable to properly monitor them." The Court of Appeals subsequently denied Rodriguez's petition for certiorari on April 20, 2015. *Rodriguez v. State*, 442 Md. 517 (2015).

Services v. Doe, 439 Md. 201 (2014) ("*Doe II*"),[6] the "office" had "determined that [Pett] was not required to register in the State of Maryland as a sex offender."

Upon his removal from the registry, Pett filed an amended complaint on July 20, 2015, and then a second amended and final complaint on February 23, 2016, the dismissal of which is the subject of this appeal. In the final version of his complaint, he abandoned his pursuit of injunctive relief and deleted Sheriff Jenkins as a defendant but reiterated the claims he had previously made, namely, that the "defendants were made aware of [his] improper retention . . . on the Registry in about August, 2007[,]" that the "defendants were informed of the wrongful retention on the Registry by [his] counsel on July 16, 2014[,]" and that they, "in reckless disregard of [his] right not to be on the Registry, took no steps to remove him from said Registry."

Furthermore, the first count of that two-count complaint, "VIOLATION OF PROCEDURAL AND SUBSTANTIVE DUE PROCESS" (emphasis in original), alleged that "the failure to remove plaintiff from the Sex Offender Registry, with actual knowledge

[6] In *Doe II*, the Court of Appeals addressed "whether a circuit court has the authority to direct the State to remove sex offender registration information in light of the provisions of" the federal Sex Offender Registration and Notification Act "specifically directing sex offenders to register in the state in which they reside, work, or attend school." *Dep't of Pub. Safety & Corr. Services v. Doe*, 439 Md. 201, 207 (2014). The Court concluded that, "notwithstanding the registration obligations placed directly on individuals by" the federal Sex Offender Registration and Notification Act, "circuit courts have the authority to direct the State to remove sex offender registration information from Maryland's sex offender registry when the inclusion of such information is unconstitutional as articulated in *Doe I*." *Id.*

that he should not be on the Registry, deprive[d] plaintiff of a liberty interest in employment, associational rights, and reputational injury, in violation of his rights as guaranteed by . . . the Maryland Declaration of Rights, 42 U.S.C. § 1983 . . . and the Fourteenth Amendment to the United States Constitution." And, the second count, "NEGLIGENCE AND GROSS NEGLIGENCE," alleged the following:

> The defendants are under a duty to exercise ordinary and due care in placing and maintaining persons, including Plaintiff, on the Sex Offender Registry. Defendants have failed to exercise ordinary care in placing and maintaining Plaintiff on the Registry, and have maintained him on said registry recklessly and with malicious intent to continuously punish him for the underlying culpable conduct. . . . That as a result of Defendants' negligence, grossly negligent, reckless, and malicious actions, Plaintiff has suffered a loss of income, freedom of travel and association, embarrassment, humiliation, and severe emotional distress.

Appellees responded to Pett's complaint with a motion to dismiss, asserting that "there has been no showing[,]" in the complaint, "that [appellees] were personally involved in the alleged violation of Mr. Pett's constitutional rights" and that, consequently, "they [were] entitled to statutory immunity," as Pett's complaint had failed to allege sufficient facts in support of his allegations of malice, bad faith, and gross negligence.

After a hearing, the circuit court granted appellees' motion to dismiss, finding that Pett had failed to plead sufficient facts in support of his claims.

I

Pett contends that the circuit court erred in dismissing his second amended and final complaint on the grounds that he had not adequately pleaded a factual basis for either his claim of gross negligence or malice and therefore had failed to overcome the immunity legislatively granted state and local officials, such as appellees.

First, we note that, in his brief, Pett cites several cases in support of his claims,[7] but then fails to provide any analysis or suggest any reason why or how those cases apply to his complaint. Nonetheless, we will briefly address Pett's claims.

Maryland Rule 2-305 requires that a complaint "shall contain a clear statement of the facts necessary to constitute a cause of action and a demand for judgment for the relief sought." In determining whether that requirement has been met, a trial court must "assume the truth of, and view in a light most favorable to the non-moving party, all well-pleaded facts and allegations contained in the complaint, as well as all inferences that may reasonably be drawn from them." *RRC Northeast, LLC. v. BAA Md., Inc.*, 413 Md. 638, 643 (2010) (internal citations omitted). The facts, however, setting forth the

[7] The cases Pett cites, in his brief, are: *Cooper v. Rodriguez*, 443 Md. 680 (2015); *Barbre v. Pope*, 402 Md. 157 (2007); *Taylor v. Harford County Dept. of Soc. Services*, 384 Md. 213 (2004); *Lee v. Cline*, 384 Md. 245 (2004); *Romanesk v. Rose*, 248 Md. 420 (1968); *Holloway-Johnson v. Beall*, 220 Md. App. 195 (2014), *aff'd in part, rev'd in part*, 446 Md. 48 (2016).

cause of action, "must be pleaded with sufficient specificity; bald assertions and conclusory statements by the pleader will not suffice." *Id.* at 643-44.

Furthermore, in reviewing "a trial court's dismissal" of a complaint for failing to comply with Maryland Rule 2-305, we, like the trial court, "presume the truth of all well-pleaded facts and any reasonable inferences deriving from them." *Ireland v. Shearin*, 417 Md. 401, 406 (2010). But, as such a "review requires a determination[,]" by this Court, "of whether the trial court was legally correct . . . we review the trial court's legal conclusions *de novo*." *Id.*

Maryland's Sex Offender Registration Act requires Maryland residents convicted of sexual offenses enumerated by that statute to register with the DPSCS, or with another law enforcement entity, for various lengths of time, depending upon the nature of the offense or offenses of which they have been convicted. *See* Md. Code Ann., Crim. Proc. §§ 11-701 to -727. It further imposes, upon the DPSCS, and the registry's supervising authorities, certain responsibilities related to the maintenance of the registry and its registrants. In particular, the Act requires that the DPSCS "keep a central registry of registrants and a listing of juvenile sex offenders," § 11-713, and that those public officials charged with supervising the registry, following a registrant's registration, "explain the requirements of this subtitle to the registrant," including a registrant's duties when he or she changes their residence address in the state. § 11-708.

Those same public officials, however, are granted immunity under both § 11-719[8] of the Criminal Procedure Article of the Maryland Code and § 5-522(b)[9] of the Courts & Judicial Proceedings Article of the Maryland Code as to civil suits for damages as to actions they may take in the scope of their duties in connection with the sex offender registry. But that immunity is not absolute. The immunity from civil liability for damages for an "elected public official, public employee, or public unit" under § 11-719 does not apply where the official, employee, or unit acted with gross negligence or in bad faith. And, the immunity granted to "[s]tate personnel" under § 5-522(b) does not apply where the personnel in

[8] § 11-719 of the Criminal Procedure Article of the Maryland Code provides:

> An elected public official, public employee, or public unit has the immunity described in §§ 5-302 and 5-522 of the Courts Article regarding civil liability for damages arising out of any action relating to the provisions of this subtitle, unless it is proven that the official, employee, or unit acted with *gross negligence* or *in bad faith*.

(Emphasis added).

[9] § 5-522(b) of the Courts & Judicial Proceedings Article of the Maryland Code provides:

> State personnel . . . are immune from suit in courts of the State and from liability in tort for a tortious act or omission that is within the scope of the public duties of the State personnel and is *made without malice or gross negligence*, and for which the State or its units have waived immunity under Title 12, Subtitle 1 of the State Government Article, even if the damages exceed the limits of that waiver.

(Emphasis added).

question acted with gross negligence or malice. Accordingly, if, as Pett contends, he alleged facts sufficient to establish a claim of either gross negligence or malice,[10] arising from the maintenance of the registry, the circuit court erred in dismissing his complaint.

Specifically, Pett claims that, when the factual allegations of his complaint and attachments are construed liberally, as required by law, they establish gross negligence and malice, and thus appellees are not subject to the immunity provisions of § 11-719 and § 5-522(b). Consequently, the circuit court, he asserts, erred in dismissing his complaint. We disagree.

In *Barbre v. Pope*, the Court of Appeals addressed gross negligence and malice. To begin with, it defined gross negligence as:

> an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another, and also implies a *thoughtless disregard* of the consequences without the exertion of any effort to avoid them. Stated conversely, *a wrongdoer is guilty of gross negligence or acts wantonly and willfully only when he inflicts injury intentionally or is so utterly indifferent to the rights of others that he acts as if such rights did not exist*.

Barbre v. Pope, 402 Md. 157, 187 (2007) (quoting *Liscombe v. Potomac Edison Co.*, 303 Md. 619, 635 (1985) (emphasis added).

Pett's claim of gross negligence, however, does not allege sufficient facts supporting that claim, but he improperly relies on bald assertions and conclusory statements. *RRC*

[10] Pett does not claim, on appeal, that he sufficiently pleaded "bad faith" below.

Northeast, LLC. v. BAA Md., Inc., 413 Md. 638, 643-44 (2010) ("[T]he cause of action must be pleaded with sufficient specificity; bald assertions and conclusory statements by the pleader will not suffice.") (citations omitted). In his final complaint Pett simply claimed that appellees, "in reckless disregard of [Pett's] right not to be on the registry, took no steps to remove him," and "maintained him on said registry recklessly . . . with malicious intent to continuously punish him for the underlying culpable conduct." At no point in his complaint did he indicate how maintaining him on the registry constituted "gross negligence." In other words, his claim of gross negligence was "conclusory," as it was not supported by any mention of specific facts suggesting that any appellee acted "utterly indifferent to" Pett's rights "as if such rights did not exist." *See Barbre*, 402 Md. at 187. Indeed, the only facts alleged suggest that Pett was simply erroneously retained on the registry past his required registration term.

And his claim of malice suffers from a similar factual deficiency. As noted, the Court of Appeals also set forth, in *Barbre v. Pope*, 402 Md. 157, 182 (2007), the requirements necessary to adequately plead malice and thereby avoid dismissal under the immunity provisions of § 5-522(b). The Court declared that for "cases involving allegations of malice . . . well-[pleaded] facts showing 'ill-will' or 'evil or wrongful motive' are sufficient to take a claim outside of the immunity and non-liability provisions of the MTCA."

But Pett's complaint merely sets forth appellees' positions they occupied in relation to the registry, and their general responsibilities with respect to the registry. It, however, presents no "well-[pleaded] facts" that any appellee acted with "ill-will" or an "evil or wrongful motive" toward him. Rather, the attachments to his second amended complaint, in fact, suggest the opposite conclusion: That appellees were properly assessing the legality of his status on the registry.

Accordingly, Pett failed to sufficiently allege a factual basis for either his gross negligence or malice claims, and thus, the immunity from civil liability damages provided to appellees under § 11-719 and § 5-522(b) left the circuit court with no choice but to dismiss his complaint.

II

Although not listed as an issue in his brief, Pett suggests, in the body of that brief, that the circuit court erred in dismissing his 42 U.S.C. § 1983 claims that his right to "procedural and substantive due process . . . guaranteed by Articles 19 and 24 of the Maryland Declaration of Rights . . . and the Fourteenth Amendment to the United States Constitution" were violated by Stephen T. Moyer, the Secretary of the DPSCS; Allison Gilford, Supervisor of the Sex Offender Registry; and Elizabeth Bartholomew, Manager

of the Sex Offender Registry.[11] In his brief, Pett states that, "although not patently set forth, it can be reasonably inferred from the pleadings that [Moyer] had supervisory authority over the persons in his agency who wrongfully retained [Pett] on the Registry[,]" and that he sufficiently alleged Gilford and Bartholomew's "culpability" in "paragraphs #6 and #7" as well as paragraph 17 of his complaint. We disagree.

> For a supervisor to be liable, under § 1983, a plaintiff must show:
>
> (1) that the supervisor *had actual or constructive knowledge* that his subordinate was engaged in conduct that posed a "pervasive and unreasonable risk" of constitutional injury to citizens like plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show "deliberate indifference to or tacit authorization of the alleged offensive practices,"; and (3) that there was an "affirmative causal link" between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff.

Shaw v. Stroud, 13 F.3d 791, 799 (4th Cir. 1994) (emphasis added).

But Pett alleged no "affirmative causal link" between Moyer's actions as a "supervisor," much less any specific actions by Moyer in connection with the extension of his registration. Rather, the only mention of Moyer, in Pett's complaint, is Moyer's status as the Secretary of the DPSCS, and a general statement concerning Moyer's "responsibility of operating that agency in accordance with the relevant laws, rules and regulations." Consequently, Pett did not sufficiently allege that Moyer had any actual or constructive

[11] It is not altogether clear what claims Pett makes regarding Gilford and Bartholomew. However, we presume, for the sake of this appeal, that he suggests that, like Moyer, they violated his constitutional rights and are therefore "culpab[le]" under § 1983.

knowledge concerning the challenged conduct; that Moyer was deliberately indifferent to Pett's purportedly unlawfully registry extension; that Moyer gave tacit authorization to that unlawful extension, or any "inaction" by Moyer, much less an "affirmative causal link" between any inaction and Pett's extension. As Pett failed to allege sufficient facts to support his § 1983-based claims against Secretary Moyer, the circuit court did not err in dismissing those claims.

As for Gilford and Bartholomew, we note that, for an official to be liable under § 1983, it must be "affirmatively shown that the official charged acted personally in the deprivation of the plaintiffs' rights." *Vinnedge v. Gibbs*, 550 F.2d 926, 928 (4th Cir. 1977) (citations omitted). The paragraphs of his complaint that Pett cites in support of what he describes as their "culpability"—paragraphs six, seven, and seventeen—do not, however, allege sufficient facts to preclude the grant of the motion to dismiss. In both paragraphs 6 and 7, Pett identified Gilford as the "Supervisor of the Maryland Sex Offender Registry," and Bartholomew is identified as the "Manager of the Maryland Sex Offender Registry," and both individuals, Pett asserts, had responsibilities related to that registry, that is, operating it in accord with "relevant laws, regulations, rules, and polices." Then, in paragraph 17 of his complaint, Pett simply provides the conclusory allegation that "defendants were aware that [Pett's] retention on the Registry was illegal, improper, and unauthorized, but continued to maintain him on said Registry." Hence, Pett fails to provide an allegation of specific conduct, by either Gilford or Bartholomew, relating to Pett's

purportedly impermissible maintenance on the registry. Consequently, the circuit court did not err in dismissing those claims.

JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.