STATE OF VERMONT

SUPERIOR COURT Washington Unit	2020 SEP -4 P 4:01	CIVIL DIVISION Docket No. 402-7-19 Wncv

Benjiman Nichols,
Plaintiff

v.

State of Vermont,
Defendant

FILED

Opinion and Order on Motions to Dismiss and for Summary Judgment

Defendant has moved to dismiss this action under Vt. R. Civ. P. 12(b)(1) &(6). Defendant asserts that it is cloaked with sovereign immunity regarding Plaintiff's claims and, therefore, that the Court lacks jurisdiction over the claims. Vt. R. Civ. P. 12(b)(1). To the extent that is not true, Defendant maintains Plaintiff Benjiman Nichols has failed to state a claim. Vt. R. Civ. P. 12(b)(6). Defendant attached certain public records from a related judicial proceeding in support of certain parts of its motion. In an earlier ruling, the Court converted the motion into a one for summary judgment, per Vt. R. Civ. P. 56(d), so that it could consider the materials appended to the Defendant's motion. It granted Plaintiff an opportunity to respond to the transformed motion, which he did.

The Court makes the following determinations.

I. Legal Standards for Dismissal and Summary Judgment

The Vermont Supreme Court disfavors Rule 12(b)(6) motions to dismiss. "Dismissal under Rule 12(b)(6) is proper only when it is beyond doubt that there exist no facts or circumstances consistent with the complaint that would entitle Plaintiff to relief." *Bock v. Gold*, 2008 VT 81, ¶ 4, 184 Vt. 575, 576 (mem.) (quoting *Union Mut. Fire Ins. Co. v. Joerg*, 2003 VT 27, ¶ 4, 175 Vt. 196, 198)). In considering a motion to dismiss, the Court "assume[s] that all factual allegations pleaded in the complaint are true, accept[s] as true all reasonable inferences that may be derived from plaintiff's pleadings, and assume[s] that all contravening assertions in defendant's pleadings are false." *Mahoney v. Tara, LLC*, 2011 VT 3, ¶ 7, 189 Vt. 557, 559 (mem.) (internal quotation, brackets, and ellipses omitted).

Motions to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) are slightly different. The Court is allowed to accept certain types of evidence that relate to the bases for the court's jurisdiction without transforming the motion into a summary judgment motion. *See Conley v. Crisafulli*, 2010 VT 38, ¶ 3, 188 Vt. 11, 14. Federal law is clear that the question of sovereign immunity is jurisdictional. *See, e.g., DaVinci Aircraft, Inc. v. U.S.*, 926 F.3d 1117, 1123 (9th Cir.) (unless a waiver of sovereign immunity exists, the "district court lacks subject matter jurisdiction" over claims against the United States), *cert. denied*, 140 S.Ct. 439 (2019). While our Supreme Court has not so held with regard to state sovereign immunity, it has referred to the doctrine as being "jurisdictional." *City of S. Burlington v. Dep't of Corr.*, 171 Vt. 587, 590 (2000) (requiring preservation "of

jurisdictional issues such as sovereign immunity"); *Denis Bail Bonds, Inc. v. State*, 159 Vt. 481, 485 (1993) (Vermont Tort Claims Act's (VTCA's) waiver of sovereign immunity is similar to "jurisdictional provision" of the Federal Tort Claims Act (FTCA) upon which the VTCA is based). The Court concludes that it lacks jurisdiction over claims against the State of Vermont unless there is valid waiver of its sovereign immunity.

Further, as the Court has converted the motion to dismiss into a motion for summary judgment, the standards of Rule 56 are also relevant. Summary judgment procedure is properly regarded as "an integral part of the . . . Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Morrisseau v. Fayette*, 164 Vt. 358, 363 (1995) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). Summary judgment is appropriate if the evidence in the record, typically referred to in the statements required by Vt. R. Civ. P. 56(c), shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Vt. R. Civ. P. 56(a); *Gallipo v. City of Rutland*, 163 Vt. 83, 86 (1994).

A party opposing summary judgment may not simply rely on allegations in the pleadings to establish a genuine issue of material fact. Instead, it must come forward with deposition excerpts or affidavits to establish such a dispute. *Murray v. White*, 155 Vt. 621, 628, (1991). If the non-moving party will bear the burden of proof at trial, the moving party may be entitled to summary judgment if the non-

moving party is unable to come forward with evidence supporting its case. *Poplaski v. Lamphere*, 152 Vt. 251, 254–55 (1989).

In assessing a motion for summary judgment, the Court views all facts and indulges all inference in favor of the non-moving party. *Price v. Leland*, 149 Vt. 518, 521 (1988).

II. Factual and Procedural Background

The Complaint alleges that Plaintiff was improperly served with a Domestic Violence Final Order of Protection (the "Order"), in New Hampshire. He was later arrested, in Vermont, for violating the contact terms of the Order. The contact was observed by a court officer, and the Plaintiff was arrested at the courthouse. After arraignment and hearing, he was held without bail. He want to trial and was convicted. His conviction was reversed on appeal in *State v. O'Keefe*, 2019 VT 14, 209 Vt. 497, which is referenced in the Amended Complaint.[1] The Supreme Court concluded that, even if Plaintiff had oral notice of the terms of the Order from the New Hampshire judge and that his attorney was provided with a copy of the written Order, the State had produced no evidence that it was also mailed to Plaintiff as was required under New Hampshire law. Since the evidence submitted did not show that the Order had been validly served on Plaintiff, his convictions for violating that Order could not stand. In sum, Plaintiff spent over four years in jail in connection with that criminal proceeding.

[1] Plaintiff's former name was Timothy O'Keefe.

Plaintiff's Complaint alleges claims of: Violation of the due process clause of the Vermont Constitution, Chapter I, Article 10; false imprisonment; and violation of Vermont's Innocence Protection Act (VIPA).

Defendant's motion to dismiss challenges each of those causes of action. It argues that the Article 10 claim fails because no private monetary remedy is appropriate under Article 10 due to the existence of the VIPA and because the claims fails to state a due process violation. It contends that the false imprisonment claim fails because the State has retained its immunity where an alternate remedy, such as the VIPA, exists; and because the existence of "probable cause" for the prosecution precludes the false imprisonment claim. Finally, it asserts that the VIPA claim fails because Plaintiff has not alleged, and could not allege, that he was "actually innocent" of the charges. Plaintiff disputes all of those points.

III. The Article 10 Claim

The State makes a multifaceted assault on Plaintiff's claim of a due process violation under the Vermont Constitution. Vt. Const. Art. 10. It argues that the provision is not self-executing and that, even if it is, a damages remedy should not be implied. Lastly, the State asserts that the Plaintiff fails to state a claim for a due process violation on the merits.

Plaintiffs seeking to bring a claim directly under the Vermont Constitution must satisfy two initial hurdles. First, the provision has to be "self-executing." In other words, under a four-part test, it must provide clear standards that were intended to be enforced without some type of enacting legislation. *Shields v.*

Gerhart, 163 Vt 219, 222 (1995). Second, the Court must consider whether a monetary damages remedy is appropriate or whether there is some other protective scheme or remedy that may suffice to protect the interests secured by the Constitution. *Id.*; *In re Town Highway No. 20*, 2012 VT 17, ¶ 36, 191 Vt. 231, 253 ("Determining whether a constitutional tort merits monetary relief, therefore, necessarily compels a careful inquiry into the precise nature of the injury alleged and the adequacy of existing remedies to redress it. The question is thus highly contextual....").

As to the first two points, there is no controlling Vermont precedent regarding Article 10. The federal court for the District of Vermont has found that Article 10 is self-executing. *Billado v. Parry*, 937 F. Supp. 337, 345 (D. Vt. 1996). Also, under somewhat similar circumstances as presented here, a trial court opinion has determined that a monetary damages remedy should not be implied in light of the existence of a possible tort remedy for false imprisonment. *See Mason v State*, No. 246-4-13 Wrcv, 2016 WL 9453678, at *3 (Vt. Super. July 11, 2016).

In this instance, the Court concludes that it need not weigh in on those thorny threshold issues because Plaintiff has simply failed to state a claim for a due process violation. The Supreme Court's ruling in *O'Keefe* is specifically referenced in and is a part of the Amended Complaint. That decision shows that Plaintiff was charged with the criminal offense of violating a New Hampshire abuse prevention order. Plaintiff was present at the underlying New Hampshire hearing where the abuse prevention order was issued, along with his counsel. At the end of the

hearing, the judge indicated a final order was being issued. The Court provided Plaintiff notice of the final order through service upon his attorney. Plaintiff later allegedly violated the order by having contact with the woman who obtained the order. Plaintiff asserted when he was arrested that he thought the order was enforceable only in New Hampshire.

The *O'Keefe* Supreme Court decision shows that Plaintiff had counsel and received a jury trial. He moved for acquittal at the end of the State's case based on the alleged failure properly to serve him under New Hampshire law. The Court denied the motion and determined that service upon Plaintiff's attorney, coupled with Plaintiff's receipt of actual notice at the hearing met the demands of Vermont law. The jury considered the evidence and found Plaintiff guilty.

Plaintiff appealed the guilty verdict to the Vermont Supreme Court. Again, he was represented by counsel. The High Court concluded that New Hampshire law required that the protection order be sent to Plaintiff by mail. As the evidence did not show that step was performed by the New Hampshire court, the protective order could not be enforced in Vermont, and Plaintiff could not be charged with violating that order.

Plaintiff has failed to make any showing as to how Vermont has denied him due process in the course of those proceedings. In fact, the brief history set out by the Court in *O'Keefe* – even leaving aside the lengthier procedural history of the case in the trial court – shows that Plaintiff received full due process of law. The fact that different jurists interpret the law and notice provisions differently does not

amount to a failure of due process. Otherwise, many cases that are reversed on appeal would automatically establish due process violations. But that is not the law. Plaintiff was afforded full due process protections and his conviction was, ultimately, reversed based on the Supreme Court's interpretation of New Hampshire law. The Court perceives no due process violation.[2]

IV. False Imprisonment

A. Failure to State a Claim

The State argues that Plaintiff cannot establish that his arrest and detention were unlawful. It maintains that Plaintiff must show that the State lacked probable cause for restraining his liberty. The Court disagrees.

The tort of false imprisonment occurs when a person intentionally restrains the physical liberty of another without lawful authority. *See State v. May*, 134 Vt. 556, 559 (1976); *Restatement (Second) of Torts*, § 35. While there is some ancient support for the notion that "lack of probable cause" may be part of a plaintiff's case-in-chief, *see Carleton v. Taylor*, 50 Vt. 220 (1877) (suggested in synopsis but opinion's focus is on tort of malicious prosecution), the Court believes the persuasive weight of modern authority is that probable cause provides a defense or "justification" for a restraint upon another. *See Jenkins v. City of New York*, 478 F.3d 76, 84 (2d Cir. 2007) ("The existence of probable cause to arrest constitutes justification and is a complete defense to an action for false arrest, whether that

[2] The Court expresses no opinion as to whether a due process claim could be raised against New Hampshire based on its failure to send notice by mail of the underlying protective order.

action is brought under [N.Y.] state law or under § 1983." (internal quotations and citations omitted)); *Blaszak v. Thrun*, No. 19 C 7115, 2020 WL 704797, at *1 (N.D. Ill. Feb. 12, 2020) ("Probable cause is also a defense to [an Illinois] state-law claim of false imprisonment."); *Freeland v. Maui*, No. CIV. 11-00617 ACK-KS, 2013 WL 6528831, at *19 (D. Haw. Dec. 11, 2013) ("Probable cause is an affirmative defense to the claim of false imprisonment [under Hawaii law]."); *Johnson v. Ford*, 496 F. Supp. 2d 209, 213 (D. Conn. 2007) ("It is well-established that probable cause is a complete defense to claims of false imprisonment and false arrest."); *Wildoner v. Borough of Ramsey*, 744 A.2d 1146, 1154 (N.J. 2000) ("probable cause is an absolute defense to Plaintiff's false arrest, false imprisonment, and malicious prosecution claims"); 35 C.J.S. *False Imprisonment* § 10 (2020) ("Generally, however, the lack of probable cause is not an element of false imprisonment or false arrest, and probable cause is considered a defense to claims of false arrest or false imprisonment ....").

As a result, the Court believes the burden falls on the State to establish that probable cause supported the prosecution, and Plaintiff has stated a claim of false imprisonment.

B. Probable Cause

The State maintains that the record establishes that probable cause existed in connection with Plaintiff's imprisonment. To support that conclusion, the State has submitted evidence of the procedural steps that took place in Plaintiff's criminal prosecution. The Court has accepted those records and converted the Motion to Dismiss into a Motion for Summary Judgment. It also gave Plaintiff an additional

opportunity to submit materials and arguments in opposition to the request for judgment. The Court has considered those submissions and arguments.

Before examining that factual record, it is important to note that Plaintiff has only affirmatively pled a claim for false imprisonment, not malicious prosecution. Despite the briefing of the parties, the Court views those to be two independent torts. And the distinctions between them are important. As the United States Supreme Court has explained:

> The common-law cause of action for malicious prosecution . . ., unlike the related cause of action for false arrest or imprisonment, . . . permits damages for confinement imposed *pursuant to legal process.* "If there is a false arrest claim, damages for that claim cover the time of detention *up until issuance of process or arraignment, but not more.*" But a successful malicious prosecution plaintiff may recover, in addition to general damages, "compensation for any arrest or imprisonment, including damages for discomfort or injury to his health, or loss of time and deprivation of the society."

Heck v. Humphrey, 512 U.S. 477, 484 (1994) (emphasis added; citations omitted).

Further, the "gravamen of false imprisonment is the imposition of restraint on a person's freedom of movement without legal process; the gravamen of malicious prosecution is the wrongful initiation of unwarranted legal proceedings against a person." *Beers v. Jeson Enterprises*, 998 P.2d 716, 728 n.4 (Or. Ct. App. 2000); *accord Smith v. Stokes*, 54 S.W.3d 565, 567 (2001) (Ky. Ct. App. 2001) ("An action for false imprisonment may be maintained where the imprisonment is without legal authority. But, where there is a valid or apparently valid power to arrest, the remedy is by an action for malicious prosecution." (citation omitted)); *Fair Oaks Hosp. v. Pocrass*, 628 A.2d 829; 836 (N.J. Super. Ct. 1993) ("The

fundamental difference is that under the claim of false imprisonment, the detention is done without color of authority."); *Blake v. Barton Williams, Inc.*, 361 So.2d 376 (Ala. Civ. App. 1978) ("Plaintiff was arrested under a valid warrant issued by the assistant clerk of the Municipal Court of Montgomery County. And if an arrest is made pursuant to a warrant issued by a lawfully authorized person, neither the arrest nor the subsequent imprisonment is 'false,' and, as a consequence, the complaining party's action must be one for malicious prosecution.").

The First Circuit has explained the distinction as follows:

> The Supreme Court has held that when a plaintiff's claim arises out of "detention without legal process," the tort of false imprisonment provides the appropriate analogy from which to ascertain the accrual date of a cause of action under section 1983. The Court explained that when the period of false imprisonment ends, any unlawful detention thereafter "forms part of the damages for the entirely distinct tort of malicious prosecution." It is the latter tort, not the tort of false imprisonment, that "remedies detention accompanied, not by absence of legal process, but by wrongful institution of legal process." *In other words, the commencement of a criminal case by the institution of legal process marks the dividing line between claims of false imprisonment and claims of malicious prosecution, making those species of claims legally separate and distinct.*

Harrington v. City of Nashua, 610 F.3d 24, 29 (1st Cir. 2010) (citations omitted; emphasis added).

In this case, Plaintiff's complaint expressly states a claim of false imprisonment. It does not, at present, specifically allege malicious prosecution, identify a specific state actor who acted improperly in instituting or maintaining the prosecution, or allege that he or she acted with malice toward Plaintiff. "Malice and want of probable cause are the essentials in an action for malicious prosecution."

Smith, 54 S.W.3d at 567 (citation omitted). While Plaintiff may believe he has a sufficient factual basis to raise a malicious prosecution claim under the strictures or Vt. R. Civ. P. 11, he has not done so yet, and the Court will not presume that such a factual basis exists. As a result, the Court will analyze the false imprisonment claim consistently with the above precedents: it applies solely to the time from when he was arrested to the initiation of criminal proceedings.

The undisputed facts show the following procedural background from the criminal litigation involving Plaintiff. After being arrested at the courthouse based on contact with Ms. Mazelli observed by a court officer, the Court found probable cause. Exhibit A. Plaintiff was arraigned on July 1 as well. Exhibit B. Based on the affidavits accompanying the Information the Court concluded that: "There has certainly been probable cause found." *Id.* at 8-9. The Court then set the matter for a full "weight of the evidence" hearing to determine whether the evidence of guilt in the case was "great." 13 V.S.A. § 7553a. The hearing was held on July 11, 2014. Exhibit C. The State submitted numerous affidavits and court filings from the New Hampshire abuse prevention hearing. They were admitted into evidence without objection. *Id.* at 6-7. After the evidence was closed, the Court took a break to review and consider the evidence. *Id.* at 7. Plaintiff did not appeal.[3]

[3] On June 20, 2017, the Court considered Plaintiff's motion to dismiss the charges. Exhibit D. It noted in its ruling that Plaintiff had been served with the New Hampshire order through his attorney. *Id.* at 2. Plaintiff made a number of arguments in support of dismissal. He did not contest, however, the effectiveness of service. *Id.* at 3, 5-7. The Court denied the motion to dismiss, and Plaintiff did not seek permission to appeal that decision.

The Defendant maintains that our Supreme Court's ruling in *Lay v. Pettengill* indicates that, under the above circumstances, that trial court's determination of probable cause is controlling. 2011 VT 127, 191 Vt. 141. There is much in *Lay* to support the Defendant's view. While *Lay* involved a malicious prosecution claim, both false imprisonment and malicious prosecution claims require that the underlying criminal prosecution was initiated or maintained without probable cause. The Court examined what weight to give to the criminal court's prior determination of probable cause at arraignment and in connection with a motion to dismiss. It set out the following test:

> It is significant that the trial court in the criminal prosecution previously found probable cause on both counts and additionally denied a motion to dismiss each of the counts for lack of a prima facie case. The mere fact that a criminal tribunal found probable cause normally provides a presumption that probable cause existed in the context of a subsequent wrongful prosecution claim.... This presumption of probable cause is rebuttable only if a plaintiff can demonstrate that the earlier finding of probable cause was based on misleading, fabricated, or otherwise improper evidence.... There must be a plausible suggestion that the finding of probable cause would not have been reached were it not for some irregularity or impropriety.

2011 VT 127, ¶ 22, 191 Vt. at 153.

While the above was likely sufficient to dispose of the matter, the Court continued its analysis to include an examination of whether the criminal court's finding of probable cause was also entitled to preclusive effect under the standards of collateral estoppel set out in *Trepanier v. Getting Organized, Inc.*, 155 Vt. 259, 265 (1990). 2011 VT 127, ¶ 24, 191 Vt. at 154. Under *Trepanier*:

> [P]reclusion should be found only when the following criteria are met: (1) preclusion is asserted against one who was a party or in privity with a party in the earlier action; (2) the issue was resolved by a final judgment on the merits; (3) the issue is the same as the one raised in the later action; (4) there was a full and fair opportunity to litigate the issue in the earlier action; and (5) applying preclusion in the later action is fair.

155 Vt. at 265.

The Court concluded that all factors were met and that plaintiff was collaterally estopped from contesting the criminal court's probable cause determination in connection with its denial of the motion to dismiss. It noted that the issue was the same, the plaintiff had a full and fair opportunity to contest the matter, had a chance to request the opportunity to appeal, and that applying preclusion was fair. The Court concluded that the trial court's probable cause determination had even more force because it was the result of a contested hearing that was entitled to preclusive effect. 2011 VT 127, ¶ 23, 191 Vt. at 154.

The pretrial probable cause determinations made by the criminal court in Plaintiff's case are on all fours with those discussed in *Lay*. The determinations were not made *ex parte* by the judge. The Court held an arraignment and then a weight-of-the-evidence hearing, and held Plaintiff without bail. Plaintiff had the opportunity at that hearing to challenge the State's evidence or offer his own evidence and to make legal arguments. Like in *Lay*, the State's evidence needed to reach a higher standard than mere probable cause to reach the "great weight" of the evidence standard needed to hold someone without bail. 13 V.S.A. § 7553a. Plaintiff also had the right to seek an immediate appeal of that decision. *Id.* § 7556.

Pursuant to *Lay*, the criminal court's finding of probable cause creates a "presumption" of probable cause that applies in this case. The "presumption of probable cause is rebuttable only if a plaintiff can demonstrate that the earlier finding of probable cause was based on misleading, fabricated, or otherwise improper evidence." 2011 VT 127, ¶ 22, 191 Vt. at 153. In this instance, while Plaintiff has argued against the applicability of the presumption, he has not submitted any evidence that would raise a potential material dispute of fact as to whether he could overcome the above presumption. Accordingly, the State is entitled to summary judgment on that basis.

In addition, preclusion analysis also supports that result. As in *Lay*, the above facts satisfy all of the prongs of the *Trepanier* test. The parties are in privity, the Court's finding as to the great weight of the evidence goes beyond the probable cause standard, it was a final determination in that regard, Plaintiff was represented by counsel and had the opportunity to call witnesses and challenge evidence, and he could have appealed the adverse ruling. *Lay*, 2011 VT 127, ¶¶ 24-25, 191 Vt. at 155-56. Lastly, Plaintiff has not set forth any facts that would raise a material dispute of fact suggesting that the criminal court's determination was faulty because it was based on "false testimony." 2011 VT 127, ¶ 26, 191 Vt. at 157. As a result, the Court concludes it fair to preclude re-litigation of the criminal court's probable cause determination in this case.[4]

[4] Though coming much later in the proceedings, the criminal court's decision denying the motion to dismiss also required the State to meet a higher standard than mere probable cause. And, as in *Lay*, Plaintiff had the opportunity to seek an

The State is entitled to summary judgment as to Plaintiff's claim of false imprisonment.[5]

C. The VTCA

The State also asserts that it has not waived its sovereign immunity for false imprisonment claims because such claims are governed by a separate statutory scheme – the VIPA. Section 5601(e)(7) does retain the State's sovereign immunity where the Legislature has provided a separate statutory remedy. The VTCA also provides, however, that the retention of immunity does not apply to the extent the State has purchased liability insurance. *Id.* § 5601(f).

The State has submitted information concerning a number of insurance contracts that span the time period during which Plaintiff was incarcerated. The contracts themselves have not been submitted. While Defendant represents that some of the contracts appear to preserve the immunity provided by Section

---

appeal of the adverse ruling against him. The *Trepanier* factors would also support giving preclusive effect to that determination.

[5] As Plaintiff was ultimately convicted in the criminal proceedings, the parties have also briefed the applicability of a provision of the Restatement (Second) of Torts to this issue. That provision states: "The conviction of the accused by a magistrate or trial court, although reversed by an appellate tribunal, conclusively establishes the existence of probable cause, unless the conviction was obtained by fraud, perjury or other corrupt means." Restatement of Torts, Second, § 667 (1976). Numerous states follow that view. *See, e.g., Earley v. Harry's IGA No. 1, 2, 3, 4, Inc.*, 573 P.2d 572, 572 (Kan. 1977). Plaintiff argues that such a rule is patently unfair. He argues in favor of an alternative rule espoused, *inter alia*, by the Supreme Court of New Jersey, which does not require a malicious prosecution plaintiff to show that the underlying probable cause was procured through corrupt means. *Lind v. Schmid*, 337 A.2d 365 (N.J. 1975). As the Court sees this matter as raising solely a false imprisonment claim, and it has concluded that the principles of *Lay* are sufficient to decide the matter, it has no need or occasion to resolve that dispute.

5601(e)(7), others do not, at least not expressly. The State asks the Court to analyze the contracts and make coverage determinations; or to simply rule that all such policies are irrelevant without reviewing them. The Court is not persuaded.

The extent of coverage, the meaning of the precise contractual language, and the intent of the contracting parties all may impact the Section 5601(e)(7) analysis, and discovery may be needed as to the contracts and other relevant information. The Court will not prejudge that potentially fact-based analysis on the existing record. At a minimum, given the overlapping and inconsistent coverages, Plaintiff should be afforded the opportunity to conduct discovery as to the issue.[6]

The request to dismiss based on the VTCA is denied.

V. The VIPA Claim

Defendant alleges that the VIPA must be dismissed because Plaintiff has not alleged and cannot establish that he is "actually innocent" of the offense of which he was convicted. The Court disagrees. First, Vermont is a notice pleading state. All that is required under Vt. R. Civ. P. 8 is a "short plain statement of the claim showing that the pleader is entitled to relief." *See Bock v. Gold*, 2008 VT 81, ¶ 5, 184 Vt. 575, 576 (noting same). No doubt, to prevail on his VIPA claim Plaintiff will

[6] Plaintiff also argues that Section 5601(e)(7) requires that the alternative remedy actually be available to him. While such an argument has been rejected in connection with assessing private rights of action for constitutional violations, *Wyatt v. City of Barre*, 885 F. Supp. 2d 682, 698 (D. Vt. 2012), it has not been examined in this context. Given the uncertainty over the insurance issue itself, the Court believes it imprudent to address such a novel issue when, in the end, it may not be presented in this case.

need to establish his actual innocence. But the Amended Complaint may not be dismissed simply because it does not articulate any particular phraseology.

Nor does the Court believe it appropriate to dismiss the VIPA claim at the threshold based on the State's assertion that he "cannot" establish his actual innocence. The VIPA provides that a person seeking damages must establish that he or she:

> is actually innocent of the felony or felonies that are the basis for the claim. As used in this chapter, a person is "actually innocent" of a felony or felonies if he or she did not engage in any illegal conduct alleged in the charging documents for which he or she was charged, convicted, and imprisoned.

13 V.S.A. § 5574.

The provision is likely meant to deny damages to those who have been found not guilty under the rigorous beyond-a-reasonable-doubt standard or those whose charges were dismissed because pivotal evidence was suppressed -- but who actually engaged in the allegedly illegal conduct. In cases such as this one, the allegedly illegal conduct was only arguably "illegal" because it had been proscribed by a prior court order. Absent that order, the conduct was not otherwise illegal or *malem prohibitum*.

The parties have not fully briefed the application of Section 5574 to such crimes or to the particular facts of this case. The Court will not dismiss such an untested issue. *Endres v. Endres*, 2006 VT 108, ¶ 4, 180 Vt. 640, 641 (courts should be wary of dismissing "novel" causes of action). Nor can it conclude, on the existing submissions, that there are no material facts in dispute as regards Plaintiff's receipt

of notice and conduct towards Ms. Mazelli from which the Court could make a determination as a matter of law as to his "actual innocence."[7]

Dated at Montpelier, Vermont, this 4th day of September, 2020.

Timothy B. Tomasi
Superior Court Judge

[7] While the Court has transformed this matter into a motion for summary judgment by considering the materials attached to the Defendant's motion, that process has limitations. It does not, for example, provide for a statement of uncontested material facts and statement of contested facts that would allow the Court to determine the specific facts potentially at issue. The present ruling is made without prejudice to any later motion for summary judgment that proceeds on a more traditional trajectory.