

VERMONT SUPERIOR COURT  
Orleans Unit  
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CIVIL DIVISION  
Case No. 21-CV-01253

**Robert Dragon v Chad Fontaine et al**

**ENTRY REGARDING MOTION**

Title: Motion to Dismiss Defendant State of Vermont's motion to dismiss (Motion: 5)  
Filer: Patrick T. Gaudet  
Filed Date: May 06, 2022

The motion is GRANTED.

A motion to dismiss filed at the outset of litigation is often focused on a specific legal hurdle that the defendant identifies as being a necessary, but missing, piece. Such a motion can be frustrating and confusing for a plaintiff, particularly a self-represented plaintiff, to confront. The argument often has nothing to do with either merits of plaintiff's claim or the harm that he or she has suffered. Instead, it is a technical, limited argument addressing an issue that may not have been clear to plaintiff at the outset of his or her filing.

In the present action, the Defendant, State of Vermont, lodges precisely this type of issue against the complaint. The State does not address the underlying factual issues or directly challenge the claims of Deliberate Indifference, Cruel and Unusual Punishment, or Equal Protection that Plaintiff Robert Dragon has alleged. Nor does the State address the harm and pain felt by Mr. Dragon in the wake of his mother's passing and the missed opportunities to visit in her final hours or to attend her funeral. Instead, the State is focused on a defect centering on who Mr. Dragon has sued, namely the State of Vermont and two of its employees in their official capacity.

***Procedural History and Initial Rule 75 Filing***

To understand the State's arguments, the Court begins with a procedural history of this case. Plaintiff Robert Dragon filed an initial complaint in April 2021 regarding the decision of an officer of the Department of Corrections ("DOC") not to allow Mr. Dragon to speak on the phone with his dying mother and the second decision of another DOC officer not to allow Mr. Dragon to

attend his mother's funeral or a separate private viewing. Mr. Dragon's entitled his complaint as a Rule 75 petition and alleged that he was seeking review of inhumane treatment. Such petition, to the extent that it seeks review of constitutional claims, is allowed under Vermont law. *In re Girouard*, 2014 VT 75, ¶ 12 (noting that while a court cannot review discretionary programming decisions, it can review constitutional claims under Rule 75).

Subsequent to this filing, the Prisoners' Rights Office screened the complaint and declined to represent Mr. Dragon in June 2021 because the likely remedy for his complaint was monetary damages, which is a type of claim that the Prisoners' Rights Office does not cover.

### **Claims of Negligence under 12 V.S.A. § 5601**

In March of 2022, Mr. Dragon filed a motion to amend his complaint under V.R.C.P. 15. The Court granted this motion to amend. In the amended complaint, Mr. Dragon restates the factual basis of his claim—two discretionary decisions by DOC Officers, which denied him a final conversation with his dying mother and the ability to attend either her funeral or a private viewing. He also makes explicit that his complaint is premised on alleged violations of his constitutional rights in three areas: Deliberate Indifference, Cruel and Unusual Punishment, and Equal Protection, and that he is seeking damages for the harm caused by these violations in the range of \$40,000 to \$50,000. Gone from the amended complaint is any reference to Rule 75 or “a review of governmental actions.” Instead, Mr. Dragon cites to 12 V.S.A. § 5601 and alleges “civil liability.”

Moving away from Rule 75 review in this context is consistent with Vermont's caselaw. The Vermont Supreme Court has ruled that Rule 75 is for “extraordinary relief” to require a public official or body to perform ministerial duties imposed by law or to take corrective action where there is an arbitrary abuse of power, but such compulsive power is “necessarily narrow.” *Ahem v. Mackey*, 2007 VT 27, ¶ 8 (citations omitted). Such narrow power does not include the authority to impose monetary damage. See, e.g., *Boule v. Menard*, Docket No. 325-6-16 WrCv (Jun. 20, 2017) (Gerety, J.) (dismissing a claim filed under Rule 75 seeking monetary damages for lack of subject matter of jurisdiction).

The problem with a theory of civil liability is that Mr. Dragon's claim cannot pass what is known as the “private analog test.” As laid out in Section 5601, the State's waiver of immunity for negligence and wrongful acts and omissions only extends to actions “under the same circumstances,

in the same manner, and to the same extent as a private person would be liable.” 12 V.S.A. § 5601(a). This provision limits liability to only situations where a plaintiff can show that the claim against the state is similar to a claim that a person could bring against a private individual. *Zullo v. State*, 2019 VT 1, ¶¶ 18–22; see also *Wool v. Menard*, 2018 VT 23, ¶ 9; *Sabia v. State*, 164 Vt. 293, 298 (1995).

This may be best expressed in two contrasting examples. If an officer runs a red light and crashes into another car, the victim of the crash could bring an action against the State and the officer because the action (running a red light) is one for which a private person could be held liable. *Rochon v. State*, 2004 VT 77, ¶ 6 (claim against Trooper for car crash passes the private analog test). On the other hand, if an officer negligently fails to investigate an address that leads to a search warrant being issued against the wrong address, there is no private analog and therefore no right for the owner of the wrong address to bring an action against the State for breaking into their home. *Zullo* 2019 VT 1, at ¶ 22.

In the present case, the decisions to allow an inmate to make a phone call or leave the corrections facility are inherently governmental acts to which there are no private analogs. The action is a governmental oversight of an individual’s liberty and freedom to travel or communicate that is not comparable to the circumstances, manner, or extent that a private individual could act or would be held liable. As such, the present claim cannot proceed under a theory of negligence because of the limitations contained in 12 V.S.A. § 5601.

**Civil Rights Action under 42 U.S.C. § 1983.**

This brings the analysis to the issue of civil rights. Mr. Dragon’s amended complaint cites to three important constitutional issues, namely Deliberate Indifference, Cruel and Unusual Punishment, and Equal Protection. Under 42 U.S.C. § 1983, an individual can file a monetary claim for the violation of one’s constitutional rights against a state officer or employee in their individual capacity. *Zullo*, 2019 VT 1, at ¶ 39 (citing *Howlett v. Rose*, 496 U.S. 356, 358 (1990)). There are numerous examples of so-called 1983 litigation being used to seek a monetary remedy for alleged constitutional violations. See, e.g., *Brown v. State*, 2018 VT 1, ¶ 13; *Bock v. Gold*, 2008 VT 81, ¶ 10.

To the extent that Plaintiff has made allegation that the actions of the two DOC officers violated his civil rights, the present action must be characterized as an action under Section 1983. This leads to the State’s primary argument in its Motion to Dismiss. It is well-established that

Section 1983 claims may only be filed against individuals in their individual capacity but not against the State of Vermont. *Zullo*, 2018 VT 1, at ¶ 39 (“A § 1983 action for monetary damages cannot be maintained against a state, a state agency, or state officials sued in their official capacity.”) (citing *Howlett*, 496 U.S. at 365); *Brown*, 2018 VT 1, at ¶ 15 (“With respect to claims for monetary damages, 42 U.S.C. § 1983 may not be used to assert a deprivation of a federal rights claim against a state, as a state is not a ‘person’ for purposes of the statute.”) (citing *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 64, 71(1989)); *Bock*, 2008 VT 81, at ¶ 9 (“... § 1983 claims are not maintainable against state employees in their official capacities.”) (citing *Shields v. Gerhart*, 155 Vt. 141, 150 (1990)).

In the present case, Plaintiff has filed against the State of Vermont and the Department of Corrections, which is a department within the Agency of Human Services, which, in turn, is a part of the State. While Plaintiff has mentioned the names of the two corrections officers in his complaint, he has not listed them in the caption of his case at any point or sought to serve them as separate defendants. To date, the only service that has occurred is a waiver of service executed by the State of Vermont on its own behalf on April 7, 2022. In granting Plaintiff’s Motion to Amend, the Court, in its March 24, 2022, Entry Order, also gave Plaintiff 30 days to complete service and file a return of service on any defendants.<sup>1</sup> To date, no other returns of service have been filed and no motion for extension of time or alternative service have been filed.

### **Order**

Based on the foregoing, the Court concludes that the present action cannot continue against the only named and served defendant in this matter, the State of Vermont. Mr. Dragon’s claims fail as either a Rule 75 Review or a negligence action under 12 V.S.A. § 5601. To the extent that the Mr. Dragon’s claim is intended as a claim for monetary damages under 42 U.S.C. § 1983, it cannot proceed against the State of Vermont or any individual in their official capacity. Given the lack of information in Mr. Dragon’s pleadings as to any individual defendants and the lack of service on any individuals, the present action cannot be interpreted to have been filed or served properly on anyone in their individual capacity.

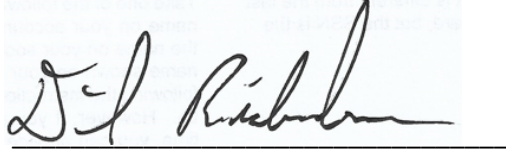
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<sup>1</sup> While Plaintiff has included an “et al.” in his filings, he has not listed the officers in their individual capacity or sought to serve them as individuals. To the extent that the complaint can be read liberally as an effort to join them, the most the Court can reasonably conclude is that the officers are joined in their official capacity as officers of the State of Vermont.

Therefore, the present action is dismissed as a matter of law.

SO ORDERED, this 27<sup>th</sup> day of July 2022.

Electronically signed on 7/27/2022 3:41 PM pursuant to V.R.E.F. 9(d)

A handwritten signature in black ink, appearing to read "D. Richardson", is written over a light blue rectangular background. A horizontal line is drawn below the signature.

Daniel Richardson  
Superior Court Judge