CUMBERLAND FARMS, INC.
v. DEAN DUBOIS ET AL.
(AC 36038)

DiPentima, C. J., and Alvord and Harper, Js.

Argued September 23—officially released December 30, 2014

(Appeal from Superior Court, judicial district of New Britain, Wiese, J.)

Lorinda S. Coon, with whom, on the brief, was *Jessica D. Meerbergen*, for the appellant (named defendant).

Daniel Algilani, with whom was *Robert C. Lubus, Jr.*, for the appellee (plaintiff).

Opinion

ALVORD, J. The defendant Dean Dubois,[1] a state police trooper, appeals from the judgment of the trial court denying his motion to dismiss. On appeal,[2] the defendant trooper Dubois argues that the court erred in denying his motion to dismiss and treating it as a motion to strike because the defendant trooper Dubois was a party to the lawsuit at issue in his official capacity only, and thus, the claims against him were barred by sovereign immunity. He further argues that because he was not a party to the lawsuit in his individual capacity, repleading could not establish a cause of action against him in his individual capacity. Because the defendant trooper Dubois was a party to the lawsuit in his official capacity only, we conclude that the court erred in treating the motion to dismiss as a motion to strike, and we reverse the judgment of the trial court on the motion to dismiss.

The following facts, as alleged in the complaint, are relevant to the defendant trooper Dubois' claims on appeal. On December 27, 2011, state police were investigating a report that a vehicle had been stolen from Woodbury. The vehicle was being tracked using stolen vehicle recovery technology, and Officer Joseph Roden of the state police traveled to the location at which the stolen vehicle had been located. Roden observed the vehicle, and he followed it into a parking lot, where he ordered the operator, Brian Miele, to exit the vehicle. Miele instead drove around Roden's vehicle and exited the parking lot. Roden pursued the vehicle along a number of streets in Waterbury, until desk personnel from state police Troop A barracks terminated the pursuit, at which time Roden pulled over his vehicle. Approximately five minutes after Roden stopped pursuing the vehicle, the defendant trooper Dubois observed the vehicle being operated on Meriden-Waterbury road in an erratic manner. The defendant trooper Dubois attempted to stop the vehicle, but the operator did not stop, and the defendant trooper Dubois pursued the operator in a westbound direction on Route 322 near the intersection with Route 10. A gasoline tanker truck, owned by the plaintiff, Cumberland Farms, Inc.,[3] was heading in a northbound direction on Route 10 in Southington when the operator began to make a left hand turn onto Route 322. At the same time, Miele was travelling in a westbound direction on Route 322, and his vehicle struck the plaintiff's tanker truck, causing it to catch on fire.

The plaintiff's complaint contained six counts, of which only the first is relevant to this appeal. The first count, addressed to "state trooper Dean Dubois and State of Connecticut," alleged that "the Defendant Trooper was acting within the scope of his duties as a Connecticut State Trooper" when he "engaged in a high speed pursuit of the stolen vehicle." The plaintiff alleged

that the collision between the stolen vehicle operated by Miele and the plaintiff's tanker trunk was caused by "the negligence of the defendant trooper . . . ." The plaintiff alleged that the state, pursuant to General Statutes § 52-556,[4] "is liable for the property damage caused by the negligence of its employee . . . the defendant trooper." The plaintiff served the defendant trooper Dubois by leaving a copy of the complaint in the hands of: "State Trooper Kevin Moore, [at the] Department of Public Safety [located at] 1111 Country Club Road, Middletown, CT 06456." The return of service stated that Moore was authorized to accept service for: "Dean Dubois, State Trooper [of] Connecticut State Police Troop A, [at] 90 Lakeside Road, Southbury, CT 06477 . . . ."

On April 3, 2013, the defendant trooper Dubois filed a motion to dismiss, arguing that the claims in the first count against him were barred pursuant to General Statutes § 4-165.[5] On June 13, 2013, the plaintiff filed an objection, in which it acknowledged that the defendant trooper Dubois "is not subject to personal liability" under § 4-165 for the damage to the plaintiff's truck based on the defendant trooper Dubois' negligence. The plaintiff went on to argue that the defendant trooper Dubois is liable for his reckless conduct, and stated that "the plaintiff has amended its complaint to reflect allegations of recklessness."

On the same day, the plaintiff filed a request for leave to amend its complaint, claiming that the "amendment is necessary to include allegations of recklessness against the defendant, state Trooper Dean Dubois." In its proposed amended complaint, the plaintiff added allegations of recklessness, on the same fact pattern, against the defendant trooper Dubois in an additional count, alleging that the defendant trooper Dubois was acting within the scope of his duties as a state trooper. The defendant trooper Dubois filed an objection to the request to amend, arguing that the amendment was improper procedurally because he had raised an issue of subject matter jurisdiction through his motion to dismiss count one of the complaint. The trial court determined that no action was necessary on the request to amend "in view of [its] subsequent memorandum of decision on the motion to dismiss and to strike and the subsequent motion to amend."

A hearing on the motion to dismiss was held on June 18, 2013. On July 16, 2013, the trial court issued its memorandum of decision, in which it determined that "there is no indication that the plaintiff cannot state [a] cause of action against [the defendant trooper] Dubois but rather that it has not stated such a cause of action. Because a motion to dismiss is an improper vehicle to attack such a deficiency . . . the motion to dismiss as to Dubois is denied."[6] (Citation omitted.) The court went on to utilize its "inherent authority to treat a

motion to dismiss as a motion to strike . . . [and struck] count one as to Dubois." The defendant trooper Dubois filed a motion for reargument and reconsideration of the July 16, 2013 memorandum of decision, arguing that along with the statutory immunity for negligence provided in § 4-165, common-law sovereign immunity would still bar a claim against the defendant trooper Dubois in his official capacity, even if the plaintiff was allowed to amend its complaint to add allegations of recklessness. The defendant trooper Dubois claimed that he had been sued in his official capacity only, and thus he was immune from suit. The plaintiff objected, and the court reconsidered its decision and ruled that it would remain the order of the court. This appeal followed.

We begin with the standard of review for a motion to dismiss. "A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the trial court's ultimate legal conclusion and resulting grant of the motion to dismiss will be de novo." (Internal quotation marks omitted.) *Henderson* v. *State*, 151 Conn. App. 246, 256, 95 A.3d 1 (2014). "When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." (Internal quotation marks omitted.) *Gold* v. *Rowland*, 296 Conn. 186, 200–201, 994 A.2d 106 (2010). "Claims involving the doctrines of common-law sovereign immunity and statutory immunity, pursuant to § 4-165, implicate the court's subject matter jurisdiction. . . . [A] subject matter jurisdictional defect may not be waived . . . [or jurisdiction] conferred by the parties, explicitly or implicitly. . . . [O]nce raised, either by a party or by the court itself, the question must be answered before the court may decide the case."[7] (Citation omitted; internal quotation marks omitted.) *Kelly* v. *Albertsen*, 114 Conn. App. 600, 605, 970 A.2d 787 (2009).

I

As a preliminary matter, we must determine whether the defendant trooper Dubois was sued in his official capacity or in an individual capacity. The plaintiff argues that while count one alleges that the defendant trooper Dubois negligently operated his motor vehicle while acting in his official capacity, "this does not mean that Trooper Dubois was sued only in his official capacity." Our Supreme Court has set forth the following criteria for determining whether a state employee has

been sued in his official capacity: "(1) a state official has been sued; (2) the suit concerns some matter in which that official represents the state; (3) the state is the real party against whom relief is sought; and (4) the judgment, though nominally against the official, will operate to control the activities of the state or subject it to liability." *Spring* v. *Constantino*, 168 Conn. 563, 568, 362 A.2d 871 (1975).[8]

We find that the first and second *Spring* criteria have been met. It is clear from the complaint that the plaintiff sued the defendant trooper Dubois in his official capacity for allegedly negligent conduct which resulted in damages to the plaintiff's tanker truck from a collision between the tanker truck and a stolen car. The plaintiff alleged in his complaint that the defendant trooper Dubois is a "member of the Connecticut State Police, an agency of the defendant, State of Connecticut." Furthermore, the plaintiff alleged the defendant trooper Dubois to be "acting within the scope of his duties as a Connecticut State Trooper" at all times relevant to the incident in question. See *Macellaio* v. *Newington Police Dept.*, 142 Conn. App. 177, 181, 64 A.3d 348 (2013) ("[t]he first and second criteria are met because the defendant is a state official and this suit concerns a matter related exclusively to his position as chief deputy clerk of the [court]"). In this case, the matter relates exclusively to the defendant trooper Dubois' actions as a state trooper.

With regard to the third and fourth *Spring* criteria, the state is the real party against whom the plaintiff sought relief, and a judgment against the defendant trooper Dubois would subject the state to liability. The only count of the complaint that was addressed to the defendant trooper Dubois concluded with the allegation that "[p]ursuant to General Statutes § 52-556, [the state] is liable for the property damage caused by the negligence of its employee . . . the defendant Trooper." See *Cimmino* v. *Marcoccia*, 149 Conn. App. 350, 359–60, 89 A.3d 384 (2014) (concluding that state was real party in interest because damages sought were premised on injuries plaintiff alleged defendants caused during performance of acts that were part of official duties). Our Supreme Court in *Miller* v. *Egan*, 265 Conn. 301, 309, 828 A.2d 549 (2003), emphasized that "[n]owhere in the plaintiff's complaint did he allege that he was bringing an action against the defendants in their individual capacities." Likewise, the plaintiff in this case did not allege in the complaint that it was suing the defendant trooper Dubois in his individual capacity. Additionally, a judgment against the defendant trooper Dubois would subject the state to liability, according to the plaintiff's own allegation that the state is "liable for the property damage caused by the negligence of its employee . . . ." See *Miller* v. *Egan*, supra, 311 (noting that complaint sought relief solely against state).

Because the four criteria of the *Spring* test have been satisfied, we determine that the defendant trooper Dubois was not sued in his individual capacity, but rather was sued in his official capacity only.

II

We must next determine whether the court erred in both failing to rule on the motion to dismiss and in utilizing the court's "inherent authority" to treat the defendant trooper Dubois' motion to dismiss as a motion to strike. "[I]f a pleading . . . on its face is legally insufficient, although facts may indeed exist which, if properly pleaded, would establish a cause of action upon which relief could be granted, a motion to strike is required. . . . A motion to dismiss, by contrast, properly attacks the jurisdiction of the court, essentially asserting that the plaintiff *cannot* as a matter of law and fact state a cause of action that should be heard by the court." (Citations omitted; emphasis in original; internal quotation marks omitted.). *Gurliacci* v. *Mayer*, 218 Conn. 531, 544, 590 A.2d 914 (1991). The trial court in this case concluded that "there is no indication that the plaintiff cannot state [a] cause of action against [the defendant] but rather that it has not stated such a cause of action. Because a motion to dismiss is an improper vehicle to attack such a deficiency . . . the motion to dismiss as to [the defendant] is denied." (Citation omitted.) The court then treated the motion to dismiss as a motion to strike and struck count one as to the defendant trooper Dubois.

We determine that the court improperly denied the defendant trooper Dubois' motion to dismiss because the court lacked subject matter jurisdiction over the claim against the defendant trooper Dubois, who was a party to the lawsuit only in his official capacity and only as part of a count brought pursuant to § 52-556 against the state.[9] The plaintiff relies on *In re Jose B.*, 303 Conn. 569, 34 A.3d 975 (2012),[10] and *Gurliacci* v. *Mayer*, supra, 218 Conn. 531,[11] to support its argument that the court properly treated the motion to dismiss as a motion to strike. The plaintiff's citation of these cases for the proposition that the failure to plead essential facts is properly treated as a motion to strike rather than a motion to dismiss is not applicable in the present case. In this case, the plaintiff fully pleaded a cause of action against one defendant, the state. The plaintiff failed to not only serve defendant trooper Dubois properly in his individual capacity but also to plead any individual capacity claims against him, such that the plaintiff would be able, by way of amendment, to plead a cause of action against him.

The trial court, in denying the state's motion to strike the allegations against it in the first count, determined that the complaint "squarely falls within the purview of § 52-556." The plaintiff, in its first count, alleged

negligence on the part of the defendant trooper Dubois and sought to collect damages from the state pursuant to § 52-556, which "provides a cause of action against the state when any person is injured through the negligence of any state employee while operating a motor vehicle owned and insured by the state." *Babes* v. *Bennett*, 247 Conn. 256, 260, 721 A.2d 511 (1998). The state "has expressly consented to be sued with respect to the negligence of any state official or employee when operating a motor vehicle owned and insured by the state . . . ." (Internal quotation marks omitted.) *McKinley* v. *Musshorn*, 185 Conn. 616, 621, 441 A.2d 600 (1981). Thus, the plaintiff sufficiently pleaded allegations against the state to bring its cause of action within a statutory waiver of sovereign immunity.[12]

The trial court incorrectly determined, however, that the plaintiff could replead to assert a cause of action against the defendant trooper Dubois. The trial court had before it an official capacity claim alleging negligence of a state trooper acting within the scope of his duties, and an allegation that the state was liable for such negligence pursuant to § 52-556. The plaintiff did not serve the defendant trooper Dubois in his individual capacity, nor did its complaint contain allegations directed at the defendant trooper Dubois in his individual capacity.[13] Therefore, the plaintiff could not state a cause of action against the defendant trooper Dubois because to do so would require allowing the plaintiff to add individual capacity claims against a defendant who was present in the case in his official capacity only. In *Miller* v. *Egan*, supra, 265 Conn. 303–304, our Supreme Court reversed the trial court's denial of the defendants' motion to dismiss official capacity claims against them. The court declined to allow the plaintiff to claim for the first time on appeal that he had sought relief against the defendants in their individual capacities in addition to the state, reasoning, "[o]therwise, it would simply be too easy for a plaintiff, who originally had alleged causes of action against a state officer only in his official capacity, thus seeking relief solely against the state, subsequently to claim that he also sought relief against the state officer in his individual capacity. By utilizing this tactic, a plaintiff could, at least partially, avoid dismissal of a complaint due to sovereign immunity and subject the unsuspecting state officer to personal liability." Id.

We find additional guidance in *Bowen* v. *Seery*, 99 Conn. App. 635, 636, 915 A.2d 335, cert. denied, 282 Conn. 906, 920 A.2d 308 (2007), in which the plaintiff sued a state police trooper alleging that the officer caused him injury by negligently striking his motor vehicle. The officer filed a motion to dismiss, arguing that sovereign immunity applied and therefore that the court lacked subject matter jurisdiction. Id., 636–37. The plaintiff filed a request to amend his complaint to add a count alleging recklessness against the officer. Id.,

637. The court declined to permit the amended complaint and granted the defendant's motion to dismiss. Id. The plaintiff appealed, arguing that the court improperly determined that the state was not a party to the action and claiming that he had attempted to add the state as a party prior to judgment entering. Id., 638–39. This court affirmed the judgment of dismissal, stating, "[the officer] is the sole defendant in this action, and . . . [the plaintiff's] request [to amend] was not an attempt to add the state as a defendant but rather to add a count of recklessness against [the officer]." Id., 639.

Just as a plaintiff may not invoke the exception to sovereign immunity contained in § 52-556 by bringing an action against an individual employee and later arguing that the state was also a party without ever having served the state; see id., 639–40; a plaintiff may not bring an action against the state alleging negligent actions by its employee in his official capacity and then later argue that the employee was a party in his individual capacity without ever having served him in such capacity. Our case law has treated persons sued in their official capacity as parties different from those sued in their individual capacity. See *C & H Management, LLC* v. *Shelton*, 140 Conn. App. 608, 614, 59 A.3d 851 (2013) (concluding for res judicata purposes that municipal official sued in individual capacity was not same party as municipal official who was sued in mandamus action, nor were two in privity). Because the defendant trooper Dubois in his official capacity is a separate party from Dean Dubois in his individual capacity, the plaintiff cannot replead its complaint to allege recklessness, and attempt thereby to bring Dean Dubois into the lawsuit in his individual capacity without ever having made proper service on him. A court would have no jurisdiction over such claim, and dismissal is the appropriate remedy.

Because § 52-556 only authorizes suit *against the state* on the basis of the negligence of its employee, and because Dean Dubois has not been sued in his individual capacity, the trial court lacked subject matter jurisdiction over the claim against the defendant trooper Dubois. Therefore, his motion to dismiss was erroneously denied.

The judgment is reversed and the case is remanded with direction to grant the motion to dismiss as to the defendant trooper Dubois and to render judgment thereon.

In this opinion the other judges concurred.

[1] The complaint also named Brian Miele, Gretchen A. Zeidler, and the state of Connecticut as defendants; they are not parties to this appeal. We refer to the state of Connecticut as the state and Dean Dubois as the defendant trooper Dubois.

[2] The denial of a motion to dismiss based on a colorable claim of sovereign immunity is an immediately appealable final judgment. *Miller* v. *Egan*, 265 Conn. 301, 303 n.2, 828 A.2d 549 (2003).

[3] The plaintiff alleges that its tanker truck was operated through its agent, employee, or servant.

[4] General Statutes § 52-556 provides: "Any person injured in person or property through the negligence of any state official or employee when operating a motor vehicle owned and insured by the state against personal injuries or property damage shall have a right of action against the state to recover damages for such injury."

[5] General Statutes § 4-165 (a) provides: "No state officer or employee shall be personally liable for damage or injury, not wanton, reckless or malicious, caused in the discharge of his or her duties or within the scope of his or her employment. Any person having a complaint for such damage or injury shall present it as a claim against the state under the provisions of this chapter."

[6] In its memorandum of decision, the court also decided, among other motions, a motion to strike filed on behalf of the state. The state moved to strike the allegations against it in the first count, arguing that the plaintiff's allegations did not relate to the operation of a motor vehicle, which is required for suit under § 52-556. The court denied the motion to strike.

[7] Once a party has raised an issue of subject matter jurisdiction, the court must immediately act on it before proceeding to any other action in the case. *Gurliacci* v. *Mayer*, 218 Conn. 531, 545, 590 A.2d 914 (1991). Therefore, once the defendant filed his motion to dismiss on the grounds that the court lacked subject matter jurisdiction, the court was required to refrain from acting on the plaintiff's request to amend its complaint. Although the court did note that "the plaintiff has filed a proposed amended complaint to reflect . . . allegations of recklessness against [the defendant trooper Dubois]," the court properly appeared to consider the motion to dismiss in relation to the operative complaint and not the proposed amended complaint.

[8] See also *Sullins* v. *Rodriguez*, 281 Conn. 128, 136, 913 A.2d 415 (2007) (setting forth *Spring* test and noting it is "an appropriate mechanism for . . . state courts to determine the capacity in which . . . defendants are sued in actions asserting violations of state law," but declining to apply it to federal claims under 42 U.S.C. § 1983); *Miller* v. *Egan*, 265 Conn. 301, 308, 828 A.2d 549 (2003) ("determination of whether the plaintiff's complaint alleged claims against the defendants in their individual capacities is governed by the test set forth in *Spring*"); *Henderson* v. *State*, supra, 151 Conn. App. 257 (applying *Spring* test).

[9] It has been established that § 52-556 does not authorize a statutory cause of action against a state employee in his individual capacity. See *McKinley* v. *Musshorn*, 185 Conn. 616, 621 n.6, 441 A.2d 600 (1981) ("[t]he plaintiff's claim that § 52-556 waives the immunity of state employees as well as of the state is unfounded in light of the express language of that section and of our holding in the present case").

[10] *In re Jose B.* involved a petition filed by a youth seeking to have himself adjudicated a neglected child, but he became eighteen years old two days after the filing of his petition. Our Supreme Court determined that the trial court lacked statutory authority to provide him with relief in the manner of a retroactive adjudication of neglect. This case does not provide support for the plaintiff's argument because, in the present case, the plaintiff brought suit pursuant to § 52-556 and properly pleaded an action pursuant to that provision. The pleadings here are unlike the pleadings in *In re Jose B.*, in which the petitioner brought suit under a statutory provision but failed to plead facts sufficient to sustain that cause of action, and our Supreme Court determined that this implicated the court's statutory authority rather than its subject matter jurisdiction.

[11] In *Gurliacci* v. *Mayer*, supra, 218 Conn. 531, the court held that the plaintiff's failure to allege either exception to the fellow employee statutory immunity provided under § 7-465 (that the employee was acting outside the scope of employment or that the employee was acting wilfully or maliciously) was not the proper subject of a motion to dismiss. Id., 542. Because the complaint merely failed to state a legally sufficient cause of action, but if properly pleaded would state a sufficient cause of action, the trial court in *Gurliacci* did not lack subject matter jurisdiction, and the complaint was instead properly subject to a motion to strike. Id., 545. *Gurliacci* does not support the plaintiff's argument because the plaintiff has not merely failed to allege facts to bring it within an exception to immunity. The plaintiff has instead invoked the statutory waiver of immunity found in § 52-556 and sought damages against the state for the alleged negligence of the defendant trooper Dubois.

[12] The parties also present arguments concerning statutory immunity under § 4-165, which provides immunity to employees acting within their scope of employment, so long as their actions are not "wanton, reckless or malicious." "The statutory immunity provided by § 4-165 is distinct from common-law sovereign immunity." *Kenney* v. *Weaving*, 123 Conn. App. 211, 218, 1 A.3d

1083 (2010). Section 4-165 immunity applies to lawsuits against state employees in their individual capacities. "Because an action against state employees in their official capacities is, in effect, an action against the state . . . the only immunity that can apply is the immunity claimed by the state itself—sovereign immunity." (Citation omitted.) *Mercer* v. *Strange*, 96 Conn. App. 123, 128, 899 A.2d 683 (2006). We determine that the defendant was sued in his official capacity only, and we therefore decline to consider arguments pertaining to § 4-165.

[13] We also note that the defendant trooper Dubois was served neither in hand nor at his abode, but was instead served at the Department of Public Safety. It follows from the plaintiff's failure to serve the defendant trooper Dubois in his individual capacity that even if the operative complaint had contained allegations against Dean Dubois in his individual capacity, the complaint still would have been subject to a motion to dismiss, albeit on the ground of personal jurisdiction, provided the motion complied with the time limitation set forth in Practice Book § 10-30 to avoid waiving the claim under Practice Book § 10-32. See *Traylor* v. *Gerratana*, 148 Conn. App. 605, 612–13, 88 A.3d 552 (dismissing individual capacity claims against legislators, who were not served at their usual place of abode in accordance with General Statutes § 52-57 [a], but rather were served in their official capacities at office of attorney general, and noting "the trial court lacked personal jurisdiction over the legislative defendants in their individual capacities"), cert. denied, 312 Conn. 901, 902, 91 A.3d 908, (2014); see also *Edelman* v. *Page*, 123 Conn. App. 233, 243–44, 1 A.3d 1188 (affirming trial court's granting of motion to dismiss individual capacity claims against state employee defendants because defendants were served at office of attorney general rather than their usual places of abode), cert. denied, 299 Conn. 908, 10 A.3d 525 (2010).