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ROBERT C. FLANAGAN *v.* RICHARD BLUMENTHAL ET AL.
(SC 16634)

Sullivan, C. J., and Borden, Katz, Zarella and Lavery, Js.[1]

Argued April 16, 2002—officially released August 12, 2003

Gregory T. D'Auria, associate attorney general, with whom were *Jane R. Rosenberg* and *Eliot D. Prescott*, assistant attorneys general, and, on the brief, *Richard Blumenthal*, attorney general, for the appellants (defendants).

Matthew E. Frechette, with whom was *Roger J. Frechette*, for the appellee (plaintiff).

Opinion

BORDEN, J. The defendants, Attorney General Richard Blumenthal and the state of Connecticut, appeal[2] from the judgment of the trial court denying their

motion to dismiss, on the ground of sovereign immunity, the claim of the plaintiff, Robert C. Flanagan, a former Superior Court judge, seeking reimbursement, pursuant to General Statutes § 5-141d,[3] for legal fees and expenses he had incurred while defending against a civil rights action filed against him by another state employee.[4] The dispositive issue in this appeal is whether the trial court improperly determined that § 5-141d constitutes a waiver by the state of its sovereign immunity.[5] We conclude, pursuant to our recent holding in *St. George* v. *Gordon*, 264 Conn. 538, 551, 825 A.2d 90 (2003), that § 5-141d waives the state's immunity from liability but does not waive the state's immunity from suit. Accordingly, we reverse the judgment of the trial court denying the defendants' motion to dismiss the action on the ground of sovereign immunity.

The plaintiff brought this action against the defendants for indemnification pursuant to § 5-141d. The defendants moved to dismiss the action on the ground of sovereign immunity. The trial court denied the motion to dismiss.

The record reveals the following facts and procedural history. On March 14, 1996, Penny Ross, now known as Penny Ross-Tackach, a court reporter for the state judicial branch, filed a complaint with the commission on human rights and opportunities (commission) against the plaintiff and the judicial branch. In her complaint, Ross-Tackach alleged that the plaintiff had violated her civil rights under state and federal law by using his position of authority to coerce her into having a sexual relationship with him.

Ross-Tackach also filed a complaint, pursuant to General Statutes § 51-51*l*, with the judicial review council (review council) making substantially similar allegations against the plaintiff. The review council ultimately determined that the allegations of coercion were unfounded. Nevertheless, the review council concluded that the plaintiff had violated canons 1 and 2A of the Code of Judicial Conduct because he had engaged in a consensual sexual relationship with Ross-Tackach, a married court employee, a fact to which the plaintiff had testified before the review council. Accordingly, the review council determined that the plaintiff should be censored publicly. The plaintiff appealed from the review council's decision to this court claiming, inter alia, that ''as a matter of law, it is not a violation of [canons 1 or 2A of the Code of Judicial Conduct] for a judge to have had a three and one-half year consensual affair with a married court reporter regularly assigned to his courtroom over the course of the affair.'' *In re Flanagan*, 240 Conn. 157, 188, 690 A.2d 865, cert. denied, 522 U.S. 865, 118 S. Ct. 172, 139 L. Ed. 2d 114 (1997). We affirmed the review council's decision, concluding that ''this was not purely personal conduct, because it took place with a person with whom [the plaintiff] had

an ongoing, daily professional relationship'' and because ''the risk of injury to public confidence in the integrity of the judiciary is substantially heightened in this instance as opposed to a case where the affair was with a person unconnected with his daily activities as a judge of the Superior Court.'' Id., 191.

After Ross-Tackach filed her complaint with the commission, the plaintiff requested that the defendants indemnify and defend him pursuant to § 5-141d.[6] The attorney general's office notified the plaintiff that it had ''determined that the allegations regarding a sexual relationship between [Ross-Tackach] and [the plaintiff] certainly do not involve allegations concerning conduct taken 'in the discharge of his duties or within the scope of his employment' within the meaning of . . . § 5-141d such as to entitle [the plaintiff] to representation and indemnification by the state.'' Accordingly, the defendants denied the plaintiff's request.

Thereafter, the plaintiff filed an action against the defendants in the United States District Court for the District of Connecticut, alleging that the defendants' refusal to indemnify and represent him had denied him due process under the United States constitution and had violated state law. The defendants moved to dismiss the plaintiff's action. The District Court dismissed, on sovereign immunity grounds, the plaintiff's federal due process claim seeking damages for the defendants' failure to indemnify him. *Flanagan* v. *Blumenthal*, United States District Court, Docket No. 3:98CV148 (D. Conn. November 22, 1999). The District Court also dismissed the plaintiff's due process claim seeking injunctive relief for the defendants' failure to represent him, after concluding that the plaintiff had failed to establish a cognizable property interest because he had not alleged sufficient facts to demonstrate that he had been acting within the scope of his employment, as required under § 5-141d. Id. After reviewing Connecticut law, the allegations in the complaint, and this court's decision in *In re Flanagan*, the District Court further determined that the plaintiff's consensual sexual relationship ''could not, as a matter of law, possibly be within the scope of [his] employment . . . .'' Id. In light of its determinations with respect to the plaintiff's federal constitutional claims, the District Court declined to exercise supplemental jurisdiction over the plaintiff's state law claims. Id. Accordingly, the District Court granted the defendants' motion to dismiss the plaintiff's claim.[7] Id.

Subsequently, after receiving a notice of the right to sue from the federal Equal Employment Opportunity Commission, Ross-Tackach filed an action against the plaintiff and the judicial branch in the United States District Court for the District of Connecticut, alleging violations of her civil rights. Thereafter, pursuant to a stipulation entered into by the parties, the District Court dismissed that action with prejudice. *Tackach* v. *Flana-*

gan, United States District Court, Docket No. 300CV022357 (D. Conn. April 25, 2001).

The plaintiff then filed the present action seeking damages, fees and costs in the Superior Court, alleging that the defendants' failure to indemnify and defend him violated § 5-141d, as well as General Statutes §§ 4-141 and 4-165, and article first, §§ 8 and 20, of the Connecticut constitution.[8] The defendants again moved to dismiss, claiming that, under the doctrine of sovereign immunity, the trial court lacked subject matter jurisdiction. The trial court denied the defendants' motion to dismiss, relying in part on *Martinez* v. *Dept. of Public Safety*, Superior Court, judicial district of Fairfield at Bridgeport, Docket No. CV00377191 (December 22, 2000) (28 Conn. L. Rptr. 569), a case in which the Superior Court had rejected a claim of sovereign immunity based on a statute similar to § 5-141d. This appeal by the defendants followed.[9]

We subsequently affirmed the trial court's judgment. *Martinez* v. *Dept. of Public Safety*, 258 Conn. 680, 784 A.2d 347 (2001) *(Martinez I)*. Thereafter, we granted the motion for rehearing en banc filed by the defendant in that case. In *Martinez* v. *Dept. of Public Safety*, 263 Conn. 74, 76, 818 A.2d 758 (2003) *(Martinez II)*, this court concluded that General Statutes (Rev. to 2003) § 53-39a,[10] which was at issue in that case, waived the state's immunity from liability but did not waive the state's immunity from suit. Accordingly, the en banc rehearing of *Martinez II* resulted in reversal of the trial court's decision. Id., 88.

The defendants claim that the plaintiff's action is barred by the doctrine of sovereign immunity. We agree.

Subsequent to *Martinez II*, and most recently, this court decided *St. George* v. *Gordon*, supra, 264 Conn. 538, in which we applied *Martinez II* to a claim for indemnity brought pursuant to § 5-141d, the same statute on which the plaintiff relies in the present case. In *St. George*, we reaffirmed our analysis in *Martinez II* regarding when a statute would be held to have waived sovereign immunity from suit, and we held that § 5-141d was not such a statute. Id., 551–53. In that case, we also considered the effect of No. 03-97, § 2, of the 2003 Public Acts on § 5-141d, and we concluded that, although that recently enacted legislation was intended to clarify the legislative intent regarding General Statutes (Rev. to 2003) § 53-39a, the statute involved in *Martinez II*, it did not affect § 5-141d. Id., 551–52 n.13. It is clear that *St. George* controls the present case, and that, therefore, the plaintiff's claim is barred by the doctrine of sovereign immunity.[11]

The judgment is reversed and the case is remanded to the trial court with direction to render judgment dismissing the plaintiff's complaint.

In this opinion ZARELLA and LAVERY, Js., con-

curred.

[1] This case originally was argued before a panel of this court consisting of Chief Justice Sullivan, and Justices Borden, Katz, Vertefeuille and Zarella. Subsequent to oral argument, Justice Vertefeuille recused herself and Chief Judge Lavery of the Appellate Court was added to the panel. Judge Lavery read the briefs and listened to the tape recording of the oral argument.

[2] The defendants appealed from the trial court's judgment to the Appellate court. We then granted the defendants' motion to transfer the case to this court pursuant to Practice Book § 65-2 and General Statutes § 51-199 (c).

[3] General Statutes § 5-141d provides: ''(a) The state shall save harmless and indemnify any state officer or employee, as defined in section 4-141, and any member of the Public Defender Services Commission from financial loss and expense arising out of any claim, demand, suit or judgment by reason of his alleged negligence or alleged deprivation of any person's civil rights or other act or omission resulting in damage or injury, if the officer, employee or member is found to have been acting in the discharge of his duties or within the scope of his employment and such act or omission is found not to have been wanton, reckless or malicious.

''(b) The state, through the Attorney General, shall provide for the defense of any such state officer, employee or member in any civil action or proceeding in any state or federal court arising out of any alleged act, omission or deprivation which occurred or is alleged to have occurred while the officer, employee or member was acting in the discharge of his duties or in the scope of his employment, except that the state shall not be required to provide for such a defense whenever the Attorney General, based on his investigation of the facts and circumstances of the case, determines that it would be inappropriate to do so and he so notifies the officer, employee or member in writing.

''(c) Legal fees and costs incurred as a result of the retention by any such officer, employee or member of an attorney to defend his interests in any such civil action or proceeding shall be borne by the state only in those cases where (1) the Attorney General has stated in writing to the officer, employee or member, pursuant to subsection (b), that the state will not provide an attorney to defend the interests of the officer, employee or member, and (2) the officer, employee or member is thereafter found to have acted in the discharge of his duties or in the scope of his employment, and not to have acted wantonly, recklessly or maliciously. Such legal fees and costs incurred by a state officer or employee shall be paid to the officer or employee only after the final disposition of the suit, claim or demand and only in such amounts as shall be determined by the Attorney General to be reasonable. In determining whether such amounts are reasonable the Attorney General may consider whether it was appropriate for a group of officers, employees or members to be represented by the same counsel.

''(d) The provisions of this section shall not be applicable to any state officer or employee to the extent he has a right to indemnification under any other section of the general statutes.''

[4] '' 'The general rule is that the denial of a motion to dismiss is an interlocutory ruling and, therefore, is not a final judgment for purposes of appeal.' *Shay* v. *Rossi*, 253 Conn. 134, 164, 749 A.2d 1147 (2000) [overruled in part on other grounds, *Miller* v. *Egan*, 265 Conn. 301, 325, A.2d (2003)]. In *Shay*, however, we concluded that the denial of a motion to dismiss based on a colorable claim of sovereign immunity is an immediately appealable final judgment because 'the order or action so concludes the rights of the parties that further proceedings cannot affect them.' Id., 164–65.'' *Martinez* v. *Dept. of Public Safety*, 263 Conn. 74, 77 n.5, 818 A.2d 758 (2003).

[5] The defendants also claim that, even if § 5-141d constitutes a waiver of the state's sovereign immunity, the plaintiff has failed to satisfy the necessary predicate under § 5-141d (c) (2), which requires that he be ''thereafter found to have acted . . . in the scope of his employment,'' because the claim brought against the plaintiff for which he seeks reimbursement arose out of a consensual sexual relationship he had with the claimant. Because we resolve this appeal on the issue of sovereign immunity, we need not reach that issue.

[6] The plaintiff also had filed an action seeking to enjoin the proceedings before the commission on the grounds of, inter alia, estoppel and res judicata, in light of the review council's findings that the charges were unfounded. The trial court's decision denying injunctive relief on the ground that the plaintiff had failed to exhaust his administrative remedies was affirmed on appeal. See *Flanagan* v. *Commission on Human Rights & Opportunities*, 54 Conn. App. 89, 733 A.2d 881, cert. denied, 250 Conn. 925, 738 A.2d

656 (1999).

[7] That judgment subsequently was affirmed on alternate grounds by the United States Court of Appeals for the Second Circuit. *Flanagan* v. *Blumenthal*, United States Court of Appeals, Docket No. 00-7307, 2000 U.S. App. Lexis 25441 (2d Cir. October 12, 2000). The Second Circuit determined that the broad discretion granted to the attorney general, under § 5-141d, to determine whether representation is ''appropriate,'' precluded the plaintiff from establishing a cognizable property interest in representation by the state. Id. That court further determined that, because § 5-141d provides an adequate postdeprivation remedy for the defendants' refusal to indemnify in the form of an action for reimbursement, the plaintiff's due process claim regarding indemnification likewise failed. Id.

[8] The plaintiff also alleged that the defendants' conduct violated article one, § 8, of the United States constitution. The plaintiff did not elaborate on the possible basis for this claim in his brief to the trial court and does not raise that claim in this appeal. We, therefore, deem that claim to be abandoned and decline to review it. *Willow Springs Condominium Assn., Inc.* v. *Seventh BRT Development Corp.*, 1, 38-39, 717 A.2d 77 (1998).

[9] The denial of a motion to dismiss based on the doctrine of sovereign immunity is a final judgment for purposes of appeal. See footnote 4 of this opinion.

[10] General Statutes (Rev. to 2003) § 53-39a provides: ''Whenever, in any prosecution of an officer of the Division of State Police within the Department of Public Safety, or a member of the Office of State Capitol Police or any person appointed under section 29-18 as a special policeman for the State Capitol building and grounds, the Legislative Office Building and parking garage and related structures and facilities, and other areas under the supervision and control of the Joint Committee on Legislative Management, or a local police department for a crime allegedly committed by such officer in the course of his duty as such, the charge is dismissed or the officer found not guilty, such officer shall be indemnified by his employing governmental unit for economic loss sustained by him as a result of such prosecution, including the payment of any legal fees necessarily incurred.''

As amended by No. 03-97, § 2, of the 2003 Public Acts, which was effective June 3, 2003, the following sentence was added to the end of General Statutes (Rev. to 2003) § 53-39a: ''Such officer may bring an action in the Superior Court against such employing governmental unit to enforce the provisions of this section.''

[11] The defendants claim, further, that the indemnification of a state employee pursuant to § 5-141d rests within the sole discretion of the attorney general, and that, therefore, the plaintiff may not even apply to the claims commissioner for relief. We decline to rule on that claim because it is premature and is far beyond what is necessary to decide the merits of this appeal.