

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

CAROLEY BRUNN, INDV.AS
PERSONAL REPRESENTATIVE
,ET
JOEL B. DOWDYE, ET AL

Plaintiff)
)
)
)
)
Defendant)

CASE NO. ST-07-CV-0000573

ACTION FOR: WRONGFUL DEATH

**NOTICE OF ENTRY OF
MEMORANDUM OPINION
AND ORDER**

TO: JUDGES AND MAGISTRATES OF THE SUPERIOR
COURT
TAMIKA ARCHER, ESQ.
CLIVE RIVERS, ESQ.
LIBRARIAN
IT DIVISION
ORDER BOOK

Please take notice that on October 20, 2009 a(n) MEMORANDUM
OPINION AND ORDER dated October 19, 2009 was entered by the Clerk in the
above-entitled matter.

Dated: October 20, 2009

Venetia H. Velazquez, Esq.
Clerk of the Court



KHALILA FRETT
COURT CLERK II

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

CAROLEY BRUNN, Individually, as Personal
Representative of SHERETT JAMES,
Deceased, and Next Friend of J'BRIYAN VAUGHN,

Plaintiffs,

vs.

JOEL DOWDYE and GOVERNMENT OF THE
VIRGIN ISLANDS,

Defendants.

CASE NO. ST-07-CV-573

MEMORANDUM OPINION AND ORDER

Pending before the Court is the Motion of Reconsideration of the Defendant Government of the Virgin Islands (the "Government"), which was filed on August 28, 2009, and challenges this Court's August 14, 2009, Memorandum Opinion and Order. On September 8, 2009, Plaintiff Caroley Brunn ("Plaintiff") filed an Opposition, and the Government filed a Reply on September 21, 2009. For the following reasons, this Court will deny the Government's Motion for Reconsideration and will *sua sponte* dismiss this case with prejudice, as to Defendant Government of the Virgin Islands only, for lack of subject matter jurisdiction.

FACTUAL AND PROCEDURAL HISTORY

On March 25, 2006, Virgin Islands police officer Joel Dowdye ("Dowdye") murdered Sherett James ("James") by shooting her in the head several times while he was off duty. On June 20, 2006, Plaintiff served on the Office of the Governor of the Virgin

Islands a notice of intention to file a claim on her own behalf, on behalf of her granddaughter J'Briyan Vaughn, and as the personal representative of James's estate. In the notice, Plaintiff alleged that the Police Department negligently selected Dowdye as a police officer and negligently trained and supervised Dowdye, which resulted in the wrongful death of James. On October 31, 2007, Plaintiff filed the Complaint against Dowdye and the Government in this action within the statutory period of limitations for a wrongful death action. On November 24, 2008, Plaintiff filed a verified Petition with the Superior Court of the Virgin Islands seeking to be appointed as the personal representative of James's estate, and she was appointed administratrix of James's estate on March 20, 2009. In an August 14, 2009, Order, the Court denied the Government's June 9, 2009, Motion for Summary Judgment with respect to Plaintiff's claim against the Government for the Police Department's negligent hiring, retention, training, and supervision of Dowdye. The Court found that contrary to the Government's contention, Plaintiff complied with the filing requirements of the Virgin Islands Tort Claims Act ("TCA") because Plaintiff filed a notice of intention to file a claim within ninety days of James's death and filed a Complaint within two years of James's death. The Court also dismissed several claims in Plaintiff's Complaint against the Government that were absent from Plaintiff's notice of intention to file a claim on the grounds that the Government was not given notice of the new claims within the time limits set forth in the TCA.

ANALYSIS

No provision of the Virgin Islands Code or rule of this Court authorizes the filing of a motion for reconsideration. The only authority for a motion for reconsideration arises under LRCi 7.3 of the District Court of the Virgin Islands, which provides that:

[s]uch [m]otion shall be filed within ten (10) days after the entry of the order or decision unless the time is extended by the Court....A motion to reconsider shall be based on:

1. intervening change in controlling law;
2. availability of new evidence, or;
3. the need to correct clear error or prevent manifest injustice.

A motion for reconsideration to correct “clear error or manifest injustice” is “appropriate when a court overlooked dispositive factual or legal matters presented to it.” *Castillo v. Kmart Corp.*, 2007 WL 4976940, at *1 (D.V.I. 2007) (citing *Anderson v. Corr. Med. Serv.*, 2007 WL 4973940 (D.N.J. 2007)). Motions for reconsideration are granted sparingly, and are “not to be used as a vehicle for registering disagreement with the court’s initial decision, for rearguing matters already addressed by the court, or for raising arguments that could have been raised before but were not.” *Bostic v. AT&T of the V.I.*, 212 F. Supp.2d 731, 733 (D.V.I. 2004).

Here, the Government’s Motion for Reconsideration was not filed within the required ten (10) days, and is, therefore, untimely, even were the Court inclined to apply the procedural rules of the District Court.

Nevertheless, “it is well established that a court may consider the issue of subject matter jurisdiction *sua sponte*.” *Chavayez v. Buhler*, 2009 WL 1810914, at *2 (V.I. 2009). A court may raise the issue of subject matter jurisdiction *sua sponte* at any time. *Dykeman v. New Jersey*, 2009 WL 2986399, at *1 (D.N.J. 2009).

Pursuant to 33 V.I.C. § 3409(c):

a claim to recover damages for injuries to property or for personal injury caused by the tort of an officer or employee of the Government of the Virgin Islands while acting as such officer or employee, shall be filed within ninety days after the accrual of such claim unless the claimant shall within such time file a written notice of intention to file a claim therefor, in which event the claim shall be filed within two years after the accrual of such claim.

In the Virgin Islands, courts read the TCA's scope of employment requirement in connection with the local law of respondeat superior delineated in Restatement (Second) of Agency § 245. *Mathurin v. Government of Virgin Islands*, 398 F. Supp. 110, 115 (D.V.I. 1975). Under section 245:

[a] master is subject to liability for the intended tortious harm by a servant to the person or things of another by an act done in connection with the servant's employment, although the act was unauthorized, if the act was not unexpected in view of the duties of the servant.

When the actions of an employee are outrageous and excessively violent, however, they are deemed to be outside the scope of his or her employment. See *Mathurin, supra*, at 116.

In this matter, Dowdye was off duty when he shot and killed James. Accordingly, it is clear that his actions were outside the scope of his employment and that the TCA bars a suit against the Government under the theory of respondeat superior.

As a result, Plaintiff argues an alternative theory of negligence, asserting that the superiors of Joel Dowdye, while acting within their scope of employment, negligently hired, retained, trained, and supervised Dowdye, which caused the death of Sherett James. Plaintiff's theory of negligence is outlined in Restatement (Third) of Agency § 7.05(1). Pursuant to that section:

[a] principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm

was caused by the principal's negligence in selecting, training, retaining, supervising, or *otherwise controlling the agent*. (emphasis added)

Despite the fact that Restatement (Third) of Agency § 7.05(1) and Restatement (Second) of Agency § 245 set forth different theories of negligence, courts read the negligent supervision theory through the lens of the theory of respondeat superior. See *In re Asbestos Litigation*, 2008 WL 1735070, at *3 (Del. Super. 2008) (because employee was not acting within the scope of his employment at the time he caused plaintiff's injury, employer had no ability to control his activity at that time, rendering Restatement (Third) of Agency § 7.05(1) inapplicable).

Similarly, the U.S. Supreme Court, while interpreting the assault and battery exclusion¹ of the Federal Tort Claims Act ("FTCA"), determined that the legislative intent was to bar claims "that sound in negligence but stem from a battery committed by a Government employee." *U.S. v. Shearer*, 473 U.S. 52, 55 (1985). The Court found that Congress did not distinguish between "negligent supervision" claims and respondeat superior claims and barred both claims under the FTCA in connection with an assault and battery. In *Harris v. United States*, the court determined that "actions premised on negligence in the hiring and supervision of an employee with violent tendencies or similar background are barred because they are inextricably related to the assault and battery" –the basis of the claim in that case. 797 F. Supp. 91, 95 (D.P.R. 1992). In addition, the Third Circuit has determined that when an employee commits an act outside the scope of his employment, a plaintiff needs to allege "independent negligence" on the part of the employee's supervisor irrespective of their employment relationship. *CNA et*

al v. United States, 535 F.3d 132, 149 (3d Cir. 2008). When a government supervisor's only connection with a plaintiff's injury is that the tortfeasor was the supervisor's subordinate, the FTCA bars the plaintiff's claim. *Id.*

The case law interpreting the FTCA, a statute analogous to the TCA, is persuasive in this case. Accordingly, when bringing a claim under the TCA, a plaintiff must allege negligence on the part of a government supervisor independent of said supervisor's relationship with his tort-committing subordinate. Otherwise, litigants could argue that the Government of the Virgin Islands is liable for any and all acts of its employees, including those acts committed outside their scope of employment, simply because the Government hired and retained the employees. This result would frustrate the purpose of the TCA's scope of employment requirement.

In Plaintiff's notice of intention to file a claim, she did not allege a claim of negligence on the part of Dowdye's supervisors independent of their employment relationship with Dowdye. Moreover, the time available to Plaintiff to amend her notice of intention to file a claim has expired. Accordingly, the Government did not waive its sovereign immunity in this case and this Court does not have subject matter jurisdiction to hear this matter.

CONCLUSION

UPON CONSIDERATION of Defendant's motion, it is

ORDERED that Defendant's Motion for Reconsideration is DENIED; and it is

¹ The FTCA's waiver of sovereign immunity does not apply to claims arising out of assault or battery. 28 U.S.C. § 2680(h).

ORDERED that this case is dismissed with prejudice, as to the Government of the Virgin Islands only, for lack of subject matter jurisdiction; and it is

ORDERED that copies of this Order shall be directed to counsel of record.


Dated: October 19, 2009



HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

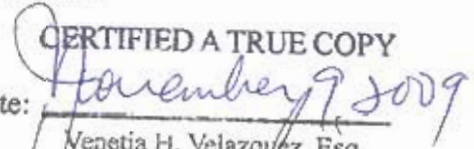
Attest:

Date: October _____, 2009
Venetia H. Velazquez, Esq.
Clerk of the Court

by: 
Pauline D. Ottley
Court Clerk Supervisor

CERTIFIED A TRUE COPY

Date:


Venetia H. Velazquez, Esq.
Clerk of the Court

By:


Court Clerk