IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

LEE ROYAL FISHER,	:	
	:	C.A. No. K11C-01-040 WLW
Plaintiff,	:	
	:	
v.	:	
	:	
SERGEANT WILFRED BECKLES,	:	
	:	
Defendant.	:	

Submitted: August 28, 2012
Decided: October 24, 2012

MEMORANDUM OPINION

Upon Plaintiff's Motion for Reargument.
Granted in part; Denied in part.

Patrick C. Gallagher, Esquire of Billion Law, Wilmington, Delaware; attorney for Plaintiff.

Marc P. Niedzielski, Esquire and Michael F. McTaggart, Esquire, Department of Justice, Wilmington, Delaware; attorneys for Defendant.

WITHAM, R.J.

The issue before the Court is whether the Court should grant Plaintiff's Motion for Reargument pursuant to Superior Court Civil Rule 59(e).

FACTUAL AND PROCEDURAL BACKGROUND

As the parties are familiar with the facts, the Court need not recite them here except as necessary to aid in understanding this disposition.[1] On January 25, 2011, Lee Royal Fisher (hereinafter "Plaintiff") filed suit against Sergeant Wilfred Beckles (hereinafter "Defendant"), the basis of which was a physical altercation between the two men that occurred on January 26, 2009 at the James T. Vaughn Correctional Center in Smyrna, Delaware. On that day, Defendant, a correctional officer, was working in the building in which Plaintiff, an inmate, was housed. There is a dispute as to how the disagreement began. Plaintiff claims that the two men began arguing over whether Plaintiff had a medical appointment on that day. The argument escalated, and a physical altercation ensued during which Plaintiff hit Defendant, a fact to which Plaintiff admits. Plaintiff alleges that Defendant then struck him two more times before two other correctional officers arrived and threw Plaintiff to the ground. Plaintiff states that while the two correctional officers were on top of him, Defendant grabbed his right ankle and twisted it until it popped. Plaintiff underwent an x-ray one day later, which revealed that his right fibula was fractured.

On March 30, 2009, Plaintiff was indicted on charges of Assault in a Detention Facility and Offensive Touching of a Law Enforcement Officer. On July 22, 2009,

[1]For a full recitation of the facts of this case, see *Fisher v. Beckles*, 2012 WL 3550497, at *1 (Del. Super. July 2, 2012).

Plaintiff entered a plea of *nolo contendere* to the Offensive Touching charge. The remaining charge was nolle prossed. Plaintiff thereafter initiated the present suit, asserting claims of assault, battery, intentional infliction of emotional distress, and a violation of his constitutional right against cruel and unusual punishment, guaranteed by the Eighth Amendment of the United States, pursuant to 42 *U.S.C.* § 1983. Plaintiff seeks damages for the fractured fibula, and other injuries to his face, head, back, and shoulder.

On March 3, 2012, Defendant moved for summary judgment on all of Plaintiff's claims. Defendant's argument was two-fold: first, the doctrine of collateral estoppel precluded Plaintiff's Section 1983 and state-law claims, and second, Plaintiff's Section 1983 claim was barred by *Heck v. Humphrey*[2] in that it contradicted the underlying criminal conviction.

On July 2, 2012, the Court denied Defendant's summary judgment motion, but determined that Plaintiff was collaterally estopped from asserting a justification defense in his civil suit because he had pled no contest to the underlying criminal charge. Plaintiff had argued that Delaware Rule of Evidence 410 prohibited the admission of his no-contest plea to the Offensive Touching charge. The Court disagreed, relying on the Sixth Circuit's decision *Walker v. Schaeffer*[3] to hold that

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[2]512 U.S. 477 (1994). Under *Heck*, "a Section 1983 action that impugns the validity of the plaintiff's underlying conviction cannot be maintained unless the conviction has been reversed on direct appeal or impaired by collateral proceedings." *Gilles v. Davis*, 427 F.3d 197, 208-09 (3d Cir. 2005).

[3]854 F.2d 138 (6th Cir. 1988).

Rule 410 did not proscribe Defendant from introducing evidence of Plaintiff's *nolo contendere* plea in his defense against Plaintiff's Section 1983 claim.[4] The Court recognized a "material difference between using the *nolo contendere* plea to subject a former criminal defendant to subsequent civil or criminal liability and using the plea as a defense against those submitting a plea interpreted to be an admission which would preclude liability."[5] The Court then found that Plaintiff's *nolo contendere* plea met all four elements of the doctrine of collateral estoppel, and thus, Plaintiff was estopped from raising the justification defense of self-defense in the instant suit.[6]

Parties' Contentions

Plaintiff filed a Motion for Reargument on July 10, 2012, in which he distinguished the language of D.R.E. 410 from its federal counterpart and argued that the Court was mistaken in holding that a *nolo contendere* plea could give rise to collateral estoppel. Defense filed a response two days later, arguing that reargument on these issues is improper because Plaintiff's motion both rehashes arguments made to the Court at the summary judgment stage and improperly raises new arguments.

DISCUSSION

A motion for reargument pursuant to Superior Court Civil Rule 59(e) will be granted only if "the Court has overlooked a controlling precedent or legal principles,

[4]*See Fisher*, 2012 WL 3550497, at *2-3.

[5]*Id.* at *3 (quoting *Walker*, 854 F.2d at 143).

[6]*Id.* at *4.

or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision."[7] A motion for reargument is not an opportunity for a party to rehash arguments already decided by the Court or to present new arguments not previously raised.[8]

When counsel has failed to develop arguments in the first instance, "a motion for reargument is not a means to obtain a 'second bite at the apple.'"[9] In this case, Plaintiff has employed a motion for reargument to present his interpretation of D.R.E. 410 and the scope of *nolo contendere* pleas after failing to develop any meaningful argument at the summary judgment stage. Although the Court will address Plaintiff's contentions, counsel is cautioned that this approach is unacceptable, and risks running afoul of the prohibition against presenting new arguments in a Rule 59(e) motion.

Furthermore, now that Plaintiff belatedly has "done its homework" and elaborated on its position, the Court remains unconvinced of the merits of its arguments. Several of Plaintiff's contentions rehash points already decided by this Court in its opinion, and none of Plaintiff's claimed points of error demonstrate that the Court has overlooked controlling authority or misapprehended either the law or the facts of this case.

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[7] *Kennedy v. Invacare, Inc.*, 2006 WL 488590, at *1 (Del. Super. Jan. 31, 2006) (citation omitted).

[8] *Id.; Hennegan v. Cardiology Consultants, P.A.*, 2008 WL 4152678, at *1 (Del. Super. Sept. 9, 2009) (citing *Denison v. Redefer*, 2006 WL 1679580, at *2 (Del. Super. Mar. 31, 2006)).

[9] *Accu-Fire Fabrication, Inc. v. Corrozi-Fountainview, LLC,* 2009 Wl 930006, at *2 (Del. Super. Mar. 26, 2009).

I

Plaintiff first argues that the question of whether collateral estoppel applies to guilty pleas has not been definitively decided in Delaware,[10] and accordingly, the Court should hesitate in affording *nolo contendere* pleas a collateral estoppel effect. Curiously, Plaintiff raises this argument for the first time in his Motion for Reargument. Although the issue of whether *nolo contendere* pleas may be preclusive appears to be one of first impression in Delaware, Plaintiff has failed to demonstrate why this Court should reconsider its holding. He does not cite a single case or other persuasive authority in support of his contentions that this Court should not be persuaded by the Sixth Circuit's holding in *Walker*. Nonetheless, the Court will take this opportunity to clarify its position.

Plaintiff's first contention on reargument is that the distinctive language of D.R.E. 410 supports the conclusion that a *nolo contendere* plea should not be given an estoppel effect. Although the language of D.R.E. 410 is similar to its federal counterpart (hereinafter F.R.E. 410), D.R.E. 410 is worded somewhat differently. D.R.E. 410 is identical to an older version of F.R.E. 410, which provided, in part: "[E]vidence of a plea of ... nolo contendere ... is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea ...."[11] This language was changed on April 30, 1979 (effective December 1, 1980) when

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[10]*See Diamond State Youth, Inc. v. Webster*, 2008 WL 4335875, at *1 (Del. Super.)

[11]*See* Pub. L. 93-595, 88 Stat. 1926, 1933 (1975).

Congress adopted the present language.[12] A review of the history of F.R.E. 410 does not satisfactorily explain to the Court why Congress saw the need to change the language. Nevertheless, the commentary to D.R.E. 410 makes it clear that this semantic distinction serves to limit exclusion of offers to plead and statements made by the person offering to plead to the person who makes the statement.[13] The present version of F.R.E. 410, as amended on December 1, 1980, is broader in scope. It applies to any "defendant who made the pleas or was a participant in plea discussions."[14]

Plaintiff argues that the distinctive language of D.R.E. 410 broadens the prohibition on the use of *nolo contendere* pleas in subsequent civil litigation. But the history of the 1980 amendments to F.R.E. 410 undermines this contention. The 1980 version grew out of a proposal to amend Rule 11(e)(6) of the Federal Rules of Criminal Procedure, which was identical to F.R.E. 410 in both form and substance. The Criminal Rules Advisory Committee had four objectives in mind in revising both

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[12]The present version of Fed. R. Evid. 410 reads, in relevant part:

> (a) Prohibited uses: In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in plea discussions:
> ... (2) a nolo contendere plea.

Fed. R. Evid. 410 (effective Dec. 1, 1980).

[13]*See* D.R.E. 410 cmt.; Thomas J. Reed, *The Re-Birth of The Delaware Rules of Evidence: A Summary of The 2002 Changes In The Delaware Rules of Evidence*, 5 Del. L. Rev. 155, 165-66 (2002).

[14]*See* D.R.E. 410 cmt.

rules, none of which implicated the admissibility of *nolo contendere* pleas in subsequent civil proceedings.[15] Thus, the scope of D.R.E. 410 and F.R.E. 410 - despite the distinction in their language - are identical with respect to *nolo contendere* pleas.

Plaintiff's second contention on reargument is that D.R.E. 410 should prevent this Court from giving estoppel effect to Plaintiff's *nolo contendere* plea. The language of D.R.E. 410 supports two plausible interpretations. Such language could be interpreted, as it was by this Court, to proscribe the "admission of a *nolo contendere* plea in proceedings which are brought *against* the person who made the plea, but not in proceedings which are brought *by* that person."[16] Under this interpretation, the phrase "against the person who made the plea of offer", as formerly used in F.R.E. 410, and used now in D.R.E. 410, describes the type of proceedings in which evidence of the plea is inadmissible. A separate line of authority interprets the same language as precluding admission of the *nolo contendere* plea against the

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[15] *See* Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 4.64 (3d. ed. 2007) (discussing the principle purposes for the 1980 amendments). The principle purpose for amending the rule was to narrow the coverage of the exclusionary doctrine covering statements by the accused. *Id.* The revisions made it clear that plea bargaining statements made by the accused are excludable only if made to an attorney for the prosecuting authority. *Id.*

[16] *Lichon v. Am. Universal Ins. Co.*, 433 N.W.2d 394, 395 (Mich. Ct. App. 1988), *rev'd*, *Lichon v. Am. Universal Inc. Co.*, 459 N.W.2d 288 (Mich. 1990) (emphasis added). A number of federal appellate and district courts have held that F.R.E. 410 contemplates a situation where the *nolo contendere* plea is being used against the pleader in a subsequent civil or criminal action in which he is the *defendant*. *See, e.g., Walker*, 854 F.2d at 143; *Rose v. Uniroyal Goodrich Tire Co.*, 219 F.3d 1216, 1219-21 (10th Cir. 2000); *Douglas v. Pub. Safety Comm'n*, 2002 WL 31050863, at *8 (D. Del. Sept. 13, 2002).

person who offered the plea in *any* civil or criminal proceeding.[17] This latter interpretation precludes admission of the plea irrespective of whether the civil proceeding is brought by *or* against the person offering the plea.

Plaintiff urges this Court to adopt the latter interpretation, but cites to no authority in support of his position. Indeed, the only two federal appellate courts to confront this issue have come down solidly against the Plaintiff's position.[18] That there is such a dearth of authority should not be surprising. Such a reading of D.R.E. 410 would go "too far by allowing the use of a nolo contendere plea not only as a shield, but as a sword."[19]

More importantly to the disposition of Plaintiff's motion for reargument, he has failed to demonstrate how this Court has overlooked legal precedent or misapplied the law in this case. The first two arguments outlined above demonstrate disagreement with the Court's reasoning, which is an inappropriate basis for reargument. To the degree Plaintiff's present arguments are grounded in a disagreement with the Court's application of *Walker* and supportive federal case law, they are untimely raised. It is well-settled that a Rule 59(e) motion is not an

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[17]*See, e.g.*, *Lichon*, 459 N.W.2d at 423. Rule 410 of the Michigan Rules of Evidence (hereinafter M.R.E. 410), which is identical in both form and substance to D.R.E. 410, was amended following the *Lichon* decision to permit the admission of *nolo contendere* pleas under some circumstances. *See Karttunen v. Clark*, 2007 WL 2902872, at *2 (E.D. Mich. Oct. 2, 2007). M.R.E. 410 now permits the admissibility of a nolo contendere plea for the limited purposes of supporting a defense "against a claim asserted by the person who entered the plea." M.R.E. 410(2).

[18]*See Walker*, 854 F.2d at 143; *Rose*, 219 F.3d at 1219-21.

[19]*Lichon*, 433 N.W.2d at 395.

appropriate vehicle for the losing party to present new arguments. The Court discerns no reason why Plaintiff could not have presented the aforementioned arguments at the summary judgment stage. Accordingly, Plaintiff's motion for reargument is **DENIED** to the extent that it seeks to reargue this Court's construction of D.R.E. 410.

II

Lastly, Plaintiff contends that, assuming that a *nolo contendere* plea may form the basis for collateral estoppel, the Court erred in holding that Plaintiff's plea estops him from presenting a justification defense because his plea served only as a limited admission of the charge. Since the plea did not constitute an admission of factual guilt, the reasonableness of the amount of force Plaintiff used against Defendant was not actually litigated. Thus, Plaintiff is essentially asking this Court to reconsider whether a *nolo contendere* plea is an adjudication of the underlying facts.

After reviewing the present motion and its response, the Court believes it miscalculated whether Plaintiff waived his right to assert a justification defense by entering a plea of *nolo contendere* to the Offensive Touching charge. The doctrine of collateral estoppel precludes a party in a subsequent suit from relitigating factual issues which were litigated in a prior suit.[20] This doctrine only applies to questions of fact which were essential to a prior decision as well as actually litigated and

[20]*See Tyndall v. Tyndall*, 238 A.2d 343, 346 (1968).

determined by a valid and final judgment.[21] Under Delaware law, one not a party to the prior suit may still assert the doctrine against another who was a party to the previous action.[22]

Although older cases support the Plaintiff's contention that a conviction is not conclusive as to a question of fact in a civil case, modern decisions place this issue in the sound discretion of the court.[23] Both *Shaw* and *Pennington* involved questions of the use of collateral estoppel in a civil suit based on a previous criminal conviction.[24]

In *Shaw*, the defendant plead guilty to the criminal charges against him as part of an agreement under which the government chose not to pursue the potential charges against his wife.[25] When the defendant entered his plea, he objected to the facts necessary to conclusively establish the elements of the civil suit and was not given an option of pleading *nolo contendere*.[26] The Court found that by entering a guilty plea, the defendant had accepted the state's representations that he had

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[21] *Taylor v. State*, 402 A.2d 373, 375 (1979).

[22] *See Foltz v. Pullman, Inc.*, 319 A.2d 38, 41 (1974); *Coca-Cola Co. v. Pepsi-Cola Co.*, 172 A. 260, 262-64 (Del. 1934).

[23] *See Benjamin F. Shaw Co. v. Short*, 1989 WL 89521, at *4 (Del. Super. 1989); *Blachowicz v. Pennington*, 1987 WL 8662, at *2 (Del. Super. Feb. 17, 1987).

[24] *See Shaw,* 1989 WL 89521, at *4; *Pennington*, 1987 WL 8662, at *2.

[25] *See Shaw*, 1989 WL 89521, at *1.

[26] *Id.* at *4.

committed fraud.[27] Nonetheless, under the circumstances, the Court was unwilling to allow collateral estoppel and a criminal conviction to dispose of the subsequent civil case under the guise of undisputed facts.[28] Moreover, the Court noted that had the defendant entered a plea of *nolo contendere*, the issue of whether the facts underlying the charges had been actually litigated would have been obviated.

In *Pennington*, a defendant convicted of offensive touching by the Family Court subsequently filed a civil suit against the victim for injuries received as a result of the victim's response to the offense.[29] The court was unwilling to allow collateral estoppel to dispose of the suit.[30] Although Family Court had characterized the victim's response to the offensive touching as "self defense", this was not essential to finding the aggressor guilty of the crime and, as such, was not binding on the court in a subsequent civil trial.[31]

As this Court noted in *Shaw*, the taking of Plaintiff's *nolo contendere* plea cannot be considered actual litigation. A plea of *nolo contendere* by definition obviates actual adjudication and is not an admission.[32] Unlike *Pennington*, Plaintiff

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[27] *Id.*

[28] *Id.*

[29] *See Pennington*, 1987 WL 8662, at *1.

[30] *Id.* at *2-3.

[31] *Id.* at *3.

[32] *See* Super. Ct. Crim. R. 11(b) (providing that a defendant may enter a *nolo contendere* plea "without admitting the essential facts constituting the offense charged...."); 2 *Restatement*

was not convicted by a jury after a full and fair hearing in which he benefitted from procedural safeguards. Rather, the very entry of his *nolo contendere* plea denotes that the facts underlying his Offensive Touching charge were unnecessarily litigated. Defendant contests such a reading, arguing that by entering a *nolo contendere* plea, Plaintiff waived the right to present a justification defense. However, even if Plaintiff did waive this right, it is inconsequential to the present analysis. The facts underlying the altercation for which Plaintiff was charged with Offensive Touching were never litigated. In light of the *Shaw* and *Pennington* decisions, it is clear that the Court miscalculated the law in holding that a *nolo contendere* plea is an adjudication of the underlying facts of an offense.[33] Accordingly, Plaintiff's motion for reargument is **GRANTED** on the narrow issue of whether he is collaterally estopped from presenting a justification defense in the present civil action. The Court will permit Plaintiff to present only those facts underlying the Offensive Touching charge that are necessary to establish his claim of self-defense.

Judgments, 2d, § 85, cmt. b, p. 294 (specifically exempting *nolo contendere* pleas from general provision that criminal convictions estop litigating the same issues of law or fact in subsequent civil proceedings).

[33]It should be noted that courts usually require the facts of the case be demonstrated by the State to determine if the court will accept the plea in question. The Defendant is asked if he or she wishes to contest the facts for the purpose of the *nolo contendere* plea.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Reargument must be **DENIED** in part, and **GRANTED** in part.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh