IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

ISRAEL SIMMONS,	:	
	:	C.A. No: K10C-08-032(RBY)
Plaintiff,	:	
	:	
v.	:	
	:	
DELAWARE TECHNICAL & COMMUNITY COLLEGE,	:	
	:	
	:	
Defendant.	:	

Submitted: March 30, 2012
Decided: May 17, 2012

Upon Consideration of Defendant's Motion for Summary Judgment
DENIED

ORDER AND OPINION

Timothy A. Dillon, Esq., and Ryan T. Keating, Esq., McCann, Schaible & Wall, LLC, Wilmington, Delaware for Plaintiff.

Stephen J. Milewski, Esq., and Sean A. Meluney, Esq., White and Williams, LLP, Wilmington, Delaware for Defendant.

Young, J.

SUMMARY

Plaintiff filed this action seeking damages for negligence rooted in premises liability. Because Plaintiff has provided the necessary experts, because the issue of comparative negligence is a question of fact, and because the determination of immunity under the State Tort Claims Act is not ripe without consideration of the material subject to Plaintiff's Motion to Compel Discovery, Defendant's Motion for Summary Judgment is **DENIED**.

FACTS

On August 30, 2008, Israel Simmons (Plaintiff) and some friends were playing basketball at Delaware Technical & Community College's (Defendant) Terry Campus in Dover, Delaware. At the time, Plaintiff was a student enrolled at Defendant's Terry Campus. The basketball game was not related to a school function. Rather, Plaintiff had taken the friends to Defendant's property to play, because his home did not have a basketball court.

There was still day light when Plaintiff arrived at Defendant's property. The sun was beginning to set at the conclusion of the basketball game. Plaintiff has testified by deposition that it was dusk, though there was enough light to see. It was at this time that Plaintiff engaged in a foot race, allegedly sustaining injury when he tripped and fell over a chain on the property. The chain was designed as a barrier and was draped close to the ground.

On August 30, 2010, Plaintiff instituted this action seeking recovery for negligence rooted in premises liability. In furtherance of the litigation, the Court issued a scheduling order addressing discovery. Originally, Plaintiff's expert

discovery cutoff was November 23, 2011. Defendant's was December 22, 2011. By stipulation issued November 1, 2011, the parties' discovery deadlines were extended by forty-five days each. Hence, Plaintiff's expert discovery cutoff was January 7, 2012. Plaintiff provided Defendant with reports from his treating physicians in a timely manner. After the cutoff, Plaintiff identified an expert regarding liability.

STANDARD OF REVIEW

Summary judgment is appropriate where the record exhibits no genuine issue of material fact so that the movant is entitled to judgment as a matter of law.[1] "Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances."[2] The movant bears the initial burden of establishing that no genuine issue of material fact exists.[3] Upon making that showing, the burden shifts to the non-movant to show evidence to the contrary.[4] When considering a motion for summary judgment, the Court considers the facts in the light most favorable to the non-movant.[5] "Generally, issues of negligence are not appropriate for summary judgment."[6]

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[1] *Tedesco v. Harris*, 2006 WL 1817086 (Del. Super. June 15, 2006).

[2] *Id.*

[3] *Ebersole v. Lowengrub*, 54 Del. 463 (Del. 1962).

[4] *Id.*

[5] *Tedesco*, 2006 WL 1817086 at *1.

[6] *Id.*

DISCUSSION

Defendant's motion for summary judgment presents three arguments. First, Defendant cites Plaintiff's failure to identify certain experts by the discovery cutoff as grounds for dismissal . Second, Defendant argues that it is entitled to judgment as a matter of law because of Plaintiff's comparative fault. Finally, Defendant asserts sovereign immunity under the Delaware Tort Claims Act.

Expert Discovery

Defendant maintains that Plaintiff has failed to produce expert witnesses to establish causation or liability. Because the expert discovery deadline has passed, Plaintiff cannot obtain further experts. Without a causation expert, Defendant argues that Plaintiff cannot establish a *prima facie* case.

In response, Plaintiff argues that his treating physicians, one of whom is a neurologist, will testify as to causation. Whether that witness is competent to render an opinion as to liability would be a matter for a *Daubert*-type procedure. That is a question for another day. At this point, he has been identified within the time constraints as to causation.

In the event that the medical witness is not competent to render liability testimony, Defendant argues that Plaintiff cannot proceed to trial. Defendant cites *Browne v. Gartside*[7] for the principle that the issues of lack of lighting and tripping hazards are not within the common knowledge of the layperson.

The authority cited by Defendant stands, accurately, for the proposition that,

[7] 2004 WL 282806, at *2 (Del. Super. Mar. 5, 2004).

often times, an expert is required to establish the existence of a dangerous condition in a premises liability action. Here, Plaintiff, allegedly, tripped over a chain. At this juncture, the record does not establish in a conclusory manner that the chain created a hazard that the layperson could not understand without the assistance of an expert.

In the alternative, Plaintiff, by the time of oral argument, had presented an architect to testify to liability. The trial date has been continued, mitigating any prejudice. Hence, summary judgment cannot be granted now.

Comparative Negligence

In Delaware, a plaintiff's own negligence does not bar recovery "where such negligence was not greater than the negligence of the defendant or the combined negligence of all defendants against whom relief is sought, but any damages awarded shall be diminished in proportion to the amount of negligence attributed to the plaintiff."[8] "Pursuant to Delaware's modified comparative negligence statute, if the plaintiff's contributory negligence is 51% or greater, it is an absolute bar to recovery."[9]

Defendant argues that Plaintiff was, as a matter of law, more than 50% at fault for the injury, thereby barring Plaintiff from recovery. In support thereof, Defendant cites Delaware's "step-in-the-dark" rule. According to the rule, "a person who comes into an unfamiliar situation, where a condition of darkness renders the use of his eyesight ineffective to define his surroundings, is not justified, in the absence of any

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[8] 10 *Del. C.* § 8132.

[9] *Asbestos Litigation Pusey Trial Group v. Owens-Corning Fiberglas Corp.*, 669 A.2d 108 (Del. 1995).

special stress of circumstances, in proceeding further, without first finding out where he is going and what may be the obstructions to safe progress. A violation of that rule is contributory negligence as a matter of law."[10]

The "step-in-the-dark" rule may not apply here. The testimony indicates that it was dusk when Plaintiff's injury occurred. Plaintiff testified by deposition that he could still see. Hence, at least, a factual issue remains for determination.

Winkler v. Del. State. Fair, Inc.,[11] may provide a more appropriate context in which to assess comparative negligence. In *Winkler*, the Superior Court held that a plaintiff's failure to maintain a proper lookout is negligence as a matter of law. Because the plaintiff in that case admitted that she tripped and fell while she was not watching where she was going, the Court instructed the jury that she was, in fact, negligent. The jury was left to decide the proportion of her negligence in the context of attributing fault.

Applying that ruling, under the facts of this case, a factual issue remains. Plaintiff admits that, to some degree, he was not paying attention to where he was running. The proportion of fault that may be attributed to him is a question for a jury.

Immunity

Immunity may be afforded by the doctrine of sovereign immunity written into Article I § 8 of the Delaware Constitution. Unless waived by the General Assembly, the doctrine of sovereign immunity provides an absolute bar to all suits against the

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[10] *Maher v. Voss*, 48 Del. 45 (Del. 1953).

[11] 608 A.2d 731 (Del. 1992) (TABLE).

State and extends to all State agencies."[12] Additionally, the State Tort Claims Act may afford the State and its agencies immunity from tort claims.[13] The parties contest Defendant's entitlement to immunity. The Court will address the arguments in turn.

Defendant argues that it is entitled to immunity, because it has not been waived by a Legislative Act. Plaintiff, by contrast, argues that Defendant waived sovereign immunity by purchasing insurance applicable to this litigation.

18 *Del. C.* § 6511 abrogates the defense of sovereign immunity where the risk of injury is covered by an insurance program. Since its enactment, the Delaware Supreme Court has interpreted its waiver to apply in cases involving commercial insurance policies up to the amount covered.[14] In *Rogers*, the Superior Court held that the Delaware State University had waived immunity, because it had purchased liability coverage. The Court held that immunity was waived up to the amount covered.

Here, Defendant is a State agency. It has purchased a commercial general liability insurance policy from Utica Mutual Insurance Company. The policy provides coverage up to $1 million. Defendant has admitted that the Utica policy may be applicable to the claim asserted in this litigation. Accordingly, because the purchase of a commercial insurance policy by a State agency waives immunity, and

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[12] *Rogers v. Del. State Univ.*, 2005 WL 2462271, at *2 (Del. Super. Oct. 5, 2005), *rev'd on other grounds*, 905 A.2d 747 (Del. 2006) (TABLE).

[13] *Id.* at *3.

[14] *Id.*

because Defendant has purchased such a policy, Defendant has waived sovereign immunity. The exposure here, though, is limited to the policy limits.

That still leaves the issue of the State Tort Claims Act, which may afford immunity in tort claims against the State despite the existence of a waiver.[15] Where it applies, "the Act protects the State and its employees and agencies from liability where their actions: (1) arose from official duties involving the exercise of discretion; (2) were done in good faith; and (3) were without gross or wanton negligence.[16] Plaintiff bears the burden of showing the absence of one of the three requirements.[17]

Defendant argues that it is entitled to summary judgment, because Plaintiff has not shown the absence of an element under the Act. In response, Plaintiff argues that the issue is not ripe for determination because, due to certain problems involving discovery, he has not been able to evaluate the discretionary or ministerial nature of the decisions regarding lighting on the premises, the placement of barriers, and the nature of security procedures.

"Discretionary acts are those which require some determination or implementation which allows a choice of methods, or , differently stated, those where there is no hard and fast rule as to a course of conduct. Ministerial acts, by contrast

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[15] *See Id.* (applying the State Tort Claims Act after finding that immunity had been waived by the purchase of insurance).

[16] *Id.* (citing 10 *Del. C.* § 4001).

[17] *James v. Laurel Sch. Dist.*, 1993 WL 81277, at *3 (Del. Super. Mar. 3, 1993).

are those which a person performs in a prescribed manner without regard to his own judgment concerning the act to be done."[18] The distinction between discretionary and ministerial is one of degree.[19] In making the determination, Courts consider the existence of "hard and fast rules" and "policies" governing the act that caused the injury.[20]

Defendants assertion of immunity under the State Tort Claims Act is, at this juncture, premature. At the time this motion was argued, Plaintiff's motion to compel discovery was pending. That motion has since been granted. Pursuant to that Order, Defendant is to provide Plaintiff with certain materials that go to the discretionary nature of actions alleged to have caused injury. Until Plaintiff has had opportunity to examine those materials, summary judgment under the Act is premature.

CONCLUSION

Defendant's Motion for Summary Judgment is **DENIED**. This decision does not prevent the filing of further Motions for Summary Judgment at the completion of discovery, or a Motion for Directed Verdict at the close of Plaintiff's case in chief.

SO ORDERED.

/s/ Robert B. Young
J.

RBY/sal

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[18] *Simms v. Christina Sch. Dist.*, 2004 WL 344015, at *8 (Del. Super. Jan. 30, 2004).

[19] *Hughes ex rel. Hughes v. Christina Sch. Dist.*, 2008 WL 73710, at *3 (Del. Super. Jan. 7, 2008).

[20] *See Id.*; *see also James*, 1993 WL 81277, at *4.