COURT OF CHANCERY
OF THE
STATE OF DELAWARE

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County CourtHouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

Submitted: October 1, 2004
Decided: November 24, 2004

Mr. Javier Quereguan
320 Maple Avenue
Wilmington, DE 19804

Eric L. Episcopo, Esquire
New Castle County Law Department
87 Reads Way
New Castle, DE 19720-1648

Jonathan L. Parshall, Esquire
Murphy Spadaro & Landon
824 N. Market Street, Suite 700
P.O. Box 8989
Wilmington, DE 19899-8989

Laura L. Gerard, Esquire
Department of Justice
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801

Re: *Javier Quereguan v. New Castle County, et al.*,
Civil Action No. 20298-NC

Dear Mr. Quereguan and Counsel:

Defendant State of Delaware, pursuant to Court of Chancery Rule 59(f), seeks reargument of the Court's decision in its September 28, 2004 letter opinion (the "Opinion") not to dismiss the claim for injunctive relief brought by *pro se* plaintiff, Javier Quereguan ("Quereguan"), against the State. For the reasons stated below, the Court grants the State's motion.

A court may grant reargument or reconsideration when it appears that the court "has overlooked a decision or principle of law that would have a controlling effect or the court has misapprehended the law or the facts so that the outcome of the decision would

be affected."[1] In the Opinion, the Court relied upon *Artesian Water Co. v. Gov't of New Castle County* to conclude that the sovereign immunity afforded to the State did not bar Quereguan from seeking injunctive relief against it.[2] The State argues that the Court misapprehended the law, because *Artesian* dealt with 10 *Del C.* § 4011, which does not apply to the State.[3] Quereguan did not oppose reargument.

Having considered the State's argument, the Court hereby grants reconsideration of its decision not to dismiss Quereguan's claim for injunctive relief against it. The State is correct that the holding in *Artesian* was based on section 4011, which is not applicable to the State. As noted in this Court's Opinion, where the State has not consented to being sued, it is immune under the doctrine of sovereign immunity from liability for damages.[4] In *Doe v. Cates*, the court stated:

> In general, the doctrine of sovereign immunity provides that the State may not be sued without its consent. Article I, § 9 of the Delaware Constitution provides that the only way to limit or waive the State's sovereign immunity is by act of the

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1 *Doft & Co. v. Travelocity.com Inc*., 2004 WL 1366994, at *1 (Del. Ch. June 10, 2004) (quoting *VGS, Inc., v. Castiel*, 2003 WL 1794210, at *1 (Del. Ch. Mar. 27, 2003)).

2 *Quereguan v. New Castle County*, 2004 WL 2271606, at *4 (Del. Ch. Sept. 28, 2004) (citing *Artesian Water Co. v. Gov't of New Castle County*, 1983 WL 17986, at *9 (Del. Ch. Aug. 4, 1983)).

3 *See Harris v. Delaware Hosp. for the Chronically Ill*, 2001 WL 1739190, at *4 (Del. Super. Dec. 27, 2001).

4 2004 WL 2271606, at *4 (citing Del. Const. art. I, § 9 and *Doe v. Cates*, 499 A.2d 1175, 1176 (Del. 1985)).

> General Assembly. Therefore, unless there is a statute by which the General Assembly can be said to have waived the defense of sovereign immunity, the appellants' suits must fail.[5]

One such statute, 18 *Del. C.* § 6511, waives sovereign immunity to the extent that statute provides the State with coverage under the State Insurance Coverage Program. The State submitted affidavits demonstrating that it does not carry any insurance applicable to the facts alleged in Quereguan's Complaint. Thus, the State has not waived its sovereign immunity under 18 *Del. C.* § 6511 in this case.

Additionally, in *Shelly's of Delaware v. Hale*, the court found that the reference in the Tort Claims Act, 10 *Del. C.* Chapter 40 to a "claim or cause of action" defeated plaintiff's argument that the act only applies where money judgments are sought.[6] As discussed in the Opinion, the Tort Claims Act does not act as a waiver of sovereign immunity, but rather serves to limit the State's liability in those instances where it has already waived immunity by some other means.[7] Therefore, the Act is applicable only after it has been determined that the State has waived its sovereign immunity. Section 4001 of the Tort Claims Act states, "[e]xcept as otherwise provided by the Constitutions or laws of the United States or of the State, . . . no claim or cause of action shall arise . . . against the State . . . in any civil suit or proceeding at law or in equity" where three

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5 499 A.2d at 1176-77 (citations omitted).

6 1988 WL 97849, at *2 (Del. Super. Sept. 16, 1988).

7 2004 WL 2271606, at *4 n.28.

elements are present. Those elements relate to whether the act or omission complained of arose out of and in connection with the performance of certain types of official duties and was done in good faith, to serve the public interest and without gross or wanton negligence. To overcome a claim of immunity, a plaintiff must prove the absence of one or more of those elements. Thus, even if the General Assembly waives sovereign immunity by statute, in a context where the Tort Claims Act applies section 4001 provides immunity from all suits, not just claims for damages.

Because Quereguan is proceeding *pro se*, the Court considers it important to focus on the nature of the wrong alleged in his Complaint in evaluating the State's motion. Viewed in the light most favorable to Quereguan, the Complaint alleges that water continues to seep through a crack in a retaining wall located on the Absalom Jones Community Center property onto Quereguan's property, and that the State is therefore liable for maintaining a nuisance. In at least one instance, the State has had to defend itself at trial against a claim for injunctive relief based on an allegation of maintaining a nuisance.[8] In *Tomlinson*, the State owned land adjacent to plaintiffs' and held it open to the public for the purpose of game hunting.[9] Plaintiffs claimed that shots fired from the guns of hunters on the State's land crossed into their property creating a "harassing and

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[8] *See Tomlinson v. Dep't of Natural Res.*, 1976 WL 8255 (Del. Ch. Feb. 11, 1976) (allowing the case to proceed to trial after consideration of defendant's motion to dismiss); 1981 WL 15136 (Del. Ch. May 5, 1981) (allowing the same case to proceed to trial after consideration of defendant's motion for summary judgment).

[9] *Tomlinson*, 1981 WL 15136, at *1.

dangerous" nuisance.[10] The court found that the State's actions in *Tomlinson* could amount to a taking under Article I, § 8 of the Delaware Constitution.[11] The court further held that a "taking" serves as a self-executing waiver of sovereign immunity and a circumstance upon which plaintiffs may be permitted to go to trial to seek injunctive relief.[12] *Tomlinson* also observed, however, that "the cases in which courts have granted relief against a governmental defendant for maintaining or creating a nuisance are principally those in which a municipal corporation has carried out some public function (such as the operation of a dump, a sewage disposal plant, or an incinerator) so as to constitute a nuisance."[13]

Quereguan's Complaint is distinguishable from the situation in *Tomlinson*. Quereguan has not alleged deprivation of the enjoyment of his property to such an extent as to constitute a taking under Article I, § 8 of the Delaware Constitution.[14] Furthermore, the challenged actions by the State in this case are not analogous to the actions in *Tomlinson* in that they do not involve a comparable public function and the

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10 *Id.*

11 *Id.* at *2.

12 *Tomlinson*, 1976 WL 8255, at *1-2.

13 *Id*. at *2.

14 Because all parties have participated in briefing and argument on the Defendants' respective motions to dismiss and have had the opportunity to brief the State's motion for reargument and no party has raised any "taking" argument, the Court finds that this is not an instance where granting leave to amend the Complaint to include such a claim would be appropriate under Ch. Ct. Rule 15(aaa).

accompanying bond bill included language suggesting that the Legislature did not intend to waive the State's sovereign immunity as to Quereguan's claims.[15] If injunctive relief ultimately is granted against a remaining Defendant, however, the Court would expect the State, as current owner of the Community Center, to provide reasonable cooperation to that Defendant, if necessary, to enable it to comply with the injunction.

For the reasons stated above, the Court grants the State's motion for reargument of its decision allowing Quereguan's claim for injunctive relief against the State and hereby grants the State's motion to dismiss that claim.[16]

IT IS SO ORDERED.

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor

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15 *See Quereguan*, 2004 WL 2271606, at *1 n.5 (discussing bond bill language).

16 In its motion for reargument, the State also questioned the Court's dismissal of defendant Red Clay School District, because the State has asserted cross-claims against New Castle County and Red Clay. The State's cross-claims are contingent upon a judgment being entered against the State based on Quereguan's Complaint. Because the Court is now dismissing the underlying claims against the State, the portion of the motion for reargument pertaining to Red Clay is moot.