

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

CASSANDRA KORNEGAY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
STATE OF DELAWARE	)	C.A. No. N11C-11-115 CLS
DEPARTMENT OF CORRECTIONS	)	
and CARL C. DANBERG,	)	
COMMISSIONER OF THE	)	
DEPARTMENT OF CORRECTIONS	)	
and WENDI LUCAS CAPLE,	)	
WARDEN OF BAYLOR WOMEN’S	)	
CORRECTIONAL INSTITUTION,	)	
	)	
Defendants.	)	

Date Submitted: July 8, 2013  
Date Decided: October 10, 2013

On Defendants’ Motion for Judgment on the Pleadings/Motion for Summary  
Judgment. **GRANTED.**

**ORDER**

Gary S. Nitsche, Esq., Weik, Nitsche & Dougherty, 305 N. Union Street, 2<sup>nd</sup> Floor,  
P.O. Box 2324, Wilmington, Delaware, 19899. Attorney for Plaintiff.

Catherine Damavandi, Esq. and Ryan P. Connell, Esq., State of Delaware  
Department of Justice, 820 North French Street, 6<sup>th</sup> Floor, Wilmington, Delaware,  
19801. Attorneys for Defendants.

**Scott, J.**

## **Introduction**

Before the Court is Defendants' Motion for Judgment on the Pleadings/Motion for Summary Judgment. The Court has reviewed the pleadings, motion, response, and an affidavit submitted by Defendants. For the following reasons, the Court has evaluated Defendants' motion as a motion for summary judgment and determined that Defendants' motion must be **GRANTED**.

## **Background**

On or about November 12, 2009, Cassandra Kornegay ("Plaintiff") fell on water at Baylor Women's Correctional Institution ("Baylor") in New Castle, Delaware. Plaintiff suffered personal injuries which lead her to initiate the present suit against the State of Delaware Department of Corrections ("DOC"), Carl C. Danberg ("Defendant Danberg"), Commissioner of the Department of Corrections and Wendi Lucas Caple ("Defendant Caple"), Warden of Baylor (collectively, "Defendants").

Plaintiff filed her Complaint for gross negligence against Defendants on November 11, 2011, alleging that she was a "business invitee on the premises... when suddenly and without warning she was caused to fall on water as a result of the Defendant's intentional, wanton and/or grossly negligent acts of the Defendants in that they knew, or in the exercise of reasonable care, should have known of the

dangerous condition that existed but failed to take action...”<sup>1</sup> Plaintiff listed six different acts or omissions to support her claim, but did not identify the duties breached by Defendants.<sup>2</sup>

Defendants moved for judgment on the pleadings on February 2, 2012, asserting sovereign immunity, qualified immunity under the State Tort Claims Act, 10 *Del. C.* § 4001, *et seq.*, and Plaintiff’s failure to plead her claim of negligence with particularity. Along with their motion, Defendant’s included the affidavit of Debra Lawhead, the Insurance Coverage Administrator for the State of Delaware, to demonstrate that the State had not waived its immunity through the purchase of insurance related to the facts of this case. Plaintiff responded by challenging Defendants’ qualified immunity and particularity arguments, but did not directly address sovereign immunity.

In a letter dated April 26, 2012, the Court informed the parties that Defendants’ motion would be viewed a as a motion for summary judgment due to Defendants’ inclusion of Debra Lawhead’s affidavit.<sup>3</sup> The Court denied Defendants’ motion, but allowed them to renew their motion as a motion for summary judgment. The Court also allowed Plaintiff to amend her complaint so

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<sup>1</sup> Compl., at ¶ 3.

<sup>2</sup> *Id.* at ¶ 4.

<sup>3</sup> Trans. ID No. 52835561.

that she could comply with Super. Ct. Civ. Rule 9's requirements for pleading negligence claims.

When Plaintiff filed her Amended Complaint, she asserted no more facts than she had asserted in her original Complaint;<sup>4</sup> however, Plaintiff stated that Defendants "failed to discharge their ministerial duties" and listed five more acts and/or omissions by Defendants.<sup>5</sup> Defendants then filed this motion on the same grounds as Defendants previously asserted in their first motion.

### **Standard of Review**

A Rule 12(c) motion for judgment on the pleadings will be converted to a motion for summary judgment where "matters outside the pleadings are presented to and not excluded by the Court ..."<sup>6</sup> This Court will grant summary judgment when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.<sup>7</sup> A party entitled to summary judgment has the burden of showing there is no genuine issue of material fact.<sup>8</sup> The Court will view evidence in the light most favorable to the nonmoving party.<sup>9</sup> If the motion for summary judgment is properly supported, the burden shifts to the non-moving

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<sup>4</sup> The Court also notes that neither party has clearly indicated the nature of Plaintiff's presence on the premises. In the Amended Complaint, Plaintiff identified herself as a "business invitee" without any elaboration. In response to this motion, she stated that she was "working" on the premises without providing any further details.

<sup>5</sup> Amended Compl, at ¶ 4.

<sup>6</sup> Del. Super. Ct. Civ. R. 12(c).

<sup>7</sup> *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

<sup>8</sup> *Id.*

<sup>9</sup> *Windom v. William C. Ungerer, W.C.*, 903 A.2d 276, 280 (Del. 2006).

party to demonstrate that there are material issues of fact.<sup>10</sup> The party opposing the motion for summary judgment then has the duty to come forward with admissible evidence showing the existence of genuine issue of material fact.<sup>11</sup>

Here, Defendants' motion is viewed as a motion for summary judgment because the Court has considered Debra Lawhead's affidavit, a matter outside the pleadings. Furthermore, in its April 26, 2012 letter, the Court notified the parties that it was denying Defendants' first motion and that Defendants would have to file a motion for summary judgment due to the inclusion of the affidavit.<sup>12</sup> Plaintiff has also acknowledged that, under Rule 12(c), Defendant's second motion must be viewed as a motion for summary judgment.<sup>13</sup>

### **Discussion**

In the absence of the State's consent, the doctrine of sovereign immunity bars suit against the State.<sup>14</sup> This doctrine applies not only to the State, but to "its agencies [] and its public officials sued in their official capacity. It does not apply to state employees sued for their own conduct."<sup>15</sup> Sovereign immunity may be waived by the State through "procuring insurance coverage under 18 *Del. C.*

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<sup>10</sup> *Moore*, 405 A.2d 680.

<sup>11</sup> *Delmar News, Inc. v. Jacobs Oil Co.*, 584 A.2d 531, 533 (Del. Super. 1990).

<sup>12</sup> *Cf. Furman v. Dept. of Transp.*, 30 A.3d 771 (Del. 2011).

<sup>13</sup> Pl. Resp., at ¶ 1, n.1.

<sup>14</sup> *Doe v. Cates*, 499 A.2d 1175, 1176-77 (Del. 1985).

<sup>15</sup> *Parker v. Wireman*, 2012 WL 1536934, at \*2 (Del. Super. Apr. 30, 2012).

§6511<sup>16</sup> for claims cited in the complaint,” or by “statute which expressly waives immunity.”<sup>17</sup> Hence, in the absence of insurance coverage or a legislative act, the doctrine “has been construed as an absolute bar to all suits against the State.”<sup>18</sup> However, even when waiver of sovereign immunity exists, based on insurance coverage or statute, the Court will consider whether the State Tort Claims Act bars the action.<sup>19</sup>

Defendants, a state agency and its officials, are protected by the doctrine of sovereign immunity. DOC is a state agency and Defendants Danberg and Caple are being sued in their respective official capacities as Commissioner of the DOC and Warden of Baylor. Therefore, Plaintiff’s suit against them must fail, absent a statute demonstrating waiver or the State’s purchase of insurance coverage.

Based on the affidavit submitted by Defendants, the Court finds that the State has not waived its immunity by purchasing insurance.<sup>20</sup> In the affidavit, Debra Lawhead, stated that the State has “not purchased any insurance nor

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<sup>16</sup> 18 *Del. C.* § 6511 states: “The defense of sovereignty is waived and cannot and will not be asserted as to any risk or loss covered by the state insurance coverage program, whether same be covered by commercially procured insurance or by self-insurance, and every commercially procured insurance contract shall contain a provision to this effect, where appropriate.”

<sup>17</sup> *J.L. v. Barnes*, 33 A.3d 902, 913 (Del. Super. 2011).

<sup>18</sup> *Martin ex rel. of Estate of Martin v. State*, 2001 WL 112100 (Del. Super. Jan. 17, 2001).

<sup>19</sup> *Parker*, 2012 WL 1536934 at \* 1 (citing *Doe*, 499 A.2d at 1180-81); *Jester v. Seaford Sch. Dist.*, 1991 WL 269899, at \*3 (Del. Super. Nov. 4, 1991) *aff’d sub nom. Jester By & Through Jester v. Seaford Sch. Dist.*, 610 A.2d 725 (Del. 1992).

<sup>20</sup> *Caraballo v. Delaware Dep’t of Corr.* 2001 WL 312453, at \*1 (Del. Super. Mar. 22, 2001)(“The courts have consistently relied on such affidavits in determining that the State has not waived sovereign immunity under § 6511 because there is no insurance coverage for the risks presented”).

established any self insurance program...that would be applicable in the circumstances and events alleged in the Complaint” or “appropriated any money for obtaining said insurance.”<sup>21</sup>

Plaintiff responds to Defendants’ motion by arguing that she “must be given the opportunity to discover whether any insurance coverage exists.”<sup>22</sup> Considering the procedural history of this case, Plaintiff will not be granted additional time to discover whether such insurance coverage exists. Plaintiff was aware as of February 2, 2012, the date of Defendants’ first motion, that Defendants were asserting sovereign immunity, arguing that the State lacked insurance coverage (based on the Debra Lawhead’s affidavit), and likely would be filing a motion for summary judgment, on the same grounds supported by the same or a similar affidavit. By the date of Defendant’s second motion, June 13, 2013, Plaintiff could have ascertained whether the State had insurance coverage related to her claim.<sup>23</sup>

Debra Lawhead also stated that that the “General Assembly [had not] enacted any legislation pertaining to or allowing any possible liability of the State resulting from the facts of the alleged in said Complaint.”<sup>24</sup> Plaintiff responded to Defendants’ sovereign immunity argument without addressing whether or not the

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<sup>21</sup> Def. Mot. for Summ. J., Aff. of Debra Lawhead, ¶¶ 5-6.

<sup>22</sup> Pl. Response, at ¶ 3 (citing *Marvel v. Prison Indus.*, 884 A.d 1065, 1070 (Del Super. 2005).

<sup>23</sup> *Cf. Marvel*, 884 A.2d at 1071 (denying a motion to dismiss in order to allow plaintiff a reasonable time to conduct discovery where plaintiff had “attempted to determine whether any insurance coverage exist[ed] but his request for such information has been denied pursuant to [ a statute].)”)

<sup>24</sup> Def. Mot. for Summ. J., Aff. of Debra Lawhead, ¶¶ 5-6.

General Assembly waived immunity. Therefore, Plaintiff has also “failed to meet her burden of showing that the General Assembly acted in some manner sufficient to waive the defense of sovereign immunity.”<sup>25</sup>

**Conclusion**

For the reasons discussed above, Defendants are protected by sovereign immunity. Therefore, Defendants’ motion for summary judgment is **GRANTED**.  
**IT IS SO ORDERED.**

**/S/Calvin L.**  
**Scott**  
**Judge Calvin L. Scott, Jr.**

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<sup>25</sup> *Kendall v. State*, 2011 WL 1938298, at \*3 (Del. Super. Apr. 29, 2011).