

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

DANA BAXTER (SCHEWE)	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 00C-04-156 (CHT)
	)	
STATE OF DELAWARE,	)	
DEPARTMENT of	)	
TRANSPORTATION (DelDOT)	)	
	)	
Defendant.	)	

**OPINION AND ORDER DENYING DEFENDANT'S APPLICATION  
FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL**

Submitted: September 13, 2002  
Decided: October 10, 2002

Bartholomew J. Dalton, Esquire and Laura J. Kominkiewicz, Esquire, DALTON & ASSOCIATES, P.A., 1106 West 10<sup>th</sup> Street, Wilmington, DE 19806, Attorneys for the Plaintiff.

Mark P. Niedzielski, Esquire and Robert F. Phillips, Esquire, Deputy Attorneys General, 820 North French Street, 6<sup>th</sup> Floor, Wilmington, DE 19801, Attorneys for the State of Delaware Department of Transportation.

**TOLIVER, JUDGE**

**STATEMENT OF FACTS AND  
NATURE OF THE PROCEEDINGS**

This action originally arose as a result of injuries sustained by the Plaintiff, Dana Baxter, at the intersection of Upper Pike Creek Road and Linden Hill Road in Newark, Delaware on July 13, 1999. On that date, a work crew employed by DelDOT was cutting grass and brush on Upper Pike Creek Road, from approximately 100 yards south of its intersection with Linden Hill Road up to the intersection itself. At some point during that operation, a large object was allegedly discharged from the mower's rotating blades toward Ms. Baxter's vehicle, and she was struck on the head. An ambulance took Ms. Baxter to Christiana Hospital, where she was treated and released.

The specific piece of equipment being used that day is known as a "bush hog", nomenclature to which both parties have stipulated. Although the parties cannot agree on how to characterize its exact nature, it appears that a bush hog

is a piece of mowing equipment which consists of a tractor with a hydraulic arm which is welded to it. At the end of this arm are rotating blades that mow grass, brush, and small trees when positioned parallel to the ground. This type of mower is generally used when an impediment (e.g., a guardrail) limits the access of a tractor with a trailing rotating mower.

Ms. Baxter filed her Complaint with this Court on April 18, 2000. DelDOT filed a Motion for Summary Judgment on October 1, 2001, based on the defense of sovereign immunity. That defense, it argued, is applicable to the instant litigation and was not waived by the adoption of the State's self-insurance plan ("Plan"). Article I, §9 of the Delaware State Constitution and 18 Del. C. §6511 provide that the State is immune from suit unless this immunity is waived by legislative act, or is covered by insurance obtained and/or sponsored by the State. Reduced to its simplest notion, DelDOT's basic contention is that the Plan does not cover

injuries resulting from the operation of special off-highway vehicles, which includes a bush hog. That being the case, there is no insurance and sovereign immunity does apply. Finally, DelDOT claims that Ms. Baxter failed to allege any circumstances that would support a claim against DelDOT even if sovereign immunity had been waived.

Ms. Baxter opposed DelDOT's motion, contending that the bush hog was not two separate pieces of equipment (a tractor and an attached mower head), but a single piece of mobile equipment which is covered under the Plan. As a result, sovereign immunity had been waived under the constitutional and statutory authority referred to above. Since the question of coverage, and therefore immunity, pivots on the exact nature of the equipment used at the time of the accident and injury, Ms. Baxter alleged that a dispute over a material fact existed and that DelDOT was not, as a result, entitled to summary judgment on that issue. Oral arguments on DelDOT's motion were heard on March 21, 2002,

and the Court reserved its decision at that time.

On September 6, 2002, the Court addressed DelDOT's motion for summary judgment. By order, it held that Ms. Baxter had sufficiently established the existence of material facts in dispute to withstand summary judgment, at least at that junction in the proceedings. Moreover, the burden is the movant's to establish that it is entitled to judgment as a matter of law, and DelDOT failed in that regard. Both deficiencies were fatal to DelDOT's motion. On September 13, 2002, DelDOT filed this motion pursuant to Supreme Court Rule 42. Ms. Baxter opposes certification.

DelDOT contends that this Court mistakenly concluded that the issue as to whether the mowing equipment was covered by the Plan was in dispute.<sup>1</sup> Two grounds are advanced in support of its application: that denial of

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<sup>1</sup>DelDOT also notes that this Court neglected to address one of the arguments advanced in its briefs, namely that DelDOT was entitled to summary judgment as there was no evidence of "gross or wanton negligence" on DelDOT's part, pursuant to 10 Del. C. §4001. DelDOT is correct, this issue was not addressed in the September 6, 2002 decision. The omission was inadvertent and was subsequently addressed in a October 9, 2002 decision letter to counsel. However, it is not the subject of the instant application for certification.

sovereign immunity is a sustainment of controverted jurisdiction, and that the issues addressed in this Court's September 6, 2002 Order are case dispositive.<sup>2</sup>

### **DISCUSSION**

The procedure pursuant to which DelDOT's application must be addressed is well established: "Supreme Court Rule 42(b) provides that an interlocutory appeal must determine a substantial issue, establish a legal right and meet one of several other criteria."<sup>3</sup> DelDOT advances the argument that the other relevant criteria given the decision being challenged are set forth in Rule 42(b)(ii) and (v).

Specifically:

(ii) The interlocutory order has sustained the controverted jurisdiction of the trial court; or

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<sup>2</sup> Supr. Ct. R. 42(b)(ii) and (v).

<sup>3</sup> Sandt v. Delaware Solid Waste Authority, et al., Del. Super., C.A. No. 90C-10-234, Herlihy, J. (September 14, 1993) (Mem. Op.) at 2.

. . .

(v) A review of the interlocutory order may terminate the litigation or may otherwise serve considerations of justice.

It is well settled that to be appealable, an interlocutory order must establish substantial rights.<sup>4</sup> In Wilmington Trust Co. v. Pennsylvania Co., the Supreme Court determined that the Vice Chancellor's opinion and order denying cross motions for summary judgment clearly reflected that he felt that important material facts remained in issue, and that no substantial rights were established, nor were any legal issues determined. The Court went on to hold that the interlocutory order was not appealable, as it did not satisfy the preliminary requirements of Rule 42.

The situation is identical in the instant case. The September 6, 2002 order did not determine a substantial issue, not did it establish any legal rights. This Court

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<sup>4</sup>Goldhar v. Rosenfeld, 149 A.2d 753 (1959); Wilmington Medical Center, Inc. v. Coleman, 298 A.2d 320 (1972).

simply determined that a more complete record would be gained from continued litigation, that factual disputes remained that could not be overlooked, and that the termination of litigation at this point would be premature. Thus DelDOT has failed to satisfy the first prong of the requirements for certification set out in Rule 42.

In addition, DelDOT has failed to establish exactly how this Court's September 6, 2002 Order sustained controverted jurisdiction under Rule 42(b)(ii). The Court did not determine that sovereign immunity did not apply which hinges on the factual dispute surrounding whether the Plan covered the grass cutting equipment in question. Again, the Court's decision simply determined that further inquiry was desirable at that point in the proceedings in order to complete the record and allow a decision on the merits.

Lastly, DelDOT's reliance on Rule 42(b)(v) is equally misplaced. A Motion for Summary Judgment is *inherently case dispositive* if it is granted. Thus it is not a



particularly persuasive basis for certification of an interlocutory appeal that deciding a Motion for Summary Judgment in the movant's favor would likely terminate litigation. Haveg Corp. v. Guyer established the rule that if summary judgment upon any particular issue is denied on the ground that a trial on the merits is desirable to determine the issue, the interlocutory order denying summary judgment on that issue is clearly not appealable.<sup>5</sup> Although the Supreme Court acknowledged in Wilmington Trust Co. v. Pennsylvania Co. that exceptions may arise, it did not find one in that case,<sup>6</sup> and this Court does not find one here.

Given the record as it presently exists, it appears that the Court's September 6, 2002 Order does not meet the criteria set out in Rule 42. First, DelDOT has failed to establish that a substantial legal right was determined by that decision. Second, DelDOT has failed to adequately

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<sup>5</sup> 211 A.2d 910, 914 (1965).

<sup>6</sup> 172 A.2d 63, 67 (1961).

explain how that decision sustained controverted jurisdiction pursuant to Rule 42(b)(ii). Finally, DelDOT has not been able to demonstrate exactly how certification of its interlocutory appeal, for purposes of Rule 42(b)(v), would terminate the litigation.

**CONCLUSION**

\_\_\_\_For the reasons stated above, DelDOT's application to certify the opinion and order entered herein on September 6, 2002, to the Delaware Supreme Court in accordance with Supreme Court Rule 42, is hereby **denied**.

**IT IS SO ORDERED.**

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**Toliver, Judge**