

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

JEFFREY FURMAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	C.A. No. N10C-10-164 CLS
DELAWARE DEPARTMENT OF	)	
TRANSPORTATION,	)	
	)	
Defendant.	)	

Date Submitted: January 19, 2011  
Date Decided: March 29, 2011

On Defendant's Motion to Dismiss Plaintiff's Complaint. **GRANTED.**

**ORDER**

Anthony A. Figliola, Esq., 1813 Marsh Road, Suite A, Wilmington, DE 19810.  
Attorney for Plaintiff.

Frederick H. Schranck, Esq., P.O. Box 778, Dover, DE 19903. Attorney for  
Defendant.

**Scott, J.**

## **Introduction**

Before the Court is Defendant's motion to dismiss the complaint. The Court has reviewed the parties' submission. For the reasons that follow, the motion to dismiss is **GRANTED**.

## **Background**

Plaintiff Jeffrey Furman ("Plaintiff" or "Furman") alleges the Defendant Delaware Department of Transportation ("Defendant" or "DelDOT") was grossly negligent in failing to maintain Pennsylvania Avenue at Pasture Street. Mr. Furman alleges DelDOT violated 10 *Del. C.* § 4001.

On or about Oct. 24, 2008, Plaintiff stepped into an uncovered maintenance box while crossing Pennsylvania Avenue at Pasture Street in Wilmington, Delaware. The Plaintiff alleges there were no warning signs. As a result, Plaintiff claims to have suffered permanent injuries, including a tear of the left Achilles tendon, bilateral ankle strain, right rotator cuff syndrome, right wrist sprain, right shoulder strain, and instability.

Along with its motion to dismiss DelDOT has included the affidavit of Debra Lawhead, the Insurance Coverage Administrator of the State of Delaware. In her affidavit she states "[m]y duties include administration of insurance coverage in all instances in which the State has waived sovereign immunity by establishing a State Insurance Coverage Program pursuant to 18 Del. C. Chapter

6501.” She is “responsible for administering the policies of the Insurance Determination Committee” so she has personal knowledge of the policies established by the Committee. After reviewing the complaint, Ms. Lawhead indicates neither the State nor DelDOT “has not purchased any insurance that [she is] aware of that would be applicable to the circumstances and events alleged in the Complaint against the State of Delaware, its agency and divisions (Department of Transportation).” She further states “[t]he General Assembly of the State has not appropriated any money for obtaining said insurance, nor has the General Assembly enacted any legislation pertaining to or allowing any possible liability of the State resulting from the facts as alleged in said Complaint.” Also, the State did not purchase commercial insurance during any fiscal year for the type of injury Plaintiff allegedly suffered.<sup>1</sup>

### **Standard of Review**

Superior Court Civil Rule 12(b)(6) allows a defendant to file a motion to dismiss for “failure to state a claim upon which relief can be granted.” All the facts pled in the complaint are accepted as true.<sup>2</sup> The motion will be granted “only where it appears with reasonable certainty that the plaintiff could not prove any set

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<sup>1</sup> Motion to Dismiss Ex. A.

<sup>2</sup> *Highland Capital Management, L.P. v. T.C. Group, LLC*, 2006 WL 2128677, \*2 (Del. Super. Ct.) (citing *Plant v. Catalytic Constr. Co.*, 287 A.2d 682, 686 (Del. Super. 1972), *aff’d*, 297 A.2d 37 (Del. 1972).

of facts that would entitle him to relief.”<sup>3</sup> “Conclusory allegations will not be accepted as true without specific supporting factual allegations.”<sup>4</sup>

### **Discussion**

The Defendant did not waive sovereign immunity in this case. The Eleventh Amendment prohibits suits against the individual states in federal courts.<sup>5</sup> In Delaware, “[s]uits may be brought against the State, according to such regulations as shall be made by law.”<sup>6</sup> Unless explicitly waived by the General Assembly, sovereign immunity is an absolute bar to liability claims against the State.<sup>7</sup> The General Assembly must express a clear intent to waive sovereign immunity.<sup>8</sup> The defense of sovereign immunity is waived when the risk or loss is covered by the state insurance program.<sup>9</sup> The purpose of the “Insurance for the Protection of the State” Act<sup>10</sup> is “to protect the public from wrongful acts committed by governmental officials by waiving the State’s sovereign immunity up to a legislatively imposed ceiling.”<sup>11</sup>

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<sup>3</sup> *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998) (citing *Spence v. Funk*, A.2d 967, 968 (Del. 1978)).

<sup>4</sup> *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 65-66 (Del. 1995) (citations omitted).

<sup>5</sup> U.S. amend. XI.

<sup>6</sup> Del. Const. art. I, § 9.

<sup>7</sup> *Turnbull v. Fink*, 668 A.2d 1370, 1374 (Del. 1995) (citing *Wilmington Housing Authority v. Williamson*, 228 A.2d, 782, 786 (Del. 1967)).

<sup>8</sup> *Pauley v. Reinoehl*, 848 A.2d 569, 573 (Del. 2004) (citations omitted).

<sup>9</sup> 18 *Del. C.* § 6511.

<sup>10</sup> 18 *Del. C.* § 6501 *et. seq.*

<sup>11</sup> *Pauley*, 848 A.2d at 573 (citation omitted).

In order for the Plaintiff to prevail in a suit against the State brought under the State Tort Claims Act<sup>12</sup>, he must show that: “(1) the State has waived the defense of sovereign immunity for the actions mentioned in the complaint; and, (2) the State Tort Claims Act does not bar the action.”<sup>13</sup> The State Tort Claims Act bars the action when the:

- (1) The act or omission complained of arose out of and in connection with the performance of an official duty requiring a determination of policy, the interpretation or enforcement of statutes, rules or regulations, the granting or withholding of publicly created or regulated entitlement or privilege or any other official duty involving the exercise of discretion on the public officer, employee or member shall have supervisory authority;
- (2) The act or omission complained of was done in good faith and in the belief that the public interest would best be served thereby; and
- (3) The act or omission complained of was done without gross or wanton negligence[.]<sup>14</sup>

However, when the General Assembly enacted 10 *Del. C.* § 4001 it did not intend “to waive sovereign immunity in all cases where a ministerial act was performed with gross or wanton negligence or in bad faith.”<sup>15</sup> On interlocutory appeal, the Delaware Supreme Court held “10 *Del. C.* § 4001, part of the State Tort Claims Act, does not constitute a waiver of sovereign immunity where the State has not provided insurance coverage, even where a party alleges gross

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<sup>12</sup> 10 *Del. C.* §§ 4001-4005.

<sup>13</sup> *Pauley*, 848 A.2d at 573.

<sup>14</sup> 10 *Del. C.* § 4001.

<sup>15</sup> *Doe*, 499 A.2d at 1180.

negligence.”<sup>16</sup> Therefore, if there is no insurance available to cover the type of loss or risk alleged in the complaint, then sovereign immunity is a bar to recovery.

The Plaintiff is unable to prove a set of facts that could entitle him to relief since the Defendant does not have insurance to cover the type of risk or loss alleged in the complaint, as stated in the affidavit of Debra Lawhead, the Insurance Coverage Administrator. Ms. Lawhead indicates she is responsible for administering the Insurance Determination Committee policies and has personal knowledge of those policies. After reading the complaint, she states neither the State nor DelDOT has purchased insurance for the circumstances listed in the complaint.<sup>17</sup> Even though the Plaintiff alleges DelDOT acted with gross negligence in his complaint, since there is no insurance available to cover that type of risk or loss, the Plaintiff will be unable to prove a set of facts that would entitle him to relief.

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<sup>16</sup> *State of Delaware Dep't of Health & Soc. Services v. Sheppard*, 864 A.2d 929 (Del. 2004).

<sup>17</sup> The Plaintiff focuses on the phrase “that I am aware of” in the affidavit to indicate there may be insurance available. However, she states in her affidavit that her duties include “administration of insurance coverage in *all instances* in which the State has waived sovereign immunity by establishing a State Insurance Coverage Program.” The Plaintiff’s argument is unpersuasive.

**Conclusion**

Based on the forgoing, the Defendant's motion to dismiss the complaint is

**GRANTED.**

**IT IS SO ORDERED.**

/S/CALVIN L. SCOTT  
Judge Calvin L. Scott, Jr.