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

THE ROOFERS, INC., d/b/a TRI-STATE THE ROOFERS Plaintiff, v. DELAWARE DEPARTMENT OF LABOR, Defendant.	)	C.A. No. N09C-11-063 JAP (consolidated)
H.K. GRIFFITH, INC., Plaintiff, v. DELAWARE DEPARTMENT OF LABOR, Defendant.	)	

MEMORANDUM OPINION

Appearances:

G. Kevin Fasic, Esquire, Wilmington, Delaware
Jeffrey M. Weiner, Esquire, Wilmington, Delaware
Joseph C. Handlon, Esquire, Wilmington Delaware
Laura L. Gerard, Esquire, Wilmington, Delaware

JOHN A. PARKINS, JR., JUDGE

Presently before the court are Plaintiffs' requests for costs, including attorneys' fees. The litigation arises from a dispute between the two plaintiff roofing contractors and the Department of Labor over the classification under the Prevailing Wage Act of laborers who install sheet metal roofing. After unsuccessful attempts to get a meaningful opportunity to redress their grievances with the Delaware Department of Labor, the plaintiffs understandably became frustrated and separately filed suits seeking declaratory relief and a writ of mandamus. The parties were able to resolve their differences and arrived at a settlement agreement. That agreement left open the question of whether any party was entitled to costs. That question has now been brought to a head by Plaintiffs' applications.

It might be useful to summarize the underlying dispute before addressing the award of costs. In general terms the Delaware Prevailing Wage Act requires contractors doing work for the state and its political subdivisions to pay their laborers at least the prevailing wage for specified by the Delaware Department of Labor for the particular class of laborer involved. The statutory scheme provides for a committee to meet regularly to set or adjust prevailing wage rates. There is an administrative protocol for affected parties to raise grievances they may have concerning the Department of Labor's application of Prevailing Wage Act. One supposes there could be almost an infinite variety of

disputes which could arise under the Act, including the classification of laborers into various wage classifications. Indeed it is a dispute over the classification of workers who install sheet metal roofs which gave rise to this controversy.

At this juncture the court must digress even further with a brief discussion about the installation of sheet metal roofs. Because of their durability sheet metal roofs are popular in the construction of schools and similar buildings. The roof consists of a frame, often wooden, insulation and the sheet metal itself. The initial stage of the construction of a sheet metal roof is the construction of the frame and the installation of insulation. This work is usually performed by carpenters and roofers. Until this point not one piece of sheet metal has been installed.

Once the frame is constructed and the insulation is installed the contractor takes precise as-built measurements of the roof structure and provides them to the sheet metal supplier. Using the architect's drawings and the contractor's as-built measurements, the supplier fabricates the necessary sheets at an off-site location. After the fabricated sheets are delivered to the job site they are installed by sheet metal workers. Those workers are classified to a significantly higher wage rate than carpenters and roofers. The contractors' primary bone of contention with the Department of Labor here was that the department required the contractors to pay much higher sheet metal worker

rates to the carpenters and roofers who built the frame and installed the insulation, notwithstanding that in many (if not most) cases the sheet metal for the roof had not even been fabricated yet. The ultimate installation of the sheet metal roof had little to do with the skill set needed of the carpenters and roofers who did the preparatory work. With considerable logic the contractors argued that they should be allowed to pay the carpenters and roofers at their regular rate. The Department of Labor resisted, insisting that the carpenters and framers be paid at sheet metal workers rates. Hence, these suits followed.

Happily the parties were able to resolve their differences once the lawyers were unleashed. The terms of the settlement agreement, except to note that it contains no provision for the award of costs, are not germane to the issue here. The court will therefore not rehash them.

B. The claims for costs

Plaintiffs advance several theories why they are entitled to costs, including attorneys' fees. Among them are that their efforts created the equivalent of a common fund and that the department acted in bad faith as evidenced by both its pre-litigation and post litigation conduct. The bulk of the briefing on both sides was devoted to these issues. The court need not reach

them, however, because it finds that an award of fees and costs is barred by the doctrine of sovereign immunity.[1]

C. Sovereign immunity and the award of costs.

The history and purpose of sovereign immunity has been discussed at length on several occasions by the Delaware Supreme Court.[2] This court will not gild the lily by attempting to expand upon those discussions. Suffice it to say that a fundamental purpose of the doctrine is to protect the State's treasury. Therefore, absent a clear waiver of sovereign immunity, damages (including costs) may not be awarded against the State.

For present purposes, there is nothing to distinguish monetary damages from costs. "Costs are allowances in the nature of incidental damages."[3] As a consequence, most courts throughout the country hold that the award of costs against the state is barred by sovereign immunity. "The well-established principle that the sovereign (including, in this country, a state) cannot be sued without its consent extends to the matter of costs, with the result that, absent a statute indicating its consent thereto, a state litigant may not be

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[1] The court wishes to make one comment, however, about the argument that the Department acted in bad faith during the course of the litigation. The court notes that the Deputy Attorneys General representing the Department during the litigation, as well as counsel representing Plaintiffs, were extremely professional and acted in accordance with the high standards expected of Delaware lawyers throughout this case. A reader not familiar with the record in this case might not realize that, to their credit, Plaintiffs expressly disavow any criticism of the state's litigation lawyers. The court merely adds this footnote lest any casual reader of this opinion conclude that the State's two lawyers were the subject of criticism. .

[2] *E.g.*, *Shellhorn & Hill Inc. v. State*, 187 A.2d 71 (Del. 1962); *Pajewski v. Perry*, 363 A.2d 429 (Del. 1976)

[3] *Peyton v. William C. Peyton Corp.*, 8 A.2d 89, 90 (Del. 1939)

subjected to costs of suit for which a private litigant would be liable. This principle has been applied or recognized in many cases."[4] The law in Delaware is consistent with this "well established principle." In *Wilmington Medical Center, Inc, v. Severns*[5] the Delaware Supreme Court found that, absent consent by the State, costs may not be awarded against the State:

> The State contends, however, that the doctrine of sovereign immunity, which is a well-settled principle of law based on the Delaware Constitution, Art. I, s 9, bars any award of costs against the State, absent a statutory waiver. We agree. Costs in this context includes a counsel fee and/or a fee to an attorney appointed as a guardian ad litem. Thus, since there is not a waiver by the State in this case, the Chancellor's decision to assess Mr. Sandbach's fee against the State is erroneous as a matter of law and must be reversed.[6]

Plaintiffs argue that, notwithstanding *Severns*, the General Assembly's enactment of the mandamus statute constitutes a waiver of sovereign immunity. They do not, however, point to any express waiver of sovereign immunity in the mandamus statute. It is one thing for legislation to subject state officials to extraordinary writs; it is quite another to put the State's coffers at risk. If there is any doubt whether the General Assembly intended to waive sovereign

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[4] 72 A.L.R. 2nd 1379, (1960)(Cum. Supp.)(footnote omitted)

[5] 433 A.2d 1047 (Del. 1981), *overruled in part on other grounds, Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665 (Del. 2013)

[6] *Id.* at 1049-50. Plaintiffs argue that *Severns* is distinct because in that case the State was not a party whereas in these cases it is. But nothing in the *Severns* sovereign immunity analysis turns on the fact that the State was not a named party.

immunity, that doubt must be resolved in favor of the State.[7] There is simply no clear manifestation of legislative intent to waive sovereign immunity here. The court finds, therefore, that enactment of the mandamus statutes does not constitute a waiver of sovereign immunity, and consequently Plaintiff's claims for costs are barred by that doctrine.

WHEREFORE, Plaintiffs motions for costs are **DENIED.**

SO ORDERED this 25th day of March, 2014.

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Judge John A. Parkins, Jr.

[7] *Jankowski v. Division of State Police*, 981 A.2d 1166, 1171 (Del. 2009)(" To the extent that any reasonable doubt exists, we construe the General Assembly's intent in favor of the State.")