

IN THE SUPERIOR COURT OF THE STATE DELAWARE

IN AND FOR KENT COUNTY

MARLENE ZAK, individually, and THE)
ESTATE OF ASHLEY M. CALL, by and)
through its Administrator, Jonathan Contant,)) C.A. No. K12C-02-010 JTV
Plaintiffs,)
v.)
GPM INVESTMENTS, LLC, d/b/a SHORE)
STOP, a Delaware Limited Liability)
Company; LIBERTY HOLDING CORP-)
ORATION, an unincorporated association;)
GOLDEN EAGLE PROPERTIES, an unin-)
corporated association; VALERO ENERGY)
CORPORATION, a Delaware corporation;)
THE STATE OF DELAWARE, a govern-)
ment entity, THE STATE OF DELAWARE)
DEPARTMENT OF TRANSPORTATION,)
an agency of the State of Delaware; and)
DAWN D. BARR, individually,)
Defendants.)

Submitted: January 18, 2013

Decided: April 30, 2013

William D. Fletcher, Jr., Esq., and B. Brian Brittingham, Esq., Schmittinger & Rodriguez, Dover, Delaware. Attorneys for Plaintiffs.

Marc P. Niedzielski, Esq., Department of Justice, Wilmington, Delaware.
Attorney for Defendants State of Delaware and Department of Transportation.

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Norman H. Brooks, Jr., Esq., Marks, O'Neill, O'Brien & Courtney, Wilmington, Delaware. Attorney for Defendant GPM.

Daniel L. McKenty, Esq., and Katherine L. Hemming, Esq., Heckler & Frabizzio, Wilmington, Delaware. Attorneys for Defendants GPM and Liberty Holdings Corp.

David A. Felice, Esq., and Sean J. Bellew, Esq., Ballard Spahr, LLC, Wilmington, Delaware. Attorneys for Defendants Valero.

*Upon Consideration of Defendants State of Delaware &
State of Delaware Department of Transportation's
Motion for Summary Judgment*

GRANTED

VAUGHN, President Judge

OPINION

This is a wrongful death action that arises out of a motor vehicle collision that caused the death of Ashley Call. The plaintiffs are Marlene Zak, the mother of the decedent, and the Estate of Ashley Call (collectively, "the plaintiffs"). The defendants are GPM Investments, LLC d/b/a Shore Stop; Liberty Holding Corporation; Golden Eagle Properties; Valero Energy Corporation; the State of Delaware; the State of Delaware Department of Transportation ("DelDOT"); and Dawn D. Barr. The State of Delaware and DelDOT (collectively, "the defendants") filed a Motion for Judgment on the Pleadings Pursuant to Superior Court Civil Rule 12(c). The Court converted that motion to a Motion for Summary Judgment, and allowed the parties to submit materials from outside of the pleadings and additional briefs. This is the Court's opinion regarding the defendants' Motion for Summary

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Judgment Pursuant to Rule 56.

FACTS

On February 9, 2010, the decedent, Ashley Call, went to a Shore Stop gas station located on Route 13 in Townsend to cash a paycheck and fuel her Neon Plymouth on her way to work. Prior to that day, on February 5 through 6, a snow storm laid approximately 21 inches of snow. Defendant DelDOT plowed Route 13 on either February 7 or 8, and caused snow to pile into three mounds on the right shoulder of the road near the exit of the Shore Stop property. According to the Delaware State Police investigation report, the piles of snow were 30, 47, and 59.5 inches in height.¹

After fueling her vehicle, the decedent attempted to pull out of the gas station by making a right hand turn onto Route 13 when her vehicle was struck on the driver's side by defendant Dawn Barr. The decedent died on impact due to blunt force injuries to her chest and neck. The Delaware State Police investigation report stated that the three snow mounds "could have possibly obscured the victim's sight line as she was in the exit lane of the [Shore Stop]."

In their complaint, the plaintiffs allege that the defendants were negligent, grossly negligent, and/or reckless in plowing the snow so as to create an unsafe and dangerous condition by obstructing the view of motor vehicle operators exiting the gas station, and for failing to warn Shore Shop to safely operate its premises and other

¹ The report stated that the 30 inch snow mound was located closest to Ashley Call on her left as she was exiting the gas station, followed by the 47 inch mound, then the 59.5 inch mound.

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motor vehicle operators on Route 13 to drive cautiously.

CONTENTIONS

The defendants contend that they are entitled to summary judgment on sovereign immunity grounds, and alternatively, because they did not owe a duty of care to the decedent under the public duty doctrine. To support its contention that the defendants are immune and that the State did not waive its sovereign immunity, they presented the affidavit of the State's Insurance Coverage Administrator, Debra Lawhead, which states that the State does not maintain a commercial insurance policy or self-insurance program that covers the specific accident alleged here.

The plaintiffs contend that summary judgment is inappropriate, because Ms. Lawhead admitted in a deposition that the State does maintain a self-insurance coverage program for state vehicles, including DelDOT's snow plows. They assert that the question of whether the State's insurance policy covers this particular accident is a question of law for the Court to decide, and not one that Ms. Lawhead, who they contend is not trained or qualified to give such an opinion, can determine. In addition, the plaintiffs contend that the public duty doctrine is inapplicable in this case, because a "special relationship" was created when DelDOT plowed the snow in such a manner so as to impair the line of sight of the decedent when she was exiting the gas station.

DISCUSSION

Summary judgment should be granted when there are no genuine issues of

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material fact and the moving party is entitled to judgment as a matter of law.² The moving party bears the burden of establishing the non-existence of material issues of fact.³ If a motion is properly supported, the burden shifts to the non-moving party to establish the existence of material issues of fact.⁴ In considering the motion, the facts must be viewed in the light most favorable to the non-moving party.⁵ Thus, the Court must accept all undisputed factual assertions and accept the non-movant's version of any disputed facts.⁶ Summary judgment is inappropriate "when the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances."⁷

SOVEREIGN IMMUNITY

The doctrine of sovereign immunity provides that the State may not be sued without its consent.⁸ Article I, Section 9 of the Delaware Constitution provides that the only way to limit or waive the State's sovereign immunity is by an act of the

² Super. Ct. Civ. R. 56(c).

³ *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

⁴ *Id.* at 681.

⁵ *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992).

⁶ *Sztybel v. Walgreen Co.*, 2011 WL 2623930, at *2 (Del. Super. June 29, 2011).

⁷ *Mumford & Miller Concrete, Inc. v. New Castle County*, 2007 WL 404771, at *4 (Del. Super. Jan. 31, 2007).

⁸ *Doe v. Cates*, 499 A.2d 1175, 1176 (Del. 1985).

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General Assembly.⁹ The General Assembly has enacted 18 *Del. C.* § 6511, which waives sovereign immunity to the extent that either the State insurance coverage program was funded by direct appropriation (self-insurance) or that the State purchased commercially available insurance to cover the loss.¹⁰ Specifically, Section 6511 provides that:

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.

It is undisputed that the State self-insures all of its vehicles, including the DelDOT snow plow used in this case. The State's Insurance Coverage Administrator testified in a deposition that the State adopted the insurance policy of an insurance company, the PMA Group, as the State's own in order to determine when sovereign immunity is waived. If the injury is covered under the insurance policy, sovereign immunity is waived under 18 *Del. C.* § 6511. If it is not, then the State is immune. The question before the Court is whether the injury in this case is covered by the insurance policy that was adopted by the State. The pertinent provision of the insurance policy at issue here states:

Part IV– Liability Insurance: (1) We will pay all sums the insured legally must pay as damages because of bodily

⁹ *Shellhorn & Hill, Inc. v. State*, 187 A.2d 71, 74-75 (Del. 1962).

¹⁰ *Pauley v. Reinoehl*, 848 A.2d 569, 573 (Del. 2004).

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injury or property to which this insurance applies, caused by an accident and resulting from the ownership, maintenance, or use of a covered auto.

The plaintiffs contend that the accident in this case resulted from the “use” of the DelDOT snow plow, and therefore, sovereign immunity has been waived. To be clear, it is not alleged that the snow plow was directly involved in the accident. Rather, the plaintiffs allege that the snow plow negligently plowed the snow near the exit of the gas station so that the decedent’s line of sight was impaired.

The defendants contend that they are entitled to summary judgment because they presented an affidavit of the State’s Insurance Coverage Administrator, which stated that the insurance policy adopted by the State did not cover the accident involved here, and thus, the State did not waive sovereign immunity. The plaintiffs contend that the Insurance Coverage Administrator is not qualified to give an opinion regarding insurance coverage, and that the question of whether the State’s insurance policy covers this particular accident is a matter of contract interpretation to be decided by the Court.

I agree with the plaintiffs that the Administrator’s judgment as to whether an occurrence is or is not covered under the State’s policy must give way to the Court’s analysis of the issue when coverage is called into question. Although this Court has often relied on similar affidavits in determining that the State has not waived sovereign immunity under Section 6511,¹¹ I find that given the facts and contract

¹¹ *Caraballo v. Delaware Dept. Of Corr.*, 2001 WL 312453, at *1 (Del. Super. Mar. 22, 2001); *see also J.L. v. Barnes*, 33 A.3d 902, 913-14 (Del. Super. 2011); *Kendall v. State*, 2011 WL

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language presented here, it is appropriate for the Court to determine whether the accident is covered by the State's insurance contract.¹²

The Court must next address whether the injuries sustained here resulted from the “ownership, maintenance, or use” of the DelDOT snow plow. The defendants urge this Court to use the three-part test used by the Delaware Supreme Court in *Nationwide Gen. Ins. Co. v. Royal*¹³ in order to determine whether the injury has arisen out of the “ownership, maintenance, or use” of the State motor vehicle. I disagree. Delaware courts have utilized that test only when determining whether a person was covered by underinsured motorist insurance.¹⁴ The Supreme Court adopted the three-part test, originally articulated by the Minnesota Supreme Court in

1938298, at *2 (Del. Super. Apr. 29, 2011); *Jackson v. State*, 2000 WL 33115718, at *1 (Del. Super. July 7, 2000).

¹² See e.g., *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992) (“The proper construction of any contract, including an insurance contract, is purely a question of law.”).

¹³ 700 A.2d 130 (Del. 1997). The three *Klug* factors are:
(1) whether the vehicle was an “active accessory” in causing the injury—*i.e.*, “something less than proximate cause in the tort sense and something more than the vehicle being the mere situs of the injury;” (2) whether there was an act of independent significance that broke the causal link between the use of the vehicle and the injuries inflicted; and, (3) whether the vehicle was used for transportation purposes.
Id. at 132 (citing *Continental W. Ins. Co. v. Klug*, 415 N.W.2d 876, 878 (Minn. 1987)).

¹⁴ See e.g., *Nationwide Gen. Ins. Co. v. Royal*, 700 A.2d 130, 132 (Del. 1997); *State Farm Mut. Auto. Ins. Co. v. Buckingham*, 919 A.2d 1111, 1113 (Del. 2007).

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Continental Ins. Co. v. Klug,¹⁵ because “[t]he *Klug* approach provides a flexible framework that takes into the account the circumstances of the injury and promotes the legislative purpose of Delaware’s underinsured motorist statute-the ‘protection of innocent persons from the negligence of unknown or impecunious tortfeasors.’”¹⁶ Imbedded in that test is Delaware’s “settled principle that contracts are liberally construed in favor of finding uninsured/underinsured coverage.”¹⁷

As mentioned, whether the State has waived its sovereign immunity depends on whether a particular injury is covered by the insurance policy adopted by the State. The language used in that insurance policy is similar to the language used in 10 *Del. C. § 4012*, which creates exceptions to immunity for torts brought against county and municipal governmental entities and their employees. The relevant portion of Section 4012 states:

A governmental entity shall be exposed to liability for its negligent acts or omissions causing property damage, bodily injury or death in the following instances:
(1) In its ownership, maintenance or use of any motor vehicle, special mobile equipment, trailer, aircraft or other machinery or equipment, whether mobile or stationary.

Both the insurance policy adopted by the State and Section 4012(1) provide that injured persons can sue for damages that arise out of the “ownership, maintenance or

¹⁵ 415 N.W.2d 876 (Minn. 1987).

¹⁶ *Royal*, 700 A.2d at 132.

¹⁷ *Id.* at 133; *see also Buckingham*, 919 A.2d at 1116.

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use” of a motor vehicle. However, contrary to our courts’ policy of liberally construing insurance contracts in favor of providing insurance coverage, Delaware courts strictly construe the exceptions to Section 4012 so as not to undermine the broad immunity granted by the Tort Claims Act.¹⁸

I find that in this case, where the Court is interpreting an insurance contract to determine whether sovereign immunity has been waived, it is appropriate to strictly construe the language of the contract to determine whether the accident resulted from the “use” of the DelDOT snow plow. In doing so, it is instructive to review cases interpreting Section 4012(1), which, as mentioned, has similar language to the State’s insurance policy. It is important to note, however, that the Court is not applying Section 4012(1) itself, because that statute applies to torts brought against county and municipal governmental entities and their employees, and it does not apply to the State entities involved here.

In *Sussex County v. Morris*, the Delaware Supreme Court held that “[t]he motor vehicle exception in Section 4012(1) applies when the vehicle itself is the instrument of the harm.”¹⁹ The Court went on to hold that Sussex County and its constable were not immune from a suit brought by a mentally ill patient, when that patient, who was being transported in the constable’s personal, improperly-equipped vehicle, jumped out of the moving car and injured himself. The Supreme Court held that “it could not

¹⁸ See *Walls v. Rees*, 569 A.2d 1161, 1167 (Del. 1990); *Sadler v. New Castle County*, 565 A.2d 917, 923 (Del. 1989).

¹⁹ *Sussex County v. Morris*, 610 A.2d 1354, 1360 (Del. 1992).

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be more obvious that [the plaintiff's] injuries were a direct result of the improperly equipped automobile [the constable] used.”²⁰ Therefore, the injuries in that case, the Court held, resulted from the “ownership, maintenance or use” of the motor vehicle.

In contrast, this Court held that the immunity exception under Section 4012(1) did not apply in *Hedrick v. Webb*.²¹ There, the plaintiff sued two police officers when the officers allegedly failed to properly control an intersection during a rally when a vehicle drove through the intersection and caused two motorcyclists that were participating in the rally to fall. This Court held that the police officers were immune, because the plaintiff did not allege that the officers’ use of their vehicles were negligent, and the officers’ vehicles were not the instrument of harm in that case.²²

Here, when viewing the facts in the light most favorable to the non-moving parties (*i.e.*, the plaintiffs), I find that the accident may have been at least partially caused by the “use” of the DelDOT snow plow. This is so, because the DelDOT vehicle caused the snow to pile into three mounds that were between 30 and 60 inches in height near the exit of the gas station. Arguably, the snow mounds impaired the decedent’s line of sight, and thus, potentially contributed to the cause of the accident.²³ Because the DelDOT snow plow “allegedly produce[d] or was the

²⁰ *Id.*

²¹ 2004 WL 2735517 (Del. Super. Nov. 22, 2004).

²² *Id.* at *12.

²³ The Delaware State Police investigation report stated that “[t]here were three separate snow mounds that could have possibly obscured the victim’s sight line as she was in the exit lane of the [Shore Stop].”

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instrument of the harm”²⁴ and the plaintiffs’ injuries resulted from the “use” of that vehicle, I find that the plaintiffs have shown that sovereign immunity has been waived by the State in this case. The Court must next address whether the defendants nonetheless are entitled to summary judgment on the ground that they did not owe a duty of care directly to the decedent.

PUBLIC DUTY DOCTRINE

It is well-settled that negligence is premised upon the existence of a legal duty, a breach of that duty, and injury proximately caused by that breach.²⁵ The defendants contend that they owed no legal duty to the decedent under the “public duty doctrine.” That doctrine holds that where government action is involved, the duty that is claimed to be owed to the injured party by a governmental agency or its agents runs to the public at large and not to the specific individual.²⁶ The public duty doctrine, however, is inapplicable when there is a “special relationship” between the governmental agency or its agents and the injured individual.²⁷ Such a special relationship exists when there is:

- (1) an assumption by the governmental agency or its agents, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2)
- knowledge on the part of the governmental agency or its

²⁴ *Sadler v. New Castle County*, 565 A.2d 917, 922 (Del. 1989).

²⁵ *See e.g., Patton v. Simone*, 1993 WL 144367, at *10 (Del. Super. Mar. 22, 1993).

²⁶ *Castellani v. Delaware State Police*, 751 A.2d 934, 938 (Del. Super. 1999).

²⁷ *See Patton*, 1993 WL 144367, at *13.

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agents that inaction could lead to harm; (3) some form of direct contact between the governmental agency or its agents and the injured party; and (4) that party's justifiable reliance on the affirmative undertaking of the governmental agency or its agents.²⁸

The plaintiffs contend that a “special relationship” was created here, because DelDOT had a duty to plow the roads under 17 *Del. C.* § 132(b)(2), which requires that DelDOT “maintain all state highways under its jurisdiction.” They further contend that a duty was owed directly to the decedent when the defendants undertook the affirmative act of plowing the roads and piling the snow near the exit of the gas station, whose business invitees were “reasonable and foreseeable users of the cleared pathways, beyond that of the general public at large.”

In *Castellani v. Delaware State Police*,²⁹ the plaintiff sued the Delaware State Police and several of its officers when a fatal car accident occurred, in part, as a result of a defective traffic signal. The State Police were previously informed of the defective traffic light by at least four individuals, but they failed to regulate the traffic at the intersection. The plaintiff sued the defendants for negligence, but this Court held that the State Police and its officers did not have a duty to regulate the traffic, and that even if they did, they did not owe a duty of care to the plaintiff individually, because none of the special relationship factors were met.³⁰

²⁸ *Castellani*, 751 A.2d at 938.

²⁹ 751 A.2d 934 (Del. Super. 1999).

³⁰ *Id.* at 940-942.

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In *Johnson v. Indian River School District*,³¹ a handicapped child who had to wear leg braces and use crutches in order to ambulate, passed a driver's education program despite his handicap. A school office issued him a certificate to enable him to obtain a driver's license. The certificate did not note any handicap that might call for restrictions on the license. The student then went to the motor vehicle department to obtain his license. State employees at the department, who could see the student's obvious handicap, issued him a license with no restrictions. He then caused an accident while driving in which the plaintiff in the case was injured. Despite the plaintiff's allegation that the state employees were personally negligent in issuing the unrestricted license, and that their negligence proximately caused the accident, the court found that the duty which they owed was to the driving public at large and that the public duty doctrine shielded them from liability.

As mentioned, the plaintiffs contend that DelDOT had a duty imposed on them by 17 *Del. C.* § 132(b)(2) to plow the snow on State highways, and that the defendants "breached this statutory duty by failing to reasonably and safely plow and pile snow along the shoulder of U.S. Rt. 13 Northbound and Shore Stop's abutting paths of ingress/egress." However, Section 132(b)(2) simply states that DelDOT must "maintain all state highways under its jurisdiction." To the extent that the statute does impose a duty on DelDOT, I find that it imposes that duty on DelDOT for the benefit of the public as a whole and not to the decedent individually.

The plaintiffs cannot satisfy the first element of the special relationship test,

³¹ 723 A.2d 1200 (Del. 1998).

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because the defendants did not assume an affirmative duty to act on behalf of the decedent in this case; but rather, the defendants acted on behalf of the public when it plowed the snow from Route 13. Also, the plaintiffs concede that DelDOT was not plowing the road when the accident occurred. Rather, the plaintiffs state that DelDOT plowed the road at some time on February 7 or 8, and that the accident occurred on February 9 at approximately 3:30 p.m. Therefore, it is clear that the driver of the snow plow did not have actual knowledge of the decedent in this case, and there was no direct contact between the snow plow operator and the decedent. Lastly, the decedent could not have justifiably relied on an undertaking of the defendants. DelDOT simply plowed the snow from the road for the benefit of the public. Therefore, I find that the defendants did not owe a duty of care to the decedent or the plaintiffs individually and they are entitled to judgment as a matter of law.

Lastly, the Court notes that the plaintiffs also contend that this Motion for Summary Judgment is not ripe for adjudication, because there has been only minimal discovery, and they contend that more discovery is needed to determine whether a special relationship existed. This contention is unpersuasive. It is clear that there has been some discovery in this case, and the Court has afforded the plaintiffs additional opportunity for discovery when it converted the defendants' Motion for Judgment on the Pleadings to a Motion for Summary Judgment.³² Moreover, the plaintiffs do not

³² See *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69 (Del. 1995) ("Before a motion for summary judgment is ripe for decision, the non-movant normally should have an opportunity for some discovery." (emphasis added)). But cf. *Simmons v. Delaware Technical &*

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suggest what facts they can discover to establish the existence of a special relationship. The operative facts of this case are not in dispute, and the plaintiffs concede that DelDOT was not plowing Route 13 when the decedent was exiting the gas station. Accordingly, I find that there are no facts that the plaintiffs could present to establish that a special relationship with the defendants existed given the fact that the defendants, as mentioned above, clearly did not undertake an affirmative action for the benefit of the decedent individually, and the snow plow operator did not have actual knowledge of, or direct contact with, the decedent in this case.

Therefore, the State of Delaware and DelDOT's Motion for Summary Judgment is ***granted***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

oc: Prothonotary
cc: Order Distribution
File

Cnty. Coll., 2012 WL 1980409, at *4 (Del. Super. May 17, 2012) (holding that summary judgment was not ripe for adjudication, because the Court previously granted the plaintiff's motion to compel discovery of certain materials, which the plaintiff did not have an opportunity to examine yet).