

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

BLAINE QUICKEL and, )  
SHEILA McDONALD QUICKEL, his wife, )  
Plaintiffs, )  
 )  
v. ) C.A. No. 01C-04-022  
 )  
NEW CASTLE COUNTY, )  
Defendant, )  
ENTERPRISE FLASHER COMPANY, )  
Defendant / Third-Party Plaintiff, )  
STATE OF DELAWARE, )  
DEPARTMENT OF TRANSPORTATION, )  
Third-Party Defendant. )

Date Submitted: July 16, 2002

Date Decided: July 25, 2002

**ORDER**

**UPON THIRD-PARTY DEFENDANT’S MOTION TO DISMISS**

**GRANTED**

Frederick H. Schranck, Esq., Deputy Attorney General, Dover, Delaware 19903, Attorney for Department of Transportation.

William J. Cattie, Esq. of Cattie & Fruehauf, Wilmington, Delaware 19899, Attorney for Defendant Enterprise.

Thomas J. Roman, Esq. of Kimmel, Carter, Roman & Peltz, Wilmington, Delaware 19899, Attorney for Plaintiff.

Judith A. Hildick, Esq. of New Castle County Law Department, New Castle, Delaware 19720, Attorney for Defendant New Castle County.

On this 25<sup>th</sup> day of July 2002, upon consideration of Third-Party Defendant State of Delaware, Department of Transportation's Motion to Dismiss and Defendant Enterprise Flasher Company's Response, oral argument, and the record, it appears to the Court that:

(1) The original lawsuit, filed on April 3, 2001, arises from a motor vehicle accident. On or about June 26, 1999, Plaintiff Blaine Quickel, a Delaware State Police Trooper was traveling westbound on Silverside Road pursuing a felon when he encountered a construction barrel in his lane of travel. As Plaintiff swerved left to avoid the barrel, he collided with a concrete traffic control island in the middle of Silverside Road. Plaintiffs Blaine and Sheila Quickel filed the original lawsuit alleging negligence against New Castle County and Enterprise Flasher Company ("Enterprise"). On July 31, 2001, Defendant Enterprise filed a Third-Party Complaint against Third-Party Defendant State of Delaware, Department of Transportation ("Del DOT") alleging that the negligence of Del DOT was the proximate cause of Plaintiff's injuries.

(2) Del DOT now files this Motion to Dismiss based on the theory that Enterprise's action is barred as a matter of law by the doctrine of sovereign immunity. Enterprise contends that Del DOT has waived its sovereign immunity by having the

power to sue thus implying the power to be sued or because the action was ministerial and not discretionary under the Torts Claims Act.

(3) The Delaware Constitution, Article I, section 9 provides for sovereign immunity for the State. This is an absolute bar to suit unless waived by legislative act of the General Assembly. *Doe v. Cates*, 499 A.2d 1175, 1176 (Del. 1985). The General Assembly has limited sovereign immunity in some areas, such as by 19 *Del. C.* § 6511 where the State has obtained insurance to cover the risk. Here, the State has no insurance pertaining to any possible tort liability for the facts alleged in the Third-Party Complaint. Enterprise does not dispute this. Thus, another form of a waiver of sovereign immunity must be found for this suit to be maintainable.

(4) Enterprise contends that 17 *Del. C.* § 511 waives sovereign immunity as the Department of Highways is allowed to sue for injuries or damages to public roads, etc., which would cover the damage to the traffic island caused by the motor vehicle accident of this case. Enterprise's argument fails on this point. Nothing in that statute sets forth an explicit statutory exception to immunity. The Delaware courts have held that the General Assembly waived the sovereign immunity of a state agency by providing it with the power to sue or be sued. *Wilmington Housing Auth. v. Williamson*, 228 A.2d 782, 787 (Del. 1967). In support of its contention, Enterprise relies *Sandt v. Delaware Solid Waste*

*Authority*, 640 A.2d 1030 (Del. 1994), where the Court ruled that the DSWA, a State agency, waived sovereign immunity by having the statutory power “to sue and be sued.” In that case, the General Assembly explicitly gave the DSWA the power “to sue and be sued” pursuant to 7 *Del. C.* § 6406(a)(5). In the case *sub judice*, 17 *Del. C.* § 511 gives Del DOT the power to sue. Nothing explicitly mentioned in that statute or in the general powers and duties of Del DOT gives Del DOT the power to be sued.

(5) Moreover, Enterprise has failed to find any Delaware Supreme Court case to support its theory that the statutory right to sue, with no mention of the right to be sued, constitutes a waiver of sovereign immunity. The *only* support Enterprise found was a West Virginia case, *Hope Natural Gas Co. v. West Virginia Turnpike Commission*, 105 S.E.2d 630 (W. Va. Supr. 1958). The West Virginia case is distinguishable in that it deals with the West Virginia Turnpike Commission, a corporation created by the State; such is not the case here. Further, the statute creating the Commission gives the power “to sue and be sued,” which if included in the Del DOT statute would waive sovereign immunity. *Id. at 639.*

(6) Enterprise further contends that Delaware’s Tort Claims Act, 10 *Del. C.* § 4001, further exposes Del DOT to liability. Enterprise alleges that Del DOT’s actions in this case were ministerial and not discretionary, thus imposing liability on the State. In

support of its contention, Enterprise relies on *High v. State Highway Department*, 307 A.2d 799 (Del. 1973), which states that decisions as to traffic routing and signage plans on highways were discretionary acts, but the execution of such plans was ministerial and errors exposed the State to liability. A key difference between the *High* case and the present case, lies in the fact that in *High* sovereign immunity was waived by 18 *Del. C.* § 6509. Thus, the court there was not determining whether the ministerial acts waived sovereign immunity, but dealt with exposure to liability after sovereign immunity was deemed waived.

In fact the court in *Doe v. Cates* held “that the legislature did not intend by enacting 10 *Del. C.* § 4001 to waive sovereign immunity in all cases where a ministerial act was performed with gross or wanton negligence or in bad faith.” 499 A.2d at 1180. The court further held that, “In keeping with the purpose of the State Tort Claims Act, this Court holds that § 4001 must be applied to limit the State’s liability where it has, by some means independent of 10 *Del. C.* § 4001, waived immunity.” *Id.* at 1181. Therefore, here we do not get to the Tort Claims Act, as there has been no independent waiver of sovereign immunity.

For the aforementioned reasons, Third-Party Defendants’ Motion to Dismiss is  
Hereby GRANTED.

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**IT IS SO ORDERED.**

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**ALFORD, J.**

Original: Prothonotary's Office - Civil Div.