IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

BERTON PARKER and BELLINA PARKER,	)	C.A. No. 09C-02-027 JTV
Plaintiffs,	)	
v.	)	
EDWARD S. WIREMAN, PHILIP H. MOORE, and THE STATE OF DELAWARE DEPARTMENT OF TRANSPORTATION,	)	
Defendants.	)	

Submitted: November 19, 2011
Decided: April 30, 2012

Gregory A. Morris, Esq., Liguori &Morris, Dover, Delaware. Attorney for Plaintiffs.

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

Upon Consideration of Defendants'
Motion For Summary Judgment
GRANTED

VAUGHN, President Judge

Parker, et al. v. Wireman, et al.
C.A. No. 09C-02-027 JTV
April 30, 2012

OPINION

The defendants, Edward S. Wireman, Philip H. Moore and the Department of Transportation have all moved for summary judgment. The motion is opposed by the plaintiffs. The motion is also opposed by Hartford Underwriters Insurance Company, which has intervened as a defendant. Hartford is the plaintiffs' uninsured motorist coverage carrier.

FACTS

On February 23, 2007 plaintiff Berton Parker was operating his motor vehicle southbound on County Route 187. Plaintiff Bellina Parker was in the passenger seat. They approached a road construction site. Defendant Wireman was operating a piece of machinery referred to in the complaint as crane/gradall/construction machinery. Defendant Moore was a flagger. They were both state employees and the gradall was owned by the state. Defendant Moore had a sign that read "slow" facing the plaintiffs. The other side of the sign read "stop" and faced traffic in the opposing direction. Defendant Moore claims that he motioned for the plaintiffs to stop by holding his hand up because he observed circumstances that created a need for traffic to stop in both directions. The plaintiffs claim that he did not motion for them to stop. For purposes of this motion, therefore, I accept as true the plaintiffs' claim that he did not motion for them to stop and that they were authorized to continue to proceed at a slow speed. At that time the gradall was picking up dirt and loading it into the back of a truck. As the plaintiff's vehicle came near the gradall, the gradall rotated and struck it, causing injury to the plaintiffs.

STANDARD OF REVIEW

Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[1] The moving party bears the burden of establishing the non-existence of material issues of fact.[2] If a motion is properly supported, the burden shifts to the non-moving party to establish the existence of material issues of fact.[3] In considering the motion, the facts must be viewed in the light most favorable to the non-moving party.[4] Thus, the court must accept all undisputed factual assertions and accept the non-movant's version of any disputed facts.[5] Summary judgment is inappropriate "when the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more throughly into the facts in order to clarify the application of law to the circumstances."[6]

DISCUSSION

The defendants contend that they are entitled to summary judgment on the grounds of sovereign immunity. The plaintiffs and Hartford contend that there has

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[1] Super. Ct. Civ. R. 56(c).

[2] *Gray v. Allstate Ins. Co.*, 2007 WL 1334563, at *1 (Del. Super. May 2, 2007).

[3] *Id.*

[4] *Pierce v. Int'l Ins. Co. of Ill.*, 671 A.2d 1361, 1363 (Del. 1996).

[5] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99-100 (Del. 1992).

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

been a waiver of sovereign immunity or that there is a question of fact as to whether there was a waiver.

When the defense of sovereign immunity is raised, the court must first determine whether there has been a waiver of sovereign immunity under 18 *Del. C.* § 6511 or some other statute.[7] If there has been no waiver of sovereign immunity under that section or another statute, sovereign immunity exists and no further analysis is necessary.[8] If it is determined that the state has waived sovereign immunity under 18 *Del. C.* § 6511 or another statute, then it is appropriate to next determine whether the limitation on civil liability set forth in the State Tort Claims Act bars the action.[9]

As mentioned, there are two means by which the State may waive sovereign immunity: (1) 18 *Del. C.* § 6511, which provides that sovereign immunity is waived for claims covered by the state insurance coverage program, whether by commercially procured insurance or by self-insurance; or (2) by statute which expressly waives immunity.[10] Where neither is present, the state normally files an affidavit of the director of the State of Delaware Insurance Office so stating and sovereign immunity

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[7] *J.L. v. Barnes*, 33 A.3d 902, 913 (Del. Super. 2011).

[8] *Doe v. Cates*, 499 A.2d 1175, 1180-81 (Del. 1985); *see also Pauley v. Reinoehl*, 848 A.2d 569, 573 (Del. 2004).

[9] *See Doe*, 499 A.2d at 1180-81.

[10] *J.L.*, 33 A.3d at 913.

is established.[11] This case is different because the state does have some self insurance for accidents caused by state vehicles. That coverage is defined by an expired commercial automobile policy. Coverage exists for "autos," but the definition of "auto" excludes "mobile equipment," which is separately defined. After reviewing the policy, I find that the gradall machinery involved here is "mobile equipment." Another section of the policy does provide that mobile equipment is a covered auto if it is being carried or towed by a covered vehicle. However, in this case it cannot be disputed that the gradall was not being carried or towed. I therefore conclude that the accident which occurred here is not covered under the state's insurance coverage program. I further conclude, therefore, that sovereign immunity is not waived. Therefore, summary judgment will be granted to the Department of Transportation.

The plaintiffs and Hartford contend that the record is incomplete on the sovereign immunity issue. They contend that there is no affidavit or other evidence as to exactly what coverage is applicable to this case and what the specific terms of the coverage may be. The defendants respond that no affidavit was filed in this case because it was perceived that the interpretation of the policy involved a legal judgment. I accept the defendants' contention and I am content to accept the representations of the Department of Transportation, through counsel, that the tendered insurance policy is true and correct and defines the risks involving state vehicles which are insured or not insured.

The defendants contend that where sovereign immunity exists for the state, it

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[11] *Jackson v. State*, 2000 WL 33115718, at *1 (Del. Super. July 7, 2000).

also exists for its employees. It relies upon the cases of *Pauley v. Reinoehl*[12] and *Doe v. Cates*.[13] However, I have carefully reviewed those decisions and conclude that they discuss sovereign immunity only of the state and its agencies, not individual state employees. My opinion is that sovereign immunity applies to the state, its agencies, and its public officials sued in their official capacity.[14] It does not apply to state employees sued for their own conduct. Therefore, for defendants Wireman and Moore, one passes by 18 *Del. C.* § 6511 and goes directly to the State Tort Claims Act.

Under the State Tort Claims Act, a state employee has qualified immunity from civil liability.[15] Immunity exists where (1) "[t]he act or omission complained of arose out of and in connection with the performance of an official duty . . . involving the exercise of discretion . . . ; (2) "[t]he 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) [t]he act or omission complained of was done without gross or wanton negligence."[16] All three elements must be present for the employee to have the benefit of this qualified immunity.[17]

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[12] 2002 WL 1978931 (Del. Super. Aug. 21, 2002).

[13] 499 A.2d at 1175.

[14] *J.L.*, 33 A.3d at 913.

[15] *Id.* at 914; *see also* 10 *Del. C.* § 4001.

[16] *J.L.*, 33 A.3d at 914.

[17] *Id.*

Applying those factors to the facts of this case, viewed in the light most favorable to the plaintiffs, I find that all three elements are satisfied as a matter of law. The acts of operating machinery and regulating traffic at a state road construction site are discretionary acts involving personal judgment, as opposed to ministerial acts.[18] There are no facts in the record to suggest that either employee was acting in bad faith or that either believed that he was not acting in the best public interest.

"Gross negligence is defined as 'a higher level of negligence representing 'an extreme departure from the ordinary standard of care.'"[19] It implies "a lack of care involving a conscious indifference to consequences in circumstances where probability of harm to another is reasonably apparent,"[20] an "I-don't-care-a-bit-what-happens" attitude.[21] It is the functional equivalent to criminal negligence.[22] "Wanton negligence" has been defined as heedless and reckless disregard for another's rights with consciousness that an act or omission may result in injury to another.[23] When the standards for gross or wanton negligence are applied to the facts of this case, I do

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[18] *See id.* at 914-15.

[19] *Brown v. United Water Delaware, Inc.*, 2010 WL 2052373, *4 (Del. Super. May 20, 2010) (quoting *Brown v. Robb*, 583 A.2d 949 (Del. 1990)); *see also Brittingham v. Bd. of Adjustment of the City of Rehoboth Beach*, 2005 WL 1653979, *3 (Del. Super. April 26, 2005).

[20] *Pauley*, 2002 WL 1978931, at *7.

[21] *McHugh v. Brown*, 125 A.2d 583, 586 (Del. 1956).

[22] *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 530 (Del. 1987).

[23] *Vannicola v. City of Newark*, 2010 WL 5825345, at *9-10 (Del. Super. Dec. 21, 2010).

not believe that any rational juror could conclude that either defendant Wireman or defendant Moore acted with gross or wanton negligence. This was an unfortunate accident and either or both defendants could well be found to have committed simple negligence, but not gross or wanton negligence.

The plaintiffs and Hartford contend that the record is incomplete on the State Tort Claims Act factors. However, if there were more to the accident than I have described above, the parties have had an ample opportunity to so inform the court.

The plaintiffs and Hartford also contend that the individual defendants are liable to the plaintiffs pursuant to the state created danger doctrine. The state created danger doctrine has four elements and arises from substantive due process.[24] However, even under this theory the above-described qualified immunity exists so long as the state actor's conduct does not "violate clearly established statutory or Constitutional rights of which a reasonable person would have known."[25] Rights are clearly established if a reasonable person in the state actor's position would have known that, in light of decided case law, the action would be illegal.[26] I find that it is not clearly established in factual circumstances even remotely analogous to those involved here that the actions of the flagger and the machine operator violated statutory or constitutional rights of which a reasonable person would have known.

Therefore, the defendants' Motion for Summary Judgment is ***granted*** as to all

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[24] *Wyatt v. Krzysiak*, 82 F. Supp. 2d 250, 255 (D. Del. 1999).

[25] *Id.* at 259 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

[26] *Wyatt,* 82 F. Supp. 2d at 259.

three defendants.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

cc: Prothonotary
cc: Order Distribution
File