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

CAROLYN KENDZIERSKI,	)	
	)	
Plaintiff,	)	
	)	C.A. No. 07C-08-245 PLA
v.	)	
	)	
DELAWARE FEDERAL CREDIT UNION, d/b/a DEL ONE, and THE STATE OF DELAWARE	)	
	)	
Defendants.	)	

ON DEFENDANT DELAWARE FEDERAL CREDIT UNION'S MOTION FOR SUMMARY JUDGMENT
DENIED
ON DEFENDANT STATE OF DELAWARE'S MOTION FOR SUMMARY JUDGMENT
GRANTED

Submitted: January 23, 2009
Decided: February 4, 2009

James R. Leonard, Esquire, ROEBERG, MOORE & FRIEDMAN, P.A., Wilmington, Delaware, Attorney for Plaintiff.

Kristi J. Doughty, Esquire, and Robert T. Aulgur, Jr., Esquire, WHITTINGTON & AULGUR, Middletown Delaware, and Steven B. Kantrowitz, Esquire, and Travis N. Gery, Esquire, KANTROWITZ & PHILLIPPI, LLC, Philadelphia, PA, Attorneys for Defendant Delaware Federal Credit Union.

Michael F. McTaggart, Esquire, Deputy Attorney General, Wilmington, Delaware, Attorney for Defendant State of Delaware.

ABLEMAN, JUDGE

Introduction

Before the Court are two Motions for Summary Judgment in a slip-and-fall case brought by Plaintiff Carolyn Kendzierski ("Plaintiff") against Delaware Federal Credit Union ("DFCU") and the State. Plaintiff claims she fell on the exterior steps of a building owned by the State and leased to DFCU.

DFCU seeks summary judgment on the basis that the State retained control of the exterior of the leased building and bore sole responsibility for maintaining the steps. In addition, DFCU contends that Plaintiff cannot prove that it knew or should have known of the existence of a dangerous or defective condition on the steps. The State's Motion for Summary Judgment argues that it is immune from suit under principles of sovereign immunity and the State Tort Claims Act.

After reviewing the record, the Court concludes that DFCU did not bear responsibility for the maintenance or repair of the exterior steps, but that Plaintiff has raised a triable issue as to whether DFCU breached a duty to provide safe ingress and egress to its leased premises by failing to warn of a latent dangerous condition. The Court also finds that Plaintiff's claim against the State is barred by sovereign immunity and the State Tort Claims Act. Accordingly, for the reasons set forth herein, DFCU's Motion for

Summary Judgment is denied, and the State's Motion for Summary Judgment is granted.

Statement of Facts

Plaintiff alleges that on September 14, 2005, she fell on the exterior steps of a credit union operated by DFCU at 150 East Water Street in Dover. According to Plaintiff, she was visiting the credit union with her husband to apply for a second mortgage. Plaintiff's deposition testimony indicates that she was a long-time customer at DFCU, having visited the branch where her alleged fall occurred approximately once a week for more than a decade prior to the events at issue in this litigation.[1]

Plaintiff asserts that she fell on her tailbone when exiting the credit union because bricks in the exterior steps were loose. As a result of the fall, Plaintiff claims that she has experienced low back and knee pain on her right side, emotional distress, and pain and suffering.[2]

At her deposition, Plaintiff testified that she had used the same exterior steps to enter and exit the credit union during all of her previous visits, and had never experienced any problems.[3] On the day of her fall,

[1] Docket 27 (Excerpt from Pl.'s Dep. Tr.), 9:2-16.

[2] Docket 1 (Pl.'s Compl.), ¶ 7.

[3] Docket 27, at 9:18-25.

however, before entering the credit union Plaintiff observed an orange cone on the right-hand side of one of the steps, where it "looked like they had had some work done on them."[4] She recounts entering and exiting on the side of the steps opposite from where the cone was located, but could not precisely describe how wide the steps were.[5]

The property at 150 East Water Street ("the property") is owned by the State, which leases a portion of the premises to DFCU. Specifically, DFCU leases "[t]he first two floors [of the property], basement excluded."[6] The lease provides that the State Department of Administrative Services (now the State Office of Management and Budget) would assume certain responsibilities for exterior maintenance and repair. In relevant part, the lease states:

> LESSOR covenants and agrees and is obligated to perform the following: . . .
> (d) to provide ordinary repairs and maintenance to the exterior of the leased premises . . . ;
> (e) to provide structural repairs to the exterior of the entire premises . . . ; [and]
> (f) to provide ordinary repairs and maintenance to all external public areas of the premises and/or areas common to

[4] *Id.* at 24:24-25.

[5] *Id.* at 11:11-25, 24:13-20.

[6] Docket 21, App., at A-4.

> all the tenants limited to the sidewalks, walkways, and grounds[.][7]

The State also explicitly retains the right to "enter the . . . premises and all parts thereof . . . to inspect said premises and to carry out any provision(s) of [the] lease."[8]

On September 21, 2005, DFCU's Vice-President of Operations e-mailed the State's Office of Management and Budget to provide an incident report regarding Plaintiff's alleged fall. The e-mail describes the apparent purpose of the cone Plaintiff observed on the steps: "[Plaintiff] said she did not fall where the cone was (loose brick), but there were some pebbles on the stairs and she thinks they made her slip."[9]

On August 28, 2007, Plaintiff filed suit in this Court against DFCU and the State. Plaintiff's Complaint alleges that both the State and DFCU were negligent in (1) failing to properly maintain the exterior stairs of the credit union; (2) failing to properly adhere the bricks in the exterior steps such that they knew or should have known that the steps constituted a dangerous condition; (3) failing to warn of a dangerous condition; (4) failing to inspect the steps; (5) failing to repair the steps; and (6) failing "to provide

[7] *Id.* at A4-5.

[8] *Id.* at A-7.

[9] Docket 25, attachment.

a safe, alternative means for patron invitees to traverse the steps."[10] DFCU and the State have each filed a motion for summary judgment.

Parties' Contentions

In its Motion for Summary Judgment, DFCU argues that, under the terms of its lease with the State, the State retains control over the exterior of the property and bears sole responsibility for care and maintenance of the exterior steps. Furthermore, DFCU argues that Plaintiff must be able to show that DFCU knew or should have known of the existence of a dangerous condition, and that the record contains no evidence that this essential element of her cause of action can be proved.[11]

Plaintiff's Response argues that DFCU owed her a duty of care, because she was a business invitee.[12] Plaintiff claims that the lease cannot relieve DFCU from this duty, particularly when it was in possession of the

[10] Docket 1 (Pl.'s Compl.), ¶ 14.

[11] *See* Docket 21 (Def. DFCU's Mot. for Summ. J.), ¶¶ 6-10.

[12] The Court observes that the responses to both defendants' motions were apparently modeled on an Answer to a Complaint: they are structured to address each paragraph of the Motions for Summary Judgment by admitting or denying the content therein, with sparse counterarguments peppered in to offer Plaintiff's position. This is not the first time a party before this Court has adopted the Answer format in responding to a Motion to Dismiss or a Motion for Summary Judgment. In fact, the increasing popularity of the practice is what compels the Court caution that the Answer format is ill-suited to the task. Responding to a Motion for Summary Judgment or a Motion to Dismiss requires presenting thorough factual and legal arguments. Both litigants and the Court are hobbled by attempts to reduce those arguments to bare affirmations or denials of the moving party's assertions.

premises and was operating a business therefrom. In addition, Plaintiff suggests that the e-mail incident report between DFCU's Vice-President of Operations and the State Office of Management and Budget shows that DFCU knew, or should have known, that the steps were in a "deteriorated condition."[13]

The State asserts that it is entitled to summary judgment because it enjoys sovereign and statutory immunity from Plaintiff's claim. In support of its position, the State urges that there has been no statutory waiver of sovereign immunity applicable to Plaintiff's claimed injuries and that the State's lease with DFCU does not constitute consent to a tort suit. In the alternative, the State submits that Plaintiff's suit is also barred by the State Tort Claims Act.

In response, Plaintiff argues that the State consented to suits stemming from its lease of the property to DFCU. According to Plaintiff, she is a third-party beneficiary of the lease provisions obligating the State to maintain and repair the property's exterior and common areas. Plaintiff contends that sovereign immunity cannot bar her claim, as it arises from the State's breach of its contractual obligations.[14]

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[13] Docket 25 (Pl.'s Resp. to Def. DFCU's Mot. for Summ. J.), ¶ 7.

[14] Docket 25 (Pl.'s Resp. to Def. State's Mot. for Summ. J.), ¶¶ 1-2, 7.

Standard of Review

When considering a motion for summary judgment, the Court examines the record to ascertain whether genuine issues of material fact exist and to determine whether the moving party is entitled to judgment as a matter of law.[15] Initially, the burden is placed upon the moving party to demonstrate that his legal claims are supported by the undisputed facts.[16] If the proponent properly supports his claims, the burden "shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder."[17] Summary judgment will not be granted if, after viewing the evidence in the light most favorable to the non-moving party, there are material facts in dispute or if judgment as a matter of law is not appropriate.[18]

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

[16] *E.g.*, *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879 (Del. Super. 2005).

[17] *Id.* at 880.

[18] *Id.* at 879-80.

Analysis

A. DFCU's Motion for Summary Judgment

1. DFCU Is Not Liable for Maintenance or Repair of the Exterior Steps

In addressing the duties of a lessee where the lessor retains control over a portion of the leased premises that the lessee and others are permitted to use, this Court has relied upon the Restatement (Second) of Torts § 360.[19] Under § 360, the lessor's retention of control will subject it to liability for discoverable dangerous conditions:

> A possessor of land who leases a part thereof and retains in his own control any other part which the lessee is entitled to use as appurtenant to the part leased to him, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee . . . for physical harm caused by a dangerous condition upon that part of the land retained in the lessor's control, if the lessor by the exercise of reasonable care could have discovered the condition and the unreasonable risk involved therein and could have made the condition safe.[20]

Comment *a* to the same section emphasizes that the lessor cannot avoid liability on the basis that the lessee had knowledge of the condition:

> The rule stated in this Section applies to subject the lessor to liability to third persons entering the land, irrespective of whether the lessee knows or does not know of the dangerous condition. The lessee may, for example, know that the common entrance to the apartment or office which he has leased has

[19] *See Craig v. A.A.R. Realty Corp.*, 576 A.2d 688, 695 (Del. Super. 1989); *Rentz v. Rehoboth Mall Ltd. P'ship*, 1997 WL 716893, at *2 (Del. Super. Aug. 22, 1997).

[20] RESTATEMENT (SECOND) OF TORTS § 360 (1965).

> become dangerous for use because of the lessor's failure to maintain it in safe condition. His knowledge may subject him to liability even to his own licensees, if he fails to warn them of the danger. It will not, however, relieve the lessor of liability for his negligence in permitting the entrance to become dangerous.[21]

Applying § 360 in *Rentz v. Rehoboth Mall Limited Partnership*, this Court held that a lessee supermarket owed no duty to maintain or repair a sidewalk shopping cart ramp where its lease provided that the lessor was solely responsible for keeping the ramp in good condition and repair.[22] Because the lessor retained control over the ramp under the explicit terms of the lease, the fact that the lessee undertook voluntary efforts to maintain the ramp and warn of dangerous conditions did not suffice to impose liability. In arriving at its conclusion, the *Rentz* Court focused on the nature of the plaintiff's claim, which was based upon an allegation of negligent construction. The *Rentz* Court found that the lessee supermarket had not "exercised sufficient control over the ramp area in this instance to hold it responsible for structural or design defects of the ramp itself."[23]

While *Rentz* addressed the question of lessee liability in the context of structural and design defects, without exploring negligent maintenance or

[21] *Id.* cmt. a.

[22] 1997 WL 716893, at *2-3.

[23] *Id.* at *3.

repair theories, the Court finds its reasoning applicable here. Loose bricks in the property's exterior steps could be symptomatic of a structural defect, bringing the facts of this case squarely within *Rentz*'s holding. Moreover, to the extent that loose bricks could constitute a maintenance issue, Plaintiff has not presented any evidence that DFCU exercised "sufficient control" over the maintenance and repair of the steps such that it is subject to liability. Although the record leaves it unclear whether there is or has been another tenant on the property during the term of DFCU's lease, the lease does not place DFCU in control of the entire property, only "[t]he first two floors, basement excluded."[24] The State explicitly retained control over the rest of the property and took sole responsibility for both ordinary and extraordinary maintenance of the exterior.[25] The State also retained the right to enter the property to conduct inspections and carry out the lease provisions.[26] The parties were free to allocate responsibility for exterior maintenance repair via the lease, and Plaintiff has presented no evidence that DFCU assumed concurrent control over the exterior steps to conduct maintenance or repairs.

[24] Docket 21, App., at A4.

[25] *Id.* at A4-5.

[26] *Id.* at A7.

The Court emphasizes that the presence of the cone does not suggest that DFCU exercised control over the steps for the purpose of maintaining or repairing them. First, there is no evidence that DFCU was responsible for placing the cone in that location. In the incident report DFCU e-mailed to the State Office of Management and Budget, DFCU's Vice-President of Operations informed the OMB that "[Plaintiff] said she did not fall where the cone was (loose brick)," without any other explanatory reference to "the cone." This language could imply that the Office of Management and Budget knew that "the cone" was on the steps, and may have placed it there. Furthermore, even if DFCU did place the cone on the steps on its own intiative, this action would be relevant to DFCU's duty to warn, discussed below; identifying a condition by marking it with a cone, without more, would not suggest that DFCU had also undertaken the obligation to repair.

Thus, Plaintiff cannot proceed against DFCU on a theory of negligent maintenance or repair. The Court now turns to address the viability of Plaintiff's claim that DFCU was negligent in failing to warn of the steps' condition.

2. Material Issues of Fact Exist Regarding DFCU's Duty to Warn

The commentary to § 360 of the Restatement leaves open the possibility that a lessee may be liable to its invitees for failure to warn of dangerous conditions existing in portions of the premises over which the lessor retains control.[27] In *Rentz*, the Court assumed, without deciding, that the lessee could be liable to a business invitee for failing to warn of a known danger, consistent with Comment *a* to § 360. However, the *Rentz* Court granted summary judgment in favor of the lessee because the plaintiff had presented no evidence that the lessee had knowledge of the alleged defects in the ramp's design and construction.[28]

The Court need not decide whether Comment *a* to Restatement § 360 reflects the law in Delaware as to all premise areas retained in the control of a lessor. In view of the particular facts of the case at bar, the Court is guided by the well-settled principle that a landowner has a duty to protect or warn invitees against latent dangers to safe ingress or egress, even when hazards arise from an adjacent property.[29] Because "[l]iability in this respect is

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[27] RESTATEMENT (SECOND) OF TORTS § 360 cmt. a ("[The lessee's] knowledge [of the existence of a dangerous condition] may subject him to liability even to his own licensees, if he fails to warn them of the danger.").

[28] 1997 WL 716893, at *3.

[29] *See, e.g.*, *Coleman v. Nat'l R.R.*, 1991 WL 113332, at *1-2 (Del. Super. June 18, 1991).

grounded upon the owner's superior knowledge of the danger to the invitee,"[30] the Court considers the duty equally applicable to lessees as to property owners. As between the lessee, the lessee's invitees, and a lessor who may be remote from the property, it is generally the lessee who is best positioned to discover latent dangers and defects. Given that discovery of a danger or defect usually precedes repair, and that providing warning to invitees should present a minimal burden, it is reasonable to impose upon the lessee a duty to warn of latent dangers, even where the lessor retains control over areas of ingress and egress.

Furthermore, absolving a lessee of the duty to warn of known or discoverable latent dangers to its own invitees' ingress and egress would permit lessees to act in an inherently unreasonable manner towards their invitees, which could include allowing invitees to encounter known traps. Thus, while a lessor's retention of control over portions of a leased premise relieves the lessee of its obligation to maintain those portions in a reasonably safe condition, it does not imply that the lessee also avoids the duty to warn of such dangers when the lessor fails in its duty. A number of other

[30] *Niblett*, 158 A.2d at 384.

jurisdictions to confront this issue have imposed upon lessees a duty to protect or warn.[31]

Delaware case law imposing upon landowners the duty to provide safe ingress and egress clearly suggests that where a latent danger arises from adjacent property, the landowner must, at a minimum, provide adequate warning to invitees.[32] If a landowner's duty to provide safe ingress and egress extends to protecting or warning against hazards on adjacent property, it follows that a lessee is subject to a duty to warn of these latent dangers to the lessee's invitees.

In the instant case, Plaintiff's claim arises from an alleged latent danger or defect in the exterior stairs of the property. The parties do not dispute that Plaintiff was a business invitee of DFCU on the date she was injured. Although the State retained control over the exterior steps and DFCU did not bear responsibility for their maintenance, the lease did not

[31] *See, e.g.*, *Garcia v. City of Hialeah*, 550 So.2d 1158, 1159-60 (Fla. Dist. Ct. App. 1989); *Hopkins v. F. W. Woolworth Co.*, 419 N.E.2d 302, (Mass. App. Ct. 1981) ("As regards [the tenant business], it had a duty to keep the premises used by its patrons in a reasonably safe condition and, at the least, to warn customers of any danger of which it knew or should have known. Even if a finding were warranted that [the tenant] had no control over the sidewalk on which the plaintiff fell, it would not be relieved from its duty to warn its invitees of danger." (citations omitted)); *Cannon v. S. S. Kresge Co.*, 116 S.W.2d 559, 569-69 (Mo. Ct. App. 1938) ("The responsibility for this duty to maintain a reasonably safe entrance and exit cannot be avoided by a storekeeper through contracting with others to maintain such entrance and exit unless it be so maintained"); *Roberts v. Tenn. Wesleyan Coll.*, 450 S.W.2d 21, 26 (Tenn. Ct. App. 1969).

[32] *See id.*; *Niblett v. Penn. R.R. Co.*, 158 A.2d 580, 383-84 (Del. Super. 1960).

relieve DFCU of its duty to provide Plaintiff with safe ingress and egress from its business premises by warning her of latent dangerous conditions on the steps.

The Court finds that material issues of fact exist as to whether DFCU is liable for breaching its duty to warn. In articulating the duty owed to invitees, Delaware has adopted Restatement (Second) of Torts § 343.[33] Section 343 establishes three elements a plaintiff must establish to prove liability:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
> (c) fails to exercise reasonable care to protect them against the danger.[34]

Plaintiffs have raised a material issue as to whether DFCU knew about or should have discovered the loose bricks that Plaintiff alleges caused her to fall. DFCU relies on Plaintiff's statements that she had never noticed anything wrong with the steps on previous visits to the credit union to argue

[33] *See, e.g.*, *Ward v. Shoney's, Inc.*, 817 A.2d 799, 802 (Del. 2003); *Hamm v. Ramunno*, 281 A.2d 601, 603 (Del. 1971).

[34] RESTATEMENT (SECOND) OF TORTS § 343.

that it could not be charged with actual or constructive knowledge of the litigated defect. This argument ignores that DFCU, as the premises occupier, is in a superior position to discover non-apparent dangerous conditions.

Plaintiff recounted in her deposition that she noticed an orange cone on the steps, several feet from where she fell. DFCU's e-mail to the Office of Management and Budget indicates that DFCU was at least aware of the cone, if not responsible for placing it there, and that DFCU knew that the cone marked an area containing loose bricks. Viewing the facts in the light most favorable to Plaintiff, the Court finds a triable issue as to whether DFCU knew or should have known, based on previous knowledge of loose brickwork elsewhere in the steps, that a dangerous condition existed on the portion of the steps where Plaintiff's fall occurred.

Finally, Plaintiff's deposition testimony regarding the cone and the appearance of "some work" having been done to the steps raises material issues of fact as to whether the alleged danger was open and obvious to the Plaintiff, or whether DFCU may have undertaken to warn invitees of the steps' condition and thereby fulfilled its duty.[35]

[35] DFCU referenced this testimony in its Motion for Summary Judgment and requested permission to supplement its motion with transcript excerpts. Specifically, DFCU's motion asserts that "[Plaintiff] noticed nothing wrong with the steps in the area in which

The Court concludes that DFCU owed Plaintiff a duty to warn her about latent dangers to her safe ingress and egress. Since material issues of fact exist as to whether that duty was breached, summary judgment cannot be granted in DFCU's favor.

B. The State's Motion for Summary Judgment

1. Sovereign Immunity Bars Plaintiff's Suit Against the State

As previously discussed, the State explicitly contracted to maintain and repair the property's exterior steps. The State asserts, however, that it enjoys sovereign immunity from Plaintiff's suit, and that its assumption of repair and maintenance obligations in the lease did not waive that immunity with regard to a negligence claim. The Court agrees.

The doctrine of sovereign immunity prevents the State from being sued without its consent.[36] Sovereign immunity may be waived only

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she claims to have fallen on September 14, 2005." Docket 21, ¶ 8. The Court notes with dismay that it did not receive a transcript of the relevant deposition testimony from any party until more than three months after DFCU's motion was filed. The deposition testimony was crucial in clarifying (1) that Plaintiff did observe the orange cone prior to her fall, and (2) that the loose bricks Plaintiff alleges were the cause of her accident were in a different area of the steps than the loose bricks described in the September 2005 e-mail between DFCU and the Office of Management and Budget. Thus, Plaintiff's deposition testimony not only resolved ambiguities about when and where the cone was placed, but also proved dispositive on the issue of DFCU's duty to warn. This evidence should have been provided to the Court as soon as deposition transcripts were available.

[36] Del. Const. art. I, § 9; *Doe v. Cates*, 499 A.2d 1175, 1176 (Del. 1985).

through an act of the General Assembly.[37] Actions of the General Assembly can, however, waive sovereign immunity implicitly, without resort to express statutory language.[38] In particular, the State is considered to have implicitly waived sovereign immunity for breach of contract suits arising from any contract authorized by the General Assembly.[39] This waiver bars an assertion of the defense of sovereign immunity against the parties to the contract or any third-party beneficiaries with standing to bring suit for breach.[40]

When the State enters into a legislatively-authorized contract, its consent to suit extends only to actions for breach of that contract, and will not apply to tort actions.[41] The State's sovereign immunity from tort liability is retained unless the State has insured against the litigated risk and the action in question involved bad-faith conduct or gross negligence.[42]

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[37] Del. Const. art. I, § 9; *Doe*, 499 A.2d at 1181.

[38] *Blair v. Anderson*, 325 A.2d 94, 96 (Del. 1974).

[39] *Middleton v. Wilm. Hous. Auth.*, 1994 WL 35382, at *1-2 (Del. Feb. 2, 1994); *Quereguan v. New Castle County*, 2006 WL 1215193, at *3 (Del. Ch. Apr. 24, 2006).

[40] *Blair*, 325 A.2d at 96-97.

[41] *See, e.g.*, *Seitz v. A-Del. Const. Co.*, 1987 WL 16711, at *4 (Del. Super. Aug. 13, 1987); *Holden v. Bundek*, 317 A.2d 29, 31 (Del. Super. 1972).

[42] *See, e.g.*, *Doe*, 499 A.2d at 1181; *Castetter v. Del. Dep't of Labor*, 2002 WL 819244, at *4 (Del. Super. Apr. 30, 2002); *Shively v. Ken-Crest Ctrs. for Exceptional Persons*, 1998 WL 960719, at *2 (Del. Super. Nov. 19, 1998).

The Court notes that it has previously held, in the unreported case of *Howard v. Delaware Federal Credit Union*, that the lease between DFCU and the State did not waive the State's sovereign immunity from a slip-and-fall negligence claim involving the exterior steps of the property at 150 East Water Street.[43] Not surprisingly, the Court considers *Howard* to be on point with this case.

Here, the State was authorized to enter into a lease with DFCU under 29 *Del. C.* § 402.[44] Plaintiff contends that the State has waived sovereign immunity as to her suit because, as a customer of DFCU, she is a third-party beneficiary of the lease provision that obligates the State to keep the exterior steps in good repair.

The Court need not address whether Plaintiff has standing to sue as a third-party beneficiary, because she has not brought a contract claim. The instant action is a tort suit grounded in premises liability. The essence of Plaintiff's claim is that DFCU and the State breached non-contractual duties

[43] *Howard v. Del. Fed. Credit Union*, Del. Super., CA. No. 06C-03-135, Toliver, J. (Nov. 30, 2007). The plaintiff in *Howard* alleged that dirt or some other substance on the steps caused her to fall.

[44] At the time the lease was entered into, 29 *Del. C.* § 402 authorized the Department of Administrative Services to enter into contracts. The current version of § 402 provides the same authority to the Office of Management and Budget.

of care. Notably, Plaintiff's Complaint does not even mention the lease between DFCU and the State.

Since Plaintiff's action sounds in tort, she can overcome the State's sovereign immunity defense only if the State has obtained applicable insurance or has committed bad-faith actions or gross negligence. The State has submitted an affidavit from Debra Lawhead, the State Insurance Coverage Officer, asserting that neither the State nor the Office of Management and Budget has obtained any insurance coverage that would apply to the risks described in Plaintiff's Complaint.[45] Plaintiff has not claimed that the State acted in bad faith or committed gross negligence in connection with its maintenance and repair of the property.[46] Thus, as in *Howard*, Plaintiff's action sounds in tort and is barred by sovereign immunity. The State is therefore entitled to judgment in its favor as a matter of law.

2. The State Tort Claims Act Bars Plaintiff's Suit Against the State

The State further argues that Plaintiff's suit is barred by the State Tort Claims Act under 10 *Del. C.* § 4001. The State Tort Claims Act provides

[45] Docket 22, Ex. 2. *See Caraballo v. Del. Dep't of Corr.*, 2001 WL 312453, at *1 (Del. Super. Mar. 21, 2001) (discussing use of such affidavits when defendants assert sovereign immunity).

[46] *See* Docket 1, ¶ 14.

the State with immunity from civil claims except where another statute expressly provides for a claim, or if one of the following three elements of immunity set forth in § 4001 are not met:

> (1) The act or omission complained of arose out of and in connection with the performance of an official duty . . . ;
>
> (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[.][47]

The plaintiff bears the burden of disproving the existence of one of the elements in order to maintain suit.[48]

Plaintiff has not disproved any of the § 4001 elements of immunity. The State contends, and this Court agrees, that the maintenance of State properties is an official duty. Plaintiff has not alleged that her injuries resulted from bad faith, gross negligence, or wanton acts or omissions by the State. Therefore, the State is entitled to statutory immunity under the State Tort Claims Act.

[47] 10 *Del. C.* § 4001.

[48] *Id.*

Conclusion

For the foregoing reasons, the Court finds that Plaintiff has raised material issues of fact as to whether DFCU violated its duty to warn her of a latent condition that posed a foreseeable danger to her safe egress from its premises. However, Plaintiff's claim against the State is barred as a matter of law under both the doctrine of sovereign immunity and the State Tort Claims Act. Accordingly, DFCU's Motion for Summary Judgment is **DENIED** and the State's Motion for Summary Judgment is **GRANTED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

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