IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ELSIE MCNUTT, Plaintiff, v. MARY FISHER, DELAWARE TRANSIT CORPORATION, AND DELAWARE ADMINISTRATION FOR REGIONAL TRANSIT a/k/a DART, Defendants.	**C.A. No.02C-08-092 (CHT)** **Non-Arbitration Case** **Trial By Jury Demanded**

ORDER AND OPINION

On Defendants' Motion for Judgment as a Matter of Law

Oral Argument: May 5, 2005
Transcript Completed: October 26, 2005
Decided: January 9, 2006

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TOLIVER, JUDGE

Before the Court is the Defendants' Motion for a Judgment as a Matter of Law, or in the alternative, a Motion for a New Trial. The matter having been briefed and oral argument completed, that which follows is the Court's resolution of the issues so presented.

STATEMENT OF FACTS AND NATURE OF PROCEEDINGS

The Plaintiff, Elsie McNutt, brought suit in the Superior Court to recover for injuries sustained on September 28, 2001, when she was struck by a Delaware Administration for Regional Transit ("DART") bus while crossing an intersection in the City of Wilmington. The Plaintiff alleged that the negligence of the operator Mary Fisher proximately caused the accident. In addition, the Plaintiff contended that the Delaware Transit Corporation h("DTC") and DART were also liable as owner of the

bus and as Ms. Fisher's employer based on the theory of *respondeat superior*.[1] Lastly, she asserts that the failure to properly train and/or supervise Ms. Fisher amounted to gross negligence on the part of the DTC and DART.

The Defendants denied that Ms. Fisher was negligent or that they were otherwise legally responsible for Mrs. McNutt's injuries. To the extent that there was liability, the Defendants argued that the Plaintiff's recovery was limited to $300,000, the extent to which the Defendants, as a state agency and/or officers thereof, waived sovereign immunity by virtue of 2 *Del. C.* §1329. To put the limitation on liability the Defendants claimed existed in context, it must be understood that on the date of the accident, there was in effect a policy of insurance labeled "Auto Liability and

[1] The Delaware Transportation Authority, established by 2 *Del. C.* §1329, operates through the Delaware Transit Corporation ("DTC") to provide DART services. DART is a wholly-owned subsidiary of the DTC.

Uninsured and Underinsured Motorist Protection" ("Primary Policy"), purchased by the DTC from the St. Paul Fire & Marine Insurance Company.[2]

The aforementioned policy provided $300,000 of coverage per accident for covered autos. That same policy was subject to two endorsements. The first endorsement did not specify an amount of coverage, but only that coverage would be increased or decreased if the General Assembly acted to amend the coverage required. The second endorsement made available additional coverage up to $11,000,000 per accident depending upon the existence or nonexistence of certain circumstances. The Defendants have maintained from the start of the litigation that the endorsements do not apply to the accident involving the Plaintiff.

[2] The policy was identified as Policy No. GP06300868.

Prior to trial, on or about May 29, 2003, the Defendants, filed an Offer of Judgment in the amount of $300,000 pursuant to Superior Court Civil Rule 58.[3] Again, that was and remains the extent to which they assert Delaware's sovereign immunity was waived by virtue of the purchase and existence of the liability insurance referenced above. On November 11, 2004, the Defendants moved for entry of partial summary judgment as to the issue of the extent of waiver of sovereign immunity. The Plaintiff filed her opposition to that motion on November 15, 2004.

The trial commenced on November 29, 2004. The Court did not rule on the Defendants' summary judgment motion, electing instead to submit the matter to the jury subject to a post-trial consideration of the legal questions presented by the

[3] The civil rules of the Superior Court shall hereinafter be referred to by number only.

motion. After the seven days of trial, the jury found the Defendants ninety percent negligent as opposed to the Plaintiff's negligence, which they determined to be ten percent of the cause of the accident. They awarded the Plaintiff a total of $6,537,000, which, when reduced by the ten percent allocation of negligence to the Plaintiff, resulted in a net award to the Plaintiff of $5,883,300.

Following the trial, the Defendants filed a Motion for Judgment as Matter of Law pursuant to Rule 50, or alternatively, a Motion for a New Trial pursuant to Rule 59.[4] The Defendants, by reference to 2 *Del. C.* §1329(a)[5], sought immunity from recovery of any amount beyond the $300,000 of

[4] The briefing and consideration of the Defendants' Motion for a New Trial has been deferred until the Defendants' Motion for Judgment as a Matter of Law is resolved and will not be addressed further in this opinion.

[5] Subsection (a) of §1329 caps recovery in tort actions against the Delaware Transportation Authority at $300,000, or the extent of the authority's insurance, whichever is less. Amended by §1329(b)in 1999, §1329(a) now waives sovereign immunity up to $300,000 for rail operations only.

coverage they contend was provided by the policy in question. As they did prior to trial, the Defendants maintain that the two endorsements are not available under the present circumstances to increase the available insurance coverage. Consequently, there was no waiver of sovereign immunity beyond the $300,000 limit provided by the primary coverage.

Endorsement No. 1, entitled "Automobile State Agency/Governmental Subdivision Limits of Coverage Endorsement-Delaware-for Damages Subject to Immunity Statute 2 Del. C. §1329," provides in part that "policy limits will increase or decrease consistent with future changes to §1329(a) directed by the Delaware General Assembly."[6] The Defendants claim that Endorsement No. 1 is not implicated here because the General Assembly has not amended §1329 since the

[6] Defs. Mot. J. as a Matter of Law. Ex. D.

endorsement became effective July 1, 2001.

Endorsement No. 2, "Automobile State Agency/Governmental Subdivision Limits of Coverage Endorsement-Delaware-For Damages Not Subject to Immunity Statute 2 *Del. C.* §1329", is the endorsement which "broadens coverage up to $11,000,000 for bodily injury or property damage that is determined by a court of law to be not subject to the immunity statute."[7] The Defendants have contended that Endorsement No. 2 is inapplicable because the damages available to the Plaintiff are subject to §1329. Moreover, they maintain that Endorsement No. 2 was a response to the *Carter I* decision which was vacated by *Carter II*,[8] and subsequently rendered

[7] Defs. Mot. J. as a Matter of Law. Ex. E.

[8] *Carter v. McLaughlin*, 2000 Del. Lexis 162 ("*Carter I*"), *vacated*, 758 A.2d 933 (Del. 2000) ("*Carter II*").

moot by *Pauley I and II.*[9] Endorsement No. 2 became effect July 1, 2001, and has been renewed annually since then.[10]

Carter I, decided by the Supreme Court on April 14, 2000, and vacated by *Carter II* on August 11, 2000, held that sovereign immunity could be waived completely where the State, through its agents and employees, is deemed grossly or wantonly negligent.[11] *Contra* to the *Carter I* opinion, *Pauley I* and *Pauley II,*[12] issued respectively on December 17, 2003 and April 26, 2004, collectively stand for the proposition that waiving sovereign immunity completely is inconsistent with the purpose and title of the State Tort Claims Act, "Limitation of

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[9] *Pauley v. Reinoehl*, 848 A.2d 561 (Del. 2003) ("*Pauley I*"); *Pauley V. Reinoehl*, 848 A.2d 569 (Del. 2004) ("*Pauley II*").

[10] *See* Def. Mot. J. as a Matter of Law. Ex. E. *See also* Letter from Daniel Griffith, Esquire to the Hon. Charles Toliver, IV, Attach. Bell Aff. ¶ 5, May 20, 2005.

[11] *Carter I* at *5.

[12] *Pauley I* at 566 (citing *Doe v. Cates*, 499 A.2d 1175 (Del. 1985)); *Pauley II* at 575.

Liability."[13] The holding of *Carter I* was nullified as a result.

Reduced to its essence, the Defendants' argument is that Endorsement No. 2 was relevant only during the post *Carter I* period when the State could have been subject to unlimited civil liability. Once that decision was vacated and *Pauley I and II* became the law of the land, there is no foreseeable event which would make Endorsement No. 2 available to any plaintiff, at least according to the Defendants. The amount available to the Plaintiff consistent with the State's waiver, is therefore, limited to $300,000.

The Plaintiff has argued from the beginning of the

[13] *See* 10 *Del. C.* §4001, the State Tort Claims Act, which protects Delaware and its agents from liability where the act or omission complained of arises from (1) an official duty involving certain forms of discretion, (2) the public officer or employee acts in good faith with the belief that the public is best served by the act or omission, and (3) the act or omission is done without gross or wanton negligence. *See also* 18 *Del. C.* §6511, the State Insurance Program, which limits Delaware's tort liability exposure to the extent that Delaware is commercially or self-insured. The State Insurance Program existed when the General Assembly enacted the STC thus, it is presumed that the Assembly considered the limits established by that pre-dating act. *Pauley I* at 566.

litigation that the $11,000,000 of coverage provided by the second endorsement is available where the Court determines: (1) that the damages are of the type/brand defined under the terms of the policy; and (2) the damages sought are not subject to the $300,000 liability limit of §1329(a) because they are associated with transit operation and not covered under that subsection. She continues to assert that the conditions imposed by both endorsements are met here because the General Assembly amended §1329(b) in 1999 which in turn applied the $300,000 liability cap of §1329(a) to rail operations only.

Simply put, the amendment, and by implication, the waiver of immunity, established a $300,000 coverage minimum for all other DTC operations, including services provided by DART. The $300,000 was, and is, the Plaintiff argues, a floor, not

a ceiling in the context of those other operations, and is consistent with the extent of liability coverage provided by virtue of Endorsement No. 2. Stated differently, Endorsement No. 2 must be interpreted so as to provide coverage for the full amount awarded to the Plaintiff.

That which follows is the Court's response to the issues so presented.

DISCUSSION

Standard of Review

Rule 50(a), in relevant part, reads:

> *Judgment as a matter of law.* (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the Court may determine the issue against the party and may grant a motion for judgment as a matter of law

> against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

Where that motion is denied, the moving party may, within ten days of the return of a verdict against that party, renew that motion.[14]

When determining a motion for a judgment as a matter of law under Super. Ct. Civ. R. 50(b), the Court does not weigh the evidence, but rather, views the evidence in the light most favorable to the non-moving party and, drawing all permissible inferences therefrom, under any reasonable view of that evidence, a jury may find in favor of the nonmoving party.[15] It is against this background that the Defendants' motion must

[14] Super. Ct. Civ. R. 50(b).

[15] *McCloskey v. McKelvey*, 174 A.2d 691, 693 (Del. Super. Ct. 1961); *Gass v. Truax*, 2002 Del. Super. Lexis 442, *4; *Luciani v. Adams*, 2003 Del. Super. Lexis 43, *11.

be considered.[16]

Analysis

The first issue to be addressed in this regard is the extent to which the immunity enjoyed by the Defendants as officials of and/or representing the State had been waived as of the date the Plaintiff was injured.

Sovereign immunity has been a part of Delaware jurisprudence since the ratification of the State Constitution in 1792.[17] The doctrine provides that neither Delaware nor an agency of the State can be sued without its consent.[18] Whether the consent has been given, expressly or impliedly, is the

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[16] For present purposes, the the motion for summary filed by the Defendants is deemed to have been subsumed within the Defendants' Motion for Judgment as a matter of law.

[17] *See Turnbull v. Fink* 668 A.2d 1370 , 1373-1374 (Del. 1995), where the Supreme Court chronicles the evolution of the doctrine of sovereign immunity and its place in Delaware jurisprudence. For the sake of brevity, the same will not be repeated here unless it is otherwise necessary for purposes of addressing the instant issues.

[18] *Pauley II* at 573.

initial determination that has to be made in most cases involving litigation against the State or any of its subdivisions. A tort action can be maintained against the State if a plaintiff identifies a statute that clearly expresses the General Assembly's intent to waive sovereign immunity. However, there is a caveat which applies, i.e., immunity is waived only to the extent that the "risk or loss" is covered by the State's Insurance Program.[19]

As stated above, §1329 was amended in 1999, and at the time the Plaintiff was injured, it read as follows:

> For the fiscal years beginning July 1, 1997, and thereafter, the annual budget of the [DTC] shall include funding for an insurance program . . . . This insurance program may be provided by either (1) a combination of self-insurance and commercially procured insurance, or (2) entirely commercially procured insurance. The monetary limits of §1329(a) of this title shall apply to passenger rail carrier operations authorized under §1332 of this title. For all other operations of the

[19] *Id.* at 574.

> [DTC], the monetary limits of §1329(a) shall not apply, and the [DTC] shall instead be liable for the amount of its insurance covering the risk or loss; provided however, that the insurance program shall provide a minimum coverage of $300,000 for any and all claims arising out of a single occurrence.[20]

It is readily apparent then that when the DART bus struck the Plaintiff, it was the kind of "risk or loss" to which the language of §1329 applies. Neither side disputes that conclusion. The protection afforded the State by the doctrine of Sovereign Immunity, is therefore, waived in part to the extent of the available insurance. The instant controversy begins and ends with the Primary Policy and the endorsements thereto, Endorsement No. 1 and Endorsement No. 2. How each is construed will determine the extent to which the amount awarded to the Plaintiff will be paid.[21]

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[20] 2 *Del. C.* §1329(b)(emphasis added).

[21] The General Assembly has not acted to amend §1329 since the endorsements to the primary policy became effective July 1, 2001. As a result, Endorsement No. 1 is not applicable and need not be considered in the Court's analysis of the so presented legal arguments.

The primary policy, by its terms, clearly covers the loss. It provides coverage on behalf of DART when bodily injury is inflicted by or connected to the operation of DART buses.[22] The bus which struck the Plaintiff was a "covered vehicle" as that term is defined in the primary policy with the limit of coverage defined as $300,000. The policy is subject to Endorsement No. 2, which reads in relevant part:

> This endorsement changes your Automobile Liability and Uninsured and Underinsured Motorist Protection.
>
> **How Coverage is Changed**
>
> The following is added to the Limits of Coverage section. This change broadens coverage.
>
> **Limits of Coverage for Damages Not subject to Delaware Immunity Statute**
> The amounts shown [$11,000,000] apply in place of those shown for similar limits of coverage in the Automobile Liability Uninsured and Underinsured Motorist coverage Summaries, but "only for damages for covered bodily injury or property damage that are determined by a court of law to be not subject to the state statute for liability insurance for tort claims

[22] Def. Mot. J. as a Matter of Law. Ex. A, pp. 1,4.

against you in Delaware."

Other Terms

All other terms of your policy remain the same.[23]

Under the terms of this endorsement, before coverage is expanded to the $11,000,000, two questions must be addressed. The first is whether the damages claimed are "for covered bodily injury." Again, there is no dispute; the injury here is the kind to which §1329 applies. The second, and most critical inquiry for purposes of this litigation, is whether the damages associated with the Plaintiff's injuries are not subject to §1329.

In this regard, it is readily apparent that the language of Endorsement No. 2 is far from a model of clarity or linguistic precision. The endorsement uses the phrases "not to be subject to immunity statute 2 *Del. C.* §1329" and "not

[23] Def. Mot. J. as a Matter of Law. Ex. E.

subject to the state statute for liability insurance for tort claims against you in Delaware (2 *Del. C.* §1329)".[24] But, it does so without defining a point of reference to which one can turn for an explanation of those terms, or defining, at least in specific terms, the scope of the coverage to be afforded other than the aforementioned references to §1329. At the same time, the language of the endorsement states the endorsement "changes" the "Auto Liability and Uninsured and Underinsured Motorist Protection" afforded and states that the change "broadens coverage." Yet it fails to distinguish between coverage which had been provided versus that which the endorsement was putting into effect other than as to the dollar amount of the coverage.

Moreover, §1329 limits the State's exposure for covered

[24] Def. Mot. J. as a Matter of Law. Ex. E.

loss arising out of rail operation to $300,000, but imposes only a minimum of $300,000 of coverage for all other covered operations. How then is the "not subject to §1329" and the "broadens coverage" language to be applied in light of the specific wording of §1329? None of the interpretations so proffered by the parties can be said to be unreasonable under the circumstances. The Court must conclude as a result, that the language of Endorsement No. 2 is ambiguous. A contract is deemed to be ambiguous when the provisions in controversy are reasonably or fairly susceptible to different interpretations.[25] Accordingly, and without more, the Court must look to the intent of the General Assembly and the

[25] *O'Brien v. Progressive Northern Insurance Co.*, 785 A.2d 281, 288 (Del. 2001). Contrary to what the Plaintiff argues, the Court must conclude that the maxim *contra preferentum* is not controlling or directly implicated here. As the Defendants point out, the primary issue to be addressed concerns the extent of the waiver of sovereign immunity, not contract interpretation although the latter, as practical matter is subsumed within the former. Moreover, the cases cited by the Plaintiff relate to disputes between an insurance company and an insured over the meaning of the terms of a policy, not a dispute between the insured and a third party who might be affected by the interpretation of the policy.

language of the endorsement to resolve the ambiguity in question.

In 1997, the General Assembly amended §1329 by adding subsection (b) which authorized funding for an insurance program to cover the risks associated with the State's transit operations.[26] That same subsection provided that the minimum coverage for all DTC operations was to be $300,000.[27] The purpose of the amendment was "to correct the unfairness that could result due to the limitation on the liability of [the DTC]."[28]

In 1999, the General Assembly amended the aforementioned subsection (b), endeavoring to clarify the insurance limits now carried by the DTC, and permit the DTC to budget for

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[26] 1997 *Del. ALS* 215 *1.

[27] *Id.*

[28] *Id.*

greater coverage.[29] As noted previously, the General Assembly limited the $300,000 cap on DTC contained in §1329(a) to passenger rail carrier operations only. For all other operations, the DTC was deemed responsible for damages up to the amount of its insurance covering the risk or loss, but was required to provide a minimum coverage of $300,000 for all claims arising out of a single occurrence. The higher limits for the DTC's non-rail operations (also termed transit operations) took effect on July 1, 2000, the beginning of the 2000 budget year. The DTC responded by purchasing Endorsement No. 2 which changed the original policy effective July 1, 2001, providing for up to $11,000,000 in additional auto liability coverage depending upon the relevant circumstances.

The legislative history of §1329 is limited, but that

[29] 1999 *Del. ALS* 160 *1 .

which is available is clear. The synopsis of 1999 Delaware House Bill 212 emphasizes that the DTC's annual budget process will now determine the maximum coverage limits for non-rail operations with the $300,000 limit acting as a coverage minimum/floor.[30] The General Assembly endeavored to increase coverage limits for non-rail operations in order to protect the public from wrongful acts committed by public officials while shielding the State Treasury from unlimited tort exposure.[31]

The rational for continuing the $300,000 limited waiver for rail operations was attributed to the existence of contracts with out-of-state agencies.[32] The resulting inference is that the Assembly would waive immunity to a

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[30] 1999 *Del. ALS* 160 *1 .

[31] *Pauley II* at 573.

[32] 1999 *Del. ALS* 160 *1 .

greater extent for all DTC operations, including rail operations, were it not otherwise bound by legal obligations. It is, as a consequence, evident that the General Assembly intended to increase the coverage limits for non-rail operations beyond the existing $300,000 cap and that the DTC's annual budgetary process would govern the extent to which coverage was increased.

Endorsement No. 2 specifically refers to "covered bodily injury" which is a reference to the definition contained in the primary policy. Again, the question for the Court is what the language "to be not subject to §1329" means. The Defendants contend that Endorsement no. 2 was purchased in response to the *Carter I* decision and refers only to the risk that sovereign immunity could be abrogated or avoided completely where the conduct complained of was deemed gross or

wanton negligence. That in turn meant that Endorsement No. 2 was rendered moot when *Carter I* was vacated by *Carter II* and further rendered a nullity by the subsequent Delaware Supreme Court decisions in *Pauley I and II* which sounded the final death knell. As the Plaintiff notes, there are at least two problems with the Defendants' approach.

The first concern is that Endorsement No. 2 was purchased and became effective after the *Carter I* decision was vacated. The second difficulty is that the Defendants continue to pay the applicable premiums and continues the coverage up to the present. If the Defendants' view, i.e., that *Pauley I and II* settled the question of whether sovereign immunity could be waived or was otherwise avoidable, were to be adopted, it would be a waste of taxpayer funds to procure coverage for no obvious reason. And, the coverage would be meaningless.

Stated differently, it is unfathomable that the State would intentionally purchase and continue to appropriate funds to provide for $11,000,000 of coverage for a risk that no longer exists.

Alternatively, the Defendants argue that Endorsement No. 2 should be read narrowly, and when it is so read, the endorsement does not apply to the amount awarded to the Plaintiff because the damages are rooted in §1329. More specifically, the Defendants contend that when all the provisions of the policy are given their "ordinary and usual meaning," the only conceivable interpretation is that Endorsement No. 2 is inapplicable because the Plaintiff's claims are based upon, or subject to §1329. Sovereign immunity, therefore, is only waived up to the $300,000 provided for by the primary policy.

The Plaintiff retorts that to read Endorsement No. 2 as the Defendants suggest, would, as stated above, mean that the State has wasted the monies spent on premiums since the endorsement would not apply to any present risk. The language should not therefore be interpreted to mean that coverage is available only when §1329 is deemed inapplicable in its entirety. Instead, the Plaintiff argues that "to be not subject to" §1329 refers to the §1329(a) $300,000 limit on liabilities arising out of rail operations. Any liability not so restricted or capped, is subject only to a $300,000 floor. To do otherwise, the Plaintiff contends, would be to ignore the clearly stated intent of the General Assembly.

The Plaintiff's view is more persuasive and should be adopted. Endorsement No. 2 must be read to include coverage of the instant verdict in favor of the Plaintiff and against

the Defendants. Again, the Court must conclude that the interpretation proffered by the Defendants is contrary to the legislature's intent and purpose upon enactment of the 1997 and 1999 amendments to §1329. It would also defy logic, particularly in light of the General Assembly's expressed intent as it relates to non-rail operations, to accept the proposition that the State would obtain and maintain coverage for a risk of liability that was judicially rendered extinct.

If Endorsement No. 2 was to provide the coverage that the Defendants argue applies, it would have been a simple matter to utilize language that would make it clear that the endorsement did not affect the coverage provided by the primary policy which was limited to $300,000 for the DTC's rail as well as non-rail operations. The fact that the policy continues to be effective evidences that the State, through

the annual renewal process, was afforded additional opportunities to clarify the coverage being provided post *Carter I* and in light of *Pauley I and II*. The State was also in the best position to avoid the very disputes which spawned the instant litigation.

No matter how it is viewed, §1329 should not be interpreted in the manner argued by the Defendants. The legislative intent behind the amendments to the section is clear. To the extent that the State purchased an insurance policy whose terms were unclear and ambiguous, it is the individual members of the public whom the General Assembly has sought to protect. Consequently, it is the Defendants, or more appropriately, the coverage afforded by the Primary Policy, and not the aforementioned citizens, that should be expected to bear the loss.

CONCLUSION

_____For the reasons stated above, the Defendants' motion for entry of a judgment in their favor as a matter of law is **denied.** The Court further concludes that Policy No. GP06300868, and Endorsement No. 2 to that policy, provide coverage for the injuries and related losses suffered by the Plaintiff on September 28, 2001. The coverage available is therefore $11,000,000.

IT IS SO ORDERED.

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Toliver, Judge