DOCKET NO: HHD-CV22-6161621-S	:	SUPERIOR COURT
LISA MESSING AND BERNARD MESSING THE PARENTS AND CO-GUARDIANS OF THE PERSON AND PROPERTY OF ADAM J. MESSING	:	J.D. OF HARTFORD
V.	:	AT HARTFORD
STATE OF CONNECTICUT	:	MAY 2, 2024

MEMORANDUM OF DECISION RE:
DEFENDANT'S MOTION TO DISMISS (# 110)

In the present action, the defendant moves to dismiss the plaintiffs' single-count complaint on the grounds that the court lacks subject matter jurisdiction to hear claims based on reckless, wanton, or malicious conduct because the Temporary Deputy Claims Commissioner lacked authority to waive the defendant's sovereign immunity for such claims. The defendant also moves to dismiss all of the plaintiffs' claims based on sovereign immunity grounds, arguing that it is entitled to immunity under the Recreational Land Use Act, General Statutes § 52-557g (a) (RLUA), as an "owner" of land.

For the reasons set forth below, the motion to dismiss is granted as to the plaintiffs' allegations of reckless, wanton, or malicious conduct, and denied as to the defendant's immunity claim based on the RLUA.

FACTS AND PROCEDURAL HISTORY

On October 17, 2022, the plaintiffs, Lisa Messing and Bernard Messing,[1] filed a complaint against the defendant, the State of Connecticut, on behalf of their son, Adam. The complaint alleges the following facts. The defendant owned, operated, maintained, and managed Enders State Forest, also known as Enders State Park (Enders). The Connecticut Department of Energy and Environmental Protection was responsible for Enders' operation, maintenance, and management. On May 18, 2017, Adam was lawfully on the Enders property. While leaving Enders, Adam slipped and fell while walking across a rock formation that made a path along the top of a waterfall (rock path) immediately adjacent to the trail leading from the waterfall to the Enders parking area. Adam fell approximately twenty feet from the top of the waterfall and landed on rocks, and was found unconscious, unresponsive, and bleeding from his nose, mouth, and ears. He suffered serious, permanent, and catastrophic injuries in the fall, including severe head trauma, a traumatic brain injury, and an open skull fracture. The plaintiffs allege, among other things, that the defendant knew or should have known of the dangerous conditions posed by the rock path; that visitors at Enders would traverse the rock path while visiting Enders; that the rock path was dangerous and a hazard to visitors; and that medical emergencies involving visitors were common in the area. The plaintiffs allege that the defendant's conduct was wilful and/or

[1] The plaintiffs bring this action on behalf of their son, Adam J. Messing, an incapacitated person (Adam). On September 8, 2017, the plaintiffs were appointed co-guardians of Adam's person and property by the Bergen County, New Jersey Surrogate's Court.

malicious, and seek punitive damages and attorney's fees in their prayer for relief. See Complt., ¶¶ 26-40; prayer for relief.

On or about March 27, 2018, the plaintiffs filed a timely notice of claim with the Office of the Claims Commissioner pursuant to General Statutes § 4-147 regarding their son's injuries. On July 28, 2022, the Temporary Deputy Claim Commissioner assigned to the claim (TDCC) issued a Finding of Facts granting the plaintiffs permission to sue the defendant for their son's injuries. The action was commenced within one year from the date that the plaintiffs were granted permission to sue the defendant pursuant to General Statutes § 4-160(i).

On May 31, 2023, the defendant filed its motion to dismiss and an accompanying memorandum of law. (Docket entry no. 110.) The plaintiffs filed their opposition papers to the motion to dismiss and accompanying memorandum of law on September 25, 2023. (Docket entry no. 118.) The defendant filed a reply on January 4, 2024. (Docket entry no. 124.) The court conducted oral argument on the motion to dismiss at a remote hearing on March 11, 2024.

DISCUSSION

"[A] motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court." (Internal quotation marks omitted.) *Fay* v. *Merrill*, 336 Conn. 432, 445, 246 A.3d 970 (2020). "A court deciding a motion to dismiss must determine not the merits of the claim or even its legal sufficiency, but rather, whether the claim is one that the court has jurisdiction to hear and decide." (Internal quotation marks omitted.) *Hinde* v.

Specialized Education of Connecticut, Inc., 147 Conn. App. 730, 740-41, 84 A.3d 895 (2014). "[A] motion to dismiss pursuant to Practice Book § 10-30 (a) (1) is the appropriate procedure for challenging subject matter jurisdiction." *Machado* v. *Taylor*, 326 Conn. 396, 401, 163 A.3d 558 (2017). "[T]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss." (Internal quotation marks omitted.) *Housatonic Railroad Co.* v. *Commissioner of Revenue Services*, 301 Conn. 268, 274, 21 A.3d 759 (2011). Regarding the common-law exceptions to sovereign immunity, "[i]n the absence of a proper factual basis in the complaint to support the applicability of these exceptions, the granting of a motion to dismiss on sovereign immunity grounds is proper." (Internal quotation marks omitted.) *Markley* v. *Dept. of Public Utility Control*, 301 Conn. 56, 66, 23 A.3d 668 (2011). Similarly, "[l]ack of a statutory waiver of [sovereign] immunity is a jurisdictional defect properly raised by a motion to dismiss." *Conboy* v. *State*, 292 Conn. 642, 650, 974 A.2d 669 (2009).

Sovereign immunity may be waived only by either statute or by the claims commissioner. See *Krozser* v. *New Haven*, 212 Conn. 415, 421, 562 A.2d 1080, cert. denied, 493 U.S. 1036, 110 S. Ct. 757, 107 L. Ed. 2d 774 (1989). "[S]tatutes in derogation of sovereign immunity should be strictly construed. . . . [When] there is *any doubt* about their meaning or intent [statutes] are given the effect which makes the least rather than the most change in sovereign immunity." (Emphasis in original; internal quotation marks omitted.) *Envirotest Systems Corp.* v. *Commissioner of Motor Vehicles*, 293 Conn. 382, 388, 978 A.2d 49 (2009). When making a monetary claim against the state, the only exception to the state's sovereign immunity is when "the legislature, either expressly or by force of a

necessary implication, statutorily waive[s] the state's sovereign immunity." *Allen* v. *Commissioner of Revenue Services*, 324 Conn. 292, 299, 152 A.3d 488 (2016), cert. denied, 137 S. Ct. 2217 (2017). When sovereign immunity has not been waived, the claims commissioner is authorized by statute to hear monetary claims against the state and determine whether the claimant has a cognizable claim. See General Statutes §§ 4-141 through 4-165b. "The claims commissioner also, when he deems it just and equitable, may effectively waive the state's sovereign immunity by authorizing suit on any claim which, in his opinion, presents an issue of law or fact under which the state, were it a private person, could be liable. . . This legislation expressly bars suits upon claims cognizable by the claims commissioner except as he may authorize, an indication of the legislative determination to preserve sovereign immunity as a defense to monetary claims against the state not sanctioned by the commissioner or other statutory provisions." (Citation omitted; internal quotation marks omitted.) *Doe* v. *Heintz*, 204 Conn. 17, 35-37, 526 A.2d 1318 (1987).

In the present case, the defendant moves to dismiss the action based on lack of subject matter jurisdiction. The defendant argues that it is immune from suit because the TDCC had no authority to waive the State's sovereign immunity under General Statutes § 4-142(a)(2) for claims of reckless, wilful, or malicious conduct of state employees. The defendant further argues that the TDCC had no authority to grant permission to sue for any negligent conduct because the RLUA shields the State from liability just as it does for a private landowner. In their opposition memorandum the plaintiffs contend that the TDCC acted within its authority in waiving the State's sovereign immunity for all of their claims. They argue that because the TDCC is authorized to grant permission to sue for negligence,

the defendant's sovereign immunity was waived for the plaintiffs' negligence claim regardless of whether the RLUA affords a liability defense. They further argue that the RLUA is inapplicable because the defendant is not an "owner" as defined in the statute.

I. The TDCC Lacked Authority to Waive Immunity for Claims of Wilful, Reckless, or Malicious Conduct.

The defendant argues that the plaintiffs' claims based on reckless, wilful, wanton, or malicious conduct are barred by sovereign immunity. The plaintiffs respond that the TDCC is empowered to waive the defendant's sovereign immunity for all of their claims, including claims based on wilful and/or malicious conduct.

General Statutes § 4-142 provides, in relevant part: "There shall be a [c]laims [c]ommissioner who shall hear and determine all claims against the state except. . . . (2) claims upon which suit otherwise is authorized by law including suits to recover similar relief arising from the same set of facts." General Statutes §4-160 provides: "When the [c]laims [c]ommissioner deems it just and equitable, the [c]laims [c]ommissioner may authorize suit against the state on any claim which, in the opinion of the [c]laims [c]ommissioner, presents an issue of law or fact under which the state, were it a private person, could be liable." General Statutes §4-165(a) provides: "No state officer or employee shall be personally liable for damage or injury, not wanton, reckless or malicious, caused in the discharge of his or her duties or within the scope of his or her employment. Any person having a complaint for such damage or injury shall present it as a claim against the state under the provisions of this chapter." "This legislation expressly bars suits upon claims cognizable by the claims commissioner except as he may authorize, an indication of the legislative determination to preserve sovereign immunity as a defense to monetary claims

against the state not sanctioned by the commissioner or other statutory provisions." *Doe* v. *Heintz*, supra, 204 Conn. 35-36. However, "the claims commissioner does not have the power to waive claims against the state for reckless, wanton or malicious acts, only negligence." *Benedict* v. *Connecticut Dept. of Energy and Environmental Protection*, Superior Court, judicial district of Middlesex, Docket No. CV-22-6034848-S (May 3, 2023, *Shah, J.*). "[T]he legislature would not have excluded wilful, reckless or malicious acts from the immunity provided by § 4-165 if it had intended the claims commissioner to have jurisdiction to grant permission to sue the state for such claims." *Horan* v. *State*, Superior Court, judicial district of Hartford, Docket No. CV-14-6049960-S (March 17, 2015, *Huddleston, J.*). "Pursuant to General Statutes §§4-142(2) and 4-165, the claims commissioner would not have jurisdiction to grant permission to bring the recklessness claims because such claims are already authorized under the common law as direct claims against the state officers or employees whose reckless conduct is alleged." Id.

In the present case, the TDCC lacked the authority to waive the defendant's sovereign immunity for claims based on wilful or malicious conduct as alleged in paragraphs 26 through 40 of the complaint. The plaintiffs cite *Burgess* v. *State*, 50 Conn. Supp. 271, 920 A.2d 383 (2007), for the proposition that the TDCC can waive immunity for recklessness. In *Burgess*, the court concluded that it was reasonable to construe the phrase "any claim" in §4-160(a) to mean exactly that. The court relied on a number of prior decisions that it found "necessarily stand for the proposition that the claims commissioner has authority to grant permission to sue the state for money damages for the intentional civil and constitutional torts alleged. It would make no sense for the appellate courts to

dismiss claims for failure to receive permission from the claims commissioner if the latter had no authority to grant such permission." Id., 279-80.

The court declines to follow *Burgess*, and instead finds more persuasive the reasoning in *Horan* v. *State*, supra, Superior Court, judicial district of Hartford, Docket No. CV-14-6049960-S and *Benedict* v. *Connecticut Dept. of Energy and Environmental Protection*, supra, Superior Court, judicial district of Middlesex, Docket No. CV-22-6034848-S. In *Horan*, the defendant moved to dismiss the plaintiffs' claim against the State, arguing that General Statutes §4-160 does not authorize the claims commissioner to grant permission to sue the State for the reckless misconduct of its employees or agents. The court agreed with the defendant, concluding that "the availability of a direct action against a reckless state officer or employee deprives the claims commissioner of jurisdiction over recklessness claims under §4-142(2) because suit is otherwise authorized by law to recover similar relief arising from the same set of facts." (Internal quotation marks omitted.) *Horan* v. *State*, supra, Superior Court, judicial district of Hartford, Docket No. CV-14-6049960-S. The court in *Benedict*, after discussing the decisions in both *Burgess* and *Horan*, concluded that *Horan* was the more reasoned decision regarding recklessness claims against the State and that it was more "consistent with the long-settled premise that statutes should be construed to affect the least, rather than the most, change in sovereign immunity." *Benedict* v. *Connecticut Dept. of Energy and Environmental Protection*, supra, Superior Court, judicial district of Middlesex, Docket No. CV-22-6034848-S.

Accordingly, the TDCC lacked the authority to waive the defendant's sovereign immunity with respect to the plaintiffs' allegations of wilful and/or malicious conduct in

paragraphs 26 through 40 of the complaint. Those claims, together with the prayer for relief seeking punitive damages and attorney's fees, are hereby ordered dismissed.

II. The Defendant is not an Owner under the RLUA.

The defendant argues that the TDCC had no authority to grant permission to sue for any negligent conduct because the RLUA shields the defendant from liability just as it would any private landowner. General Statutes § 52-557g (a) provides, in relevant part: "(a) Except as provided in section 52-557h, an owner[2] of land who makes all or any part of the land available to the public without charge, rent, fee or other commercial service for recreational purposes owes no duty of care to keep the land, or the part thereof so made available, safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure or activity on the land to persons entering for recreational purposes." The defendant contends that it should be afforded immunity under the RLUA because it makes Enders available for recreational purposes free of charge. The plaintiffs counter that the defendant is not an "owner of land" as defined in the statute, and even if it was, the RLUA at best provides a liability defense but does not implicate sovereign immunity or the court's subject matter jurisdiction.

"In an action against the state in which damages are sought, a plaintiff seeking to circumvent the doctrine of sovereign immunity must show that . . . the legislature, either expressly or by force of a necessary implication, statutorily waived the state's sovereign

[2] An "owner" is defined as "the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises. 'Owner' includes, but is not limited to, a municipality, political subdivision of the state, municipal corporation, special district or water or sewer district." General Statutes § 52-557f (3).

immunity. . . ." *Envirotest Systems Corp.* v. *Commissioner of Motor Vehicles*, supra, 293 Conn. 388. "The [Recreational Land Use Statute] 2011 amendment allowed explicitly for limited liability of municipalities, political subdivisions and other public entities such as water districts. The fact that municipalities were included in the definition of owner has no bearing on the state. The legislature knows that waiver of sovereign immunity needs to be express and yet, did not include the state in its list defining owner. . .The court does not interpret the Recreational Land Use Act to apply to the state." (Internal quotation marks omitted.) *Benedict* v. *Connecticut Dept. of Energy and Environmental Protection*, supra, Superior Court, judicial district of Middlesex, Docket No. CV-22-6034848-S.

In reaching its conclusion, the court reviewed the applicable statutes and principles relevant to state sovereign immunity and considered whether the RLUA granted the State immunity, either expressly or implicitly. Relying on General Statutes §§ 4-141 through 4-165b and General Statutes § 5-141d, the court reasoned that the "legislature knows that waiver of sovereign immunity needs to be express and yet, did not include the state in its list defining owner." Further, the court found no implicit waiver of immunity under the RLUA. "[I]n order for a court to conclude that a statute waives sovereign immunity by force of necessary implication, it is not sufficient that the claimed waiver reasonably may be implied from the statutory language. It must, by logical necessity, be the only possible interpretation of the language . . . . [S]tatutory language that waives the state's sovereign immunity by necessary implication must be susceptible to only one reasonable interpretation, namely, that the state waived its sovereign immunity. Thus, a conclusion that statutory language is ambiguous is inconsistent with the claim that the statute waives

sovereign immunity by force of a necessary implication." (Internal quotation marks omitted.) *Benedict* v. *Connecticut Dept. of Energy and Environmental Protection*, supra, Superior Court, judicial district of Middlesex, Docket No. CV-22-6034848-S. The court concluded that the State was not expressly included in the definition of "owner" under the RLUA, nor could the language in the definition of "owner" be reasonably interpreted to include the State. Therefore, the State could not claim the protection from negligence liability afforded to owners of land under the RLUA.

The same analysis applies here. The fact that the defendant makes the Enders land available for recreational purposes free of charge does not make the defendant an "owner" under the RLUA. The defendant can raise the statute as a defense to liability, but not as a basis for a motion to dismiss based on immunity and lack of subject matter jurisdiction. The motion to dismiss based on RLUA immunity is therefore denied.

CONCLUSION

For the foregoing reasons, the defendant's motion to dismiss the plaintiffs' claims for wilful and/or malicious conduct in paragraphs 26 through 40 of the complaint, and the prayer for relief seeking punitive damages and attorney's fees, is granted. The motion to dismiss based on sovereign immunity under the RLUA is denied.

BY THE COURT

Rosen, J.

Checklist for Clerk

Docket Number: HHD CV22-6161621S

Case Name: Messing v. State of CT

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HHD-CV22-6161521-S MESSING, LISA, CO-GUARDIAN Et Al v. STATE OF CONNECTICUT

Prefix: HD2 **Case Type:** T12 **File Date:** 10/17/2022 **Return Date:** 11/08/2022

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Case Type: T12 - Torts - Defective Premises - Public - Other
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Disposition Information

Disposition Date:
Disposition:
Judge or Magistrate:

Party & Appearance Information

Party		No Fee Party	Category
P-01	**LISA MESSING CO-GUARDIAN**		Plaintiff
	Attorney: SILVER GOLUB & TEITELL (058006) File Date: 10/17/2022 ONE LANDMARK SQUARE 15TH FLOOR STAMFORD , CT 06901		
P-02	**BERNARD MESSING CO-GUARDIAN**		Plaintiff
	Attorney: SILVER GOLUB & TEITELL (058005) File Date: 10/17/2022 ONE LANDMARK SQUARE 15TH FLOOR STAMFORD , CT 06901		
D-01	**STATE OF CONNECTICUT**		Defendant
	Attorney: MONICA ANN OCONNELL (439884) File Date: 11/10/2022 AG-CIVIL RIGHTS/TORTS 165 CAPITOL AVE 4TH FLR HARTFORD , CT 06106		
	Attorney: TAMAR BAKHBAVA (441140) File Date: 11/10/2022 AG-CIVIL RIGHTS/TORTS 165 CAPITOL AVE 4TH FLR HARTFORD , CT 06106		

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