

---

IN THE  
COURT OF SPECIAL APPEALS OF MARYLAND

---

September Term, 2012

---

No. 50

---

**ANTONIA K. FOWLER, PERSONAL REPRESENTATIVE OF  
JESSE HOLLEN ELKINS FOWLER,**

*Appellants,*

v.

**J.W.Y. MARTIN, JR., et al.**

*Appellees.*

---

On Appeal from the Circuit Court for Baltimore County  
(Vicki Ballou Watts, Judge)

---

**BRIEF OF APPELLEES GOVERNOR MARTIN O'MALLEY,  
MARYLAND DEPARTMENT OF TRANSPORTATION,  
MARYLAND STATE HIGHWAY ADMINISTRATION,  
MARYLAND DEPARTMENT OF BUDGET & MANAGEMENT,  
HON. JOHN D. PORCARI, AND HON. ELOISE FOSTER**

---

DOUGLAS F. GANSLER  
Attorney General of Maryland

ELIZABETH L. ADAMS  
Assistant Attorney General  
80 Calvert Street, 4th Floor  
Annapolis, Maryland 21401  
eadams@treasureR.state.md.us  
(410) 260-7412

Attorneys for Appellees, Gov. O'Malley,  
Hon. John Porcari, Hon. Eloise Foster,  
Dept. of Transportation, State Highway Admin.  
& Dept. of Budget and Management

September 21, 2012

---

## TABLE OF CONTENTS

	<b>Page</b>
STATEMENT OF THE CASE .....	1
QUESTIONS PRESENTED .....	4
STATEMENT OF FACTS .....	4
ARGUMENT.....	5
I.    APPELLANTS HAVE ABANDONED ALL CLAIMS AGAINST THE STATE DEFENDANTS. ....	5
II.   THIS COURT REVIEWS THE CIRCUIT COURT’S ENTRY OF DISMISSAL FOR LEGAL CORRECTNESS.....	7
III.  THIS COURT REVIEWS THE CIRCUIT COURT’S GRANT OF SUMMARY JUDGMENT FOR LEGAL CORRECTNESS. ....	8
IV.  THE CIRCUIT COURT WAS LEGALLY CORRECT IN ENTERING DISMISSAL IN FAVOR OF THE INDIVIDUAL STATE DEFENDANTS, AS THEY ARE IMMUNE FROM SUIT. ....	9
V.   THE CIRCUIT COURT WAS LEGALLY CORRECT IN GRANTING SUMMARY JUDGMENT, AS THE STATE HAD NOT WAIVED SOVEREIGN IMMUNITY.....	11
CONCLUSION.....	14

## TABLE OF AUTHORITIES

	Page
<b>Cases</b>	
<i>120 W. Fayette St., LLLP v. Mayor &amp; City Council of Baltimore City</i> , 413 Md. 309 (2010).....	9
<i>Abbott v. State</i> , 190 Md. App. 595 (2010).....	6
<i>Appiah v. Hall</i> , 416 Md. 533 (2010).....	9
<i>ARA Health Servs. Inc., v. Dept. of Public Safety &amp; Correctional Servs.</i> , 344 Md. 85 (1996).....	12
<i>Barbre v. Pope</i> , 402 Md. 157 (2007).....	10, 11, 14
<i>Beck v. Mangels</i> , 100 Md. App. 144 (1994).....	7
<i>Berman v. Karvounis</i> , 308 Md. 259 (1987).....	8
<i>Beyer v. Morgan State Univ.</i> , 139 Md. App. 609 (2001).....	9
<i>Board of Educ. v. Browning</i> , 333 Md. 281 (1994).....	8
<i>Board of Educ. v. Zimmer-Rubert</i> , 409 Md. 200 (2009).....	12
<i>Boyer v. State</i> , 323 Md. 558 (1991).....	10, 11
<i>Bramble v. Thompson</i> , 264 Md. 518 (1972).....	8
<i>Condon v. State</i> , 332 Md. 481 (1993).....	12
<i>Conway v. State</i> , 108 Md. App. 475 (1996).....	12
<i>D'Aoust v. Diamond</i> , 424 Md. 549 (2012).....	9
<i>Davis v. DiPino</i> , 99 Md. App. 282 (1994).....	11
<i>DeGroft v. Lancaster Silo Co.</i> , 72 Md. App. 154 (1987).....	6
<i>Dick v. Mercantile-Safe Deposit &amp; Trust Co.</i> , 63 Md. App. 270 (1985).....	8
<i>Faya v. Almaraz</i> , 329 Md. 435 (1993).....	8

<i>Ferguson v. Loder</i> , 186 Md. App. 707 (2006).....	13
<i>Figueiredo-Torres v. Nickel</i> , 321 Md. 642 (1991) .....	8
<i>Ford v. Baltimore City Sheriff's Office</i> , 149 Md. App. 107 (2002) .....	10
<i>Godwin v. County Comm'rs of St. Mary's County</i> , 256 Md. 326 (1970).....	12
<i>Hansen v. City of Laurel</i> , 420 Md. 670 (2011).....	13
<i>Health Servs. Cost Rev. v. Lutheran Hosp.</i> , 298 Md. 651 (1984) .....	6
<i>Honeycutt v. Honeycutt</i> , 150 Md. App. 604 (2003).....	6
<i>Hrehorovich v. Harbor Hosp.</i> , 93 Md. App. 772 (1992).....	8
<i>Katz v. Washington Suburban Sanitary Comm'n</i> , 284 Md. 503 (1979). .....	12
<i>Lee v. Cline</i> , 384 Md. 245 (2004).....	10
<i>Liscombe v. Potomac Edison Co.</i> , 303 Md. 619 (1985).....	11
<i>Manikhi v. Mass Transit Admin.</i> , 360 Md. 333 (2000).....	8
<i>Maryland State Bd. of Elections v. Libertarian Party</i> , 426 Md. 488 (2012).....	9
<i>Maryland v. Sharafeldin</i> , 382 Md. 129 (2004).....	10
<i>Mohiuddin v. Doctors Billing &amp; Management Solutions, Inc.</i> , 196 Md. App. 439 (2010) .8	
<i>Monumental Life Ins. Co. v. United States Fidelity and Guaranty Co.</i> , 94 Md. App. 505 (1993).....	6
<i>O'Connor v. Baltimore County</i> , 382 Md. 102 (2004) .....	9
<i>Oak Crest Village, Inc., v. Murphy</i> , 379 Md. 229 (2004).....	6
<i>Okwa v. Harper</i> , 360 Md. 161 (2000) .....	10
<i>Pope v. Board of School Comm'rs of Baltimore City, et al.</i> , 106 Md. App. 578 (1995).7, 8	
<i>Prince George's County v. Longtin</i> , 190 Md. App. 97 (2010).....	13
<i>Proctor v. Washington Metropolitan Area Transit Authority</i> , 412 Md. 691 (2010) .....	12
<i>Rios v. Montgomery County</i> , 386 Md. 104 (2005) .....	13

<i>Romanesk v. Rose</i> , 248 Md. 420 (1968) .....	11
<i>Rosenberg v. Rosenberg</i> , 64 Md. App. 487 (1985) .....	6
<i>Sawyer v. Humphries</i> , 322 Md. 247 (1991).....	10
<i>State v. B. &amp; O. R.R. Co.</i> , 34 Md. 344 (1871) .....	12
<i>State v. Card</i> , 104 Md. App. 439 (1995) .....	12
<i>State v. Hogg</i> , 311 Md. 446 (1988) .....	12
<i>Thacker v. City of Hyattsville</i> , 135 Md. App. 268 (2000) .....	10
<i>Wells v. State</i> , 100 Md. App. 693 (1994).....	11

### Statutes

Md. Code Ann., Cts. & Jud. Proc. §5-511 .....	10
Md. Code Ann., Cts. & Jud. Proc. §5-522.....	10, 12, 13
Md. Code Ann., State Gov't §12-101 .....	9
Md. Code Ann., State Gov't §12-104.....	10, 13
Md. Code Ann., State Gov't §12-105.....	9
Md. Code Ann., State Gov't §12-106 .....	13

### Rules

Md. Rule 2-322.....	9
Md. Rule 2-501 .....	11
Md. Rule 8-504.....	5, 6

**IN THE  
COURT OF SPECIAL APPEALS OF MARYLAND**

---

September Term, 2012

---

No. 50

---

**ANTONIA K. FOWLER, PERSONAL REPRESENTATIVE OF  
JESSE HOLLEN ELKINS FOWLER,**

*Appellants,*

v.

**J.W.Y. MARTIN, JR., et al.**

*Appellees.*

---

On Appeal from the Circuit Court for Baltimore County  
(Vicki Ballou Watts, Judge)

---

**BRIEF OF APPELLEE**

---

**STATEMENT OF THE CASE**

On the night of May 12, 2006, a tragic, fatal car accident claimed the life of Jesse Hollen Elkins Fowler (“Decedent”). This appeal arises from the lower court’s rulings relating to the Complaint filed as a result of that tragic event.

On May 8, 2009, Appellants filed in the Circuit Court for Baltimore County, a complaint (“Complaint”) against twenty-eight different defendants, asserting a variety of

causes of action, and seeking compensation for the death of Mr. Fowler. The Complaint sought an award of \$50,000,000.00 against each government defendant and \$1,000,000.00 against each individual defendant. (R. at 3.)

Among the Defendants named, the Plaintiffs brought suit against Governor Martin O'Malley *in his personal capacity*, former Secretary of the Maryland Department of Transportation Hon. John D. Porcari, *in his personal capacity*, and Secretary of the Maryland Department of Budget & Management, Hon. Eloise Foster, *in her personal capacity* (collectively referred to as "Individual State Defendants"). Additionally, the Plaintiff named several of the State's agencies, Maryland Department of Transportation, Maryland State Highway Administration, and Maryland Department of Budget & Management (collectively referred to as "State Agencies").<sup>1</sup>

The Complaint pled twelve counts for relief, of which the following apply to State Defendants: Count 1 - Negligence; Count 2 - Wrongful Death and Survival; Count 3 - Negligent Administration of Grants; Count 4 - Negligent Supervision; Count 5 - Professional Negligence; Count 6 - Common Law Criminal Conspiracy; and Count 12 - punitive damages. (R. at 3-11.) The Plaintiffs also brought suit against numerous other local government agencies, public officials, corporations, partnerships, and private citizens.

On August 5, 2009, the State Defendants filed a Motion to Dismiss, or in the alternative, for Summary Judgment, together with a supporting Memorandum of Law.

---

<sup>1</sup> When referred to jointly, the Individual State Employees and State Agencies are collectively "State Defendants".

(R. at 80-82, 44-68.) The State Defendants' argued that: 1) the Complaint did not state a cause of action upon which relief could be granted; 2) the Individual State Defendants were immune from suit as a matter of law; and 3) Sovereign Immunity barred the Complaint against the State's Agencies.

In response to the Motion, on August 24, 2012, the Plaintiffs filed an Opposition. (R. at 71-79.) Thereafter, on September 18, 2009, the Plaintiffs filed a line seeking to amend their Complaint to incorporate into paragraph number forty-four the following change:

But for the removal of the sign, Jesse would not have lost control of his vehicle, been injured, and died. Plaintiffs gave timely notice to the appropriate government entities in accordance with the Maryland Tort Claims Act and Local Government Tort Claims Act. Furthermore, Jesse's injuries were the direct result of the gross negligence on the part of the government defendants, both local and state, as described elsewhere herein.

(R. at 86-92.) The State Defendants filed a Reply to Plaintiffs' Opposition on October 10, 2009. (R. at 110-17.)

On October 27, 2009, and again on November 20, 2009, the motion was called for a hearing before the Honorable Judith C. Ensor. After reviewing the motions, responses thereto, and a full hearing, Judge Ensor granted the State's motion to dismiss as to the Individual State Defendants (R. at 134.), and entered summary judgment in favor of the State's Agencies.<sup>2</sup> (R. at 134.) The State Defendants had no further participation in the litigation which continued as to the other Defendants.

---

<sup>2</sup> The motion to dismiss the State Agencies was treated as a motion for summary judgment, as it was accompanied by an affidavit affirming that no tort claim notice was provided to the Maryland State Treasurer. (R. at 47-48.)

## **QUESTION PRESENTED**

1. Did the circuit court properly dismiss the Plaintiffs' Complaint against the Individual State Defendants, as there were no facts upon which a claim for relief could be made, and the Individual State Defendants were immune from suit as a matter of law?
  
2. Did the circuit court properly enter summary judgment in favor of the State Agencies, because there was no dispute as to material facts, Sovereign Immunity had not been waived, and the State Agencies were entitled to judgment as a matter of law?

## **STATEMENT OF FACTS**

While the State Defendants did not participate in the case beyond November 20, 2009, additional facts relating to the case can be found in the police report, (R. at 440-46.) and are briefly recast. On May 12, 2006, Jesse Fowler, then seventeen years of age had been celebrating with friends at an Orioles game and Hooters Restaurant. (R. at 441.) Jesse Fowler had been consuming alcoholic beverages, despite being under the lawful age. (R. at 441.)

At the close of the evening, Jesse Fowler, operating his mother's 1993 Jeep Cherokee, drove his friends home. (R. at 441.) Of the passengers, a female friend was near to missing her curfew time of 12:00 a.m. at her boarding school, and Jesse Fowler was rushing to return her to school on time. (R. at 441.) Approximately 11:34 p.m., Jesse Fowler was driving at a high rate of speed on Tufton Avenue. (R. at 446.) He failed to properly maneuver a turn in the roadway, overcompensated, crossed the double yellow line, lost control of his vehicle, and drove off the travel portion of the roadway. (R. at

446.)<sup>3</sup> The vehicle then struck the top of a cement retaining wall, became airborne, and struck a wooden fence. (R. at 446.) A railing of the wooden fence came through the front windshield, and struck Jesse Fowler in the head. (R. at 446.) He was transported to shock trauma via Maryland State Police Helicopter. (R. at 445.) Nearly an hour after the collision, at 12:44 a.m. on May 13, 2006, he was pronounced dead. (R. at 445.)<sup>4</sup>

## ARGUMENT

### I. APPELLANTS HAVE ABANDONED ALL CLAIMS AGAINST THE STATE DEFENDANTS.

Maryland Rule 8-504(a)(6) requires that a “brief *shall* ... include ... [a]rgument in support of the party’s position on each issue.” Md. Rule 8-504(a)(6) (emphasis supplied). “For noncompliance with this Rule, the appellate court may dismiss the appeal or make any other appropriate order with respect to the case.” Md. Rule 8-504(c).

Case law clearly provides that the failure to include, or to adequately brief an argument in one’s initial brief, may constitute a waiver of that argument and the court may decline to entertain it. *Honeycutt v. Honeycutt*, 150 Md. App. 604, 618 (2003). “An appellant is required to articulate and adequately argue all issues the appellant desires the appellate court to consider in the appellant’s initial brief.” *Abbott v. State*, 190 Md. App. 595, 631 (2010) (quoting *Oak Crest Village, Inc., v. Murphy*, 379 Md. 229,

---

<sup>3</sup> Tufton Avenue is not a State owned roadway. (R. at 45-46.)

<sup>4</sup> To the extent additional facts are relevant to the Court’s review, the State adopts the Statement of Facts as provided by Appellees, W.Y. Martin, JR., Glenn R. Martin a/k/a “Glinnie” Martin, Worthington Farms, LLC, Worthington Farms General Partnership, Worthington Farms, and Nancy Martin Roberts.

241 (2004)). “[A] brief [that] does not *contain* the party’s argument but merely *makes reference* to an argument contained elsewhere” is not an adequate briefing of the issue. *Monumental Life Ins. Co. v. United States Fidelity and Guaranty Co.*, 94 Md. App. 505, 544 (1993) (citing *Rosenberg v. Rosenberg*, 64 Md. App. 487, 515 n.7 (1985)) (incorporating an argument by mere reference to another document is insufficient to secure the appellate court’s consideration); *DeGroft v. Lancaster Silo Co.*, 72 Md. App. 154, 159 (1987) (“[An] appellate court will not review issues not argued in appellant’s brief.”). *See also Health Servs. Cost Rev. v. Lutheran Hosp.*, 298 Md. 651, 664 (1984) (if an issue is not adequately raised in a party’s brief, the court should decline to entertain it).

A review of the Appellants’ brief reveals that item number one identified in their Notice of Appeal has not been addressed in their brief. (R. at 2499.) Specifically, the “Order granting [the] State Defendants[’] motions [], [that were] granted [on] November 20, 2009, [and] docketed [on] December 4, 2009, [by] Ensor, judge. [sic]” has not been addressed. (R. at 2499.) The Appellants’ Brief contains only three occasions in which the State Defendants are vaguely referenced.

First, in the “Statement of the Case” contains a sentence which states “The State defendants filed for, and were granted, summary judgment early in the proceedings on the grounds of sovereign immunity.” (App. Brief, p.1, ¶1.) Second, the phrase “the decisions relating to sovereign immunity, de novo” appears in the section entitled “Standards of Review”. (App. Brief, p.9, ¶2.) Third, the phrase “Plaintiffs pray that this

Court reverse each and every decision of the trial court and remand the case for further proceedings...” appears in the section entitled “Conclusion”. (App. Brief, p.25, ¶3.)

However, the Appellants fail to present or brief any issue relating to the State Defendants or the trial court’s rulings on November 20, 2009. In failing to present any argument in their initial brief regarding the State Defendants, the Appellants “have waived the argument on appeal.” *Beck v. Mangels*, 100 Md. App. 144, 149 (1994).

## **II. THIS COURT REVIEWS THE CIRCUIT COURT’S ENTRY OF DISMISSAL FOR LEGAL CORRECTNESS.**

This Court reviews the decision of the trial court to determine whether “assuming the truth of the facts as alleged[,] . . . the complaint does not state a claim upon which relief can be granted.” *Pope v. Board of School Comm’rs of Baltimore City, et al.*, 106 Md. App. 578, 590 (1995). Moreover, “an appellate court will affirm a circuit court’s judgment on any ground adequately shown by the record, even one upon which the circuit court has not relied or one that the parties have not raised.” *Id.* (citing *Hrehorovich v. Harbor Hosp.*, 93 Md. App. 772, 785 (1992); *Bramble v. Thompson*, 264 Md. 518 (1972)).<sup>5</sup>

A trial court may enter a dismissal pursuant to Maryland Rule 2-322(b)(2) for failure to state a claim upon which relief may be granted if it “determined that ... the complaint did not disclose, on its face, a legally sufficient cause of action.” *Pope*, 106 Md. App. at 590. (citations omitted). To withstand a motion to dismiss for legal

---

<sup>5</sup> While the trial court did not enter the dismissal or grant summary judgment on the basis of no existing duty in tort, the issue was presented to the trial court. (R. at 118-132.)

insufficiency, the complaint must allege facts that, if proven, would entitle a plaintiff to relief. *Dick v. Mercantile-Safe Deposit & Trust Co.*, 63 Md. App. 270 (1985); *Mohiuddin v. Doctors Billing & Management Solutions, Inc.*, 196 Md. App. 439 (2010); Md. Rule 2-322. When reviewing a motion to dismiss, a court need not consider mere conclusory charges that have no factual support or basis, and any ambiguity or uncertainty in the allegations must be construed against the pleader. *Berman v. Karvounis*, 308 Md. 259, 265 (1987); *Figueiredo-Torres v. Nickel*, 321 Md. 642, 647 (1991). Where the facts and allegations, even if proven, would nonetheless fail to afford the plaintiff relief, dismissal is proper. *Board of Educ. v. Browning*, 333 Md. 281, 286 (1994); *Manikhi v. Mass Transit Admin.*, 360 Md. 333, 342-45 (2000); *Faya v. Almaraz*, 329 Md. 435, 443 (1993).

### **III. THIS COURT REVIEWS THE CIRCUIT COURT'S GRANT OF SUMMARY JUDGMENT FOR LEGAL CORRECTNESS.**

This Court reviews a circuit court's grant of summary judgment for legal correctness, "by determining the same two issues decided by the circuit court: was there a genuine dispute of material fact and, if not, was the moving party entitled to judgment as a matter of law?" *Beyer v. Morgan State Univ.*, 139 Md. App. 609, 635 (2001); *Maryland State Bd. of Elections v. Libertarian Party*, 426 Md. 488, 506 (2012) (citing *D'Aoust v. Diamond*, 424 Md. 549, 574-75 (2012)); *120 W. Fayette St., LLLP v. Mayor & City Council of Baltimore City*, 413 Md. 309, 329 (2010); Md. Rule 2-501. In determining whether a genuine dispute of material fact exists, an appellate court "construe[s] the facts properly before the court, and any reasonable inferences that may

be drawn from them, in the light most favorable to the non-moving party.” *Appiah v. Hall*, 416 Md. 533, 546-547 (2010) (quoting *O’Connor v. Baltimore County*, 382 Md. 102, 111 (2004)).

**IV. THE CIRCUIT COURT WAS LEGALLY CORRECT IN DISMISSING THE INDIVIDUAL STATE DEFENDANTS, AS THEY ARE IMMUNE FROM SUIT.**

Plaintiffs filed suit against Governor Martin O’Malley, Hon. John Porcari, and Hon. Eloise Foster (“Individual State Defendants”), in their personal capacities. All of these Individual State Defendants were state employees at the time of the occurrence. Md. Code Ann., State Gov’t §12-101. Under the Maryland Tort Claims Act (“MTCA”), state personnel are immune from suit. Md. Code Ann., State Gov’t §12-105. This immunity is more than a mere defense to liability.

State personnel . . . are immune from suit in courts of the State and from liability in tort for a tortious act or omission that is within the scope of the public duties of the State personnel and is made without malice or gross negligence, and for which the State or its units have waived immunity under Title 12, Subtitle 1 of the State Government Article, even if the damages exceed the limits of that waiver.

Md. Code Ann., Cts. & Jud. Proc. §5-522(b); Md. Code Ann., State Gov’t §§12-101, 12-105; *Maryland v. Sharafeldin*, 382 Md. 129 (2004)<sup>6</sup>; *Ford v. Baltimore City Sheriff’s Office*, 149 Md. App. 107, 141-143 (2002); *see also* Md. Code Ann., Cts. & Jud. Proc. §5-511, “Immunity Officials of governmental entities.”

Therefore, *by statute*, it is legally incorrect to sue a state employee as they *shall not be sued* in their personal capacities unless, in good faith, the plaintiff has properly and

---

<sup>6</sup> The State of Maryland has not waived its Sovereign Immunity for claims of malice, gross negligence, or employees acting outside of the scope of their employment. Md. Code Ann., State Gov’t §12-104; Md. Code Ann., Cts. & Jud. Proc. §5-522.

specifically pled that state employee was acting: 1) with malice; 2) with gross negligence; or 3) outside of the scope of his or her employment.<sup>7</sup> *Ford v. Baltimore City Sheriff's Office*, 149 Md. App. 107, 120-21 (2002); *Barbre v. Pope*, 402 Md. 157 (2007); *Boyer v. State*, 323 Md. 558 (1991).

In order to plead malice, a plaintiff must show facts to support “conduct characterized by evil or wrongful motive, intent to injure, knowing and deliberate wrongdoing, ill-will or fraud . . . an evil or rancorous motive influenced by hate, the purpose being to deliberately and willfully injure the plaintiff.” *Barbre*, 402 Md. at 182. (quoting *Lee v. Cline*, 384 Md. 245 (2004)); *Okwa v. Harper*, 360 Md. 161 (2000); *Thacker v. City of Hyattsville*, 135 Md. App. 268 (2000); *Sawyer v. Humphries*, 322 Md. 247 (1991). Plaintiffs’ Complaint contains no allegations of malice.

As to gross negligence, *Barbre v. Pope*, provides that

Gross negligence is “more than simple negligence” and is an intentional failure to perform a manifest duty in reckless disregard of the consequences affecting the life or property of another . . . [with] thoughtless disregard of the consequences without the exertion of any effort to avoid them. Stated conversely, a wrongdoer is guilty of gross negligence or acts wantonly and willfully only when he inflicts injury intentionally or is so utterly indifferent to the rights of others that he acts as if such rights did not exist.

*Barbre*, 402 Md. at 187-88. (quoting *Liscombe v. Potomac Edison Co.*, 303 Md. 619, 635 (1985); *Romanesk v. Rose*, 248 Md. 420, 423 (1968)). Moreover, an allegation of gross negligence must be specifically pled. *Barbre*, 402 Md. at 187-90. Vague or

---

<sup>7</sup> The Complaint is likewise of facts that support an allegation that the Individual State Defendants were acting outside the scope of their respective employment roles.

conclusory allegations of gross negligence are insufficient to overcome state personnel immunity. *Boyer v. State*, 323 Md. 558, 594 (1991); *Davis v. DiPino*, 99 Md. App. 282, 290-91 (1994) *rev'd on other grounds*, 337 Md. 642 (1995); *Wells v. State*, 100 Md. App. 693, 703 (1994).

The Plaintiffs' amendment to paragraph forty-four of the Complaint, to include an allegation of gross negligence, failed to demonstrate any sufficient facts or to show any indicia of gross negligence; it is naught but a bald allegation. The trial court correctly found that these bald or "conclusory allegations [were] not enough to bring [the] claim outside of the immunity and nonliability provisions of the MTCA . . . [and] the facts pled in this particular case . . . [were] also insufficient as to the individual Defendants. There [were] no specific facts alleged." (Nov. 20, 2009, Order, T.15, 1.5-7; T.17, 1.5-8.)

Accordingly, the failure to plead sufficient facts to support an exception to the personnel immunity constituted a failure to plead a cause of action upon which relief could be granted. Additionally, the Individual State Employees owed no duty to Jesse Fowler which could have given rise to an "an intentional failure to perform a manifest duty in reckless disregard of the consequences". *Barbre*, 402 Md. at 187-88. The trial court was legally correct in dismissing claims against the Individual State Employees.

**V. THE CIRCUIT COURT WAS LEGALLY CORRECT IN GRANTING SUMMARY JUDGMENT, AS THE STATE HAD NOT WAIVED ITS SOVEREIGN IMMUNITY.**

The well-established principle of Sovereign Immunity "belongs to the State by reason of her prerogative as a sovereign, and on grounds of public policy." *Godwin v. County Comm'rs of St. Mary's County*, 256 Md. 326, 333 (1970) (quoting *State v. B. &*

*O. R.R. Co.*, 34 Md. 344, 374 (1871)). “[T]he policy underlying the State’s Sovereign Immunity not only protects the public treasury but also protects the State and its instrumentalities from standing trial.” *State v. Hogg*, 311 Md. 446, 455 (1988). It is well understood that agencies of the State enjoy Sovereign Immunity. *Proctor v. Washington Metropolitan Area Transit Authority*, 412 Md. 691, 709 (2010) (quoting *Board of Educ. v. Zimmer-Rubert*, 409 Md. 200, 211 (2009); *ARA Health Servs. Inc., v. Dept. of Public Safety & Correctional Servs.*, 344 Md. 85, 91 (1996)); *Katz v. Washington Suburban Sanitary Comm’n*, 284 Md. 503, 507-08, (1979).

The MCTA is *the* sole means of suing the state in tort and when *all conditions precedent have been met*, the State will waive its Sovereign Immunity to a limited extent. Md. Code, State Gov’t §§12-101-110; Md. Code Ann., Cts. & Jud. Proc. §5-522; *Conway v. State*, 108 Md. App. 475, 484 (1996); *State v. Card*, 104 Md. App. 439, 447 (1995) *cert. denied*, 339 Md. 643 (1995); *Condon v. State*, 332 Md. 481, 492 (1993). In addition to the conditions precedent, the State’s waiver of its Sovereign Immunity is subject to conditions precedent, exclusions, and limitations. Md. Code Ann., State Gov’t §§12-104 (b), 12-106, 12-107, 12-108.<sup>8</sup>

A condition precedent is “a condition attached to the right to sue at all. It operates as a limitation of the liability itself[,] . . . cannot be waived[,] . . . and the action itself is

---

<sup>8</sup> The Plaintiffs demanded relief in the amount of \$50,000,000.00 compensatory damages and punitive damages. However, the State has not waived its Sovereign Immunity to claims in excess of \$200,000.00 or claims for punitive damages. Md. Code Ann., State Gov’t §12-104(a)(2); Md. Code Ann., Cts. & Jud. Proc. §5-522(a); Md. Regs. Code tit. 25 § 02.01-04 “State Insurance Programs, Maryland Tort Claims Act” (2012).

fatally flawed if the condition is not satisfied.” *Ferguson v. Loder*, 186 Md. App. 707, 714, 728 (2006) (quoting *Rios v. Montgomery County*, 386 Md. 104, 127-28 (2005)). This is because “the failure to meet a condition precedent extinguishes the right itself.” *Ferguson*, 186 Md. App. at 728; *Hansen v. City of Laurel*, 420 Md. 670, 696 (2011); *Prince George’s County v. Longtin*, 190 Md. App. 97 (2010), *aff’d* 419 Md. 450 (2011).

The most elementary of the conditions precedent is the notice of claim requirement. A claimant may not institute an action against the State arising in tort unless: “(1) the claimant submits a written claim to the Treasurer or a designee of the Treasurer within 1 year after the injury to the person or property that is the basis of the claim.” Md. Code Ann., State Gov’t §12-106(b).

At the October 2009 motions hearing, Counsel for Appellants argued that he had “an affidavit from Leonard Kerpelman . . . which he states . . . he gave the required notice of claim under Maryland’s Tort Claim[s] Act by delivering a written claim to the State Treasurer within the period dictated by statute or law as soon as he learned he was required, and sent it by way of the County.” (Oct. 27, 2009, T.9, 1.9-19.) Later he reiterated that his client indicated “he transmitted [the notice] via the County Government.” (Oct. 27, 2009, T.17, 1.24-25.) This is not proper notice of claim in accordance with the Maryland Tort Claims Act. *Barbre v. Pope*, 402 Md. at 170-71. (“Pope’s notice to a Queen Anne’s County Commissioner did not expressly or substantially comply with the MTCA notice statute.”)

It is resolutely clear that Appellants wholly failed to meet the most elementary of conditions precedent, they failed to provide a notice of claim to the Maryland State

Treasurer. (R. at 47-48.) This incurable defect requires that the State has not waived its Sovereign Immunity, and suit against it cannot proceed. The trial court properly entered summary judgment on behalf of the State Agencies.

### CONCLUSION

For the reasons stated, the judgment of the Circuit Court for Baltimore County should be affirmed.

Respectfully submitted,

DOUGLAS F. GANSLER  
Attorney General of Maryland

ELIZABETH L. ADAMS  
Assistant Attorney General  
80 Calvert Street, 4th Floor  
Annapolis, Maryland 21401  
(410) 260-7412

Attorneys for State Defendants

Rule 8-504(a)(8) Certification: This brief has been printed with proportionally spaced type: Times New Roman - 13 point.<sup>9</sup>

---

<sup>9</sup> Appended material has been excluded from this writing sample.