

VERMONT SUPERIOR COURT

SUPERIOR COURT  
Washington Unit

CIVIL DIVISION  
Docket No. 94-2-19 Wncv

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Vermont Agency of Transportation  
Appellant

v.

Michele Doucette  
Appellee

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Opinion and Order on Appeal

Appellant the Vermont Agency of Transportation (“VTrans” or “the State”) seeks Rule 74 review of the decision of the Vermont Transportation Board (“Board”) awarding Appellee Michele Doucette \$1,009.75 to compensate her for damage to her automobile caused by a pothole on Vermont Route 100. The Board found VTrans negligent in failing either to repair the pothole or post adequate warning signs cautioning the traveling public against hazardous road conditions.

The State argues on appeal that the Board’s decision should be reversed because: (1) the Board failed to identify any specific VTrans employee who was negligent; (2) the State retained sovereign immunity to Ms. Doucette’s claim under the discretionary function exception to the statutory waiver of sovereign immunity to tort claims, 12 V.S.A. § 5601; and (3) the Board’s determination that VTrans had general notice of poor road conditions in the vicinity of the pothole was insufficient to give it notice, for negligence purposes, of the specific risk presented by the

pothole that damaged Ms. Doucette’s car.<sup>1</sup> The Court makes the following determinations.

1. Procedural History and Standard of Review

Ms. Doucette brought her claim against VTrans as a “small claim” (less than \$5,000) before the Transportation Board. The Board has exclusive jurisdiction to, among other things, hear small claims “made for personal injuries or property damage, or both, sustained as the result of the negligence of any employee of [VTrans].” 19 V.S.A. § 20. The Board held an evidentiary hearing and rendered a decision in Ms. Doucette’s favor. Such a decision “may be reviewed on the record by a Superior Court,” pursuant to Rule 74. 19 V.S.A. § 5(c). The State sought review in this Court and filed a statement of questions. *See* Vt. R. Civ. P. 74(c) (describing the record on appeal and the appellant’s duty to file a statement of questions “if required”).

The Vermont Supreme Court has described the applicable standard of review as follows: “Courts presume that the actions of administrative agencies are correct, valid and reasonable, absent a clear and convincing showing to the contrary. . . .

[J]udicial review of agency findings is ordinarily limited to whether, on the record

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<sup>1</sup> The State on appeal challenges the Board’s conclusions of law and does not challenge any of its findings of fact as lacking evidentiary support. Neither party supplied the Court with a transcript of the Board hearing or an electronic recording sufficient to enable the court to evaluate the sufficiency of testimonial evidence had any findings been in dispute. *See* Vt. R. Civ. P. 74(c) (“Any party desiring a transcript of any portion of the proceedings to be included in the record on appeal shall notify all other parties thereof, shall procure such portion at that party’s own expense, and shall cause it to be filed with the clerk of the superior court within 30 days after the filing of the notice of appeal.”).

developed before the agency, there is any reasonable basis for the finding.” *State Dep’t of Taxes v. Tri-State Ind. Laundries*, 138 Vt. 292, 294 (1980). “[C]ourts ‘employ a deferential standard of review’ of an agency’s interpretation and application of its own regulations.” *In re Soon Kwon*, 2011 VT 26, ¶ 6, 189 Vt. 598, 599 (quoting *Conservation Law Found. v. Burke*, 162 Vt. 115, 121 (1993)). Review of the agency’s conclusions of law, however, is *de novo*. *In re Soon Kwon*, 2011 VT 26, ¶ 7.

## 2. The Board’s Findings and Conclusions

In February 2018, Ms. Doucette was driving on Route 100 in Wilmington when she struck a pothole that caused over \$1,000 of damage to her car. The pothole was on a stretch of road that, at the time, had been deteriorating “badly” for more than a month, and had been scheduled for major reconstruction in 2019. VTrans knew that this stretch was in poor condition generally and that potholes caused by winter weather cycles occurring during this time were a recurring problem.

VTrans determined to maintain the road by patching potholes until the reconstruction project in 2019. The Board found that agency personnel were “constantly patching potholes”—at relevant times, every day or two. VTrans had placed one or two signs “some distance” from where the incident occurred warning drivers of conditions ahead. Prior to the incident involving Ms. Doucette, other drivers had experienced potholes on this stretch of Route 100, some had sustained damage to their cars, and some had complained to VTrans. There was no evidence,

however, that anyone had previously complained to VTrans about the specific pothole Mr. Doucette struck.

The Board concluded that VTrans was negligent insofar as it was, at least, generally aware that the stretch of road where the incident occurred was deteriorating and hazardous, and it neither kept this stretch in safe condition for the traveling public or posted sufficient signage to ensure that the traveling public would take adequate precautionary measures. In so ruling, the Board acknowledged that VTrans has limited resources and must prioritize its maintenance work. The Board reasoned, though, that “the evidence in this case indicates that a dangerous condition existed along Route 100 in Wilmington for so long that VTrans knew it existed.” Board Decision at 6. It thus concluded that VTrans had breached its duty to keep the highway properly maintained or properly signed so it was safe for travel.

The State had argued, among other things, that it was protected from liability for Ms. Doucette’s claim under the discretionary function exception to the statutory waiver of sovereign immunity. The Board dismissed this argument because “VTrans does not argue that it made a public policy decision to not repair potholes, or to allocate resources needed to repair potholes to other needs.” Board Decision at 6. Rather, it explained, VTrans decided to patch potholes on this stretch until the 2019 repaving project, but its patching work did not keep up with the rate of deterioration of the highway. The Board characterized VTrans’ patching work as

the “ministerial” implementation of the decision to deal with the highway’s deterioration by patching.

3. Sovereign Immunity — Discretionary Function

“Under the common law, lawsuits against the state are barred unless the state consents to be sued by waiving its sovereign immunity.” *Hillerby v. Town of Colchester*, 167 Vt. 270, 274 (1997). To the extent that the State retains sovereign immunity, the Court lacks subject matter jurisdiction over a claim. *See United States v. Mottaz*, 476 U.S. 834, 841 (1986) (“When the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court’s jurisdiction.”). “Subject matter jurisdiction’ refers to the power of a court to hear and determine a general class or category of cases.” *Lamell Lumber Corp. v. Newstress Int’l, Inc.*, 2007 VT 83, ¶ 6, 182 Vt. 282, 287. An issue of subject matter jurisdiction must be determined before addressing the merits of a claim because without jurisdiction the court has no power to proceed at all. *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998) (“Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” (quoting *Ex Parte McCordle*, 7 Wall. 506, 514 (1868))); *see also Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) (explaining that a court must “satisfy itself of its jurisdiction over the subject

matter before it considers the merits of a case”). Accordingly, the Court addresses the State’s sovereign immunity argument prior to any analysis of negligence.<sup>2</sup>

The Vermont Tort Claims Act, subject to exception, provides that the State generally will accept liability “for injury to persons or property or loss of life caused by the negligent or wrongful act or omission of an employee of the State while acting within the scope of employment.” 12 V.S.A. § 5601(a). There is no dispute in this case that the State has a duty sounding in negligence “to use reasonable diligence to maintain its roads in a reasonably safe condition for the uses for which they were established.” *McCormack v. State*, 150 Vt. 443, 445 (1988). The State argues that it retains sovereign immunity to Ms. Doucette’s claim pursuant to 12 V.S.A. § 5601(e)(1), which, as relevant here, preserves immunity for any claim “based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of the State agency or an employee of the State whether or not the discretion involved is abused.” This is known as the “discretionary function exception.”

The purpose of the discretionary function exception “is to assure that the courts do not invade the province of coordinate branches of government by passing

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<sup>2</sup> The Board analyzed in detail and then finally resolved the issue of negligence before reaching the threshold question of sovereign immunity. The prematurity of its negligence analysis may have confounded the Board’s examination of sovereign immunity. Sovereign immunity should have been determined first. The presence of negligence is *not relevant* to the applicability of the discretionary function exception. *See Garcia v. U.S. Air Force*, 533 F.3d 1170, 1176 (10th Cir. 2008) (“The discretionary function exception applies ‘whether or not the discretion involved be abused.’ Thus, the question of negligence is irrelevant.” (citations omitted)).

judgment on legislative or administrative policy decisions through tort law.” *Sabia v. State*, 164 Vt. 293, 307 (1995). “A discretionary function is an act which requires the exercise of judgment in its performance, or, in the alternative, where there is no specifically dictated course of action for the employee to follow.” *Amy’s Enterprises v. Sorrell*, 174 Vt. 623, 625 (2002).

The Vermont Supreme Court has adopted the two-part *Gaubert* test established by the U.S. Supreme Court for determining the applicability of the discretionary function exception. *See Searles v. Agency of Transp.*, 171 Vt. 562, 563 (2000) (adopting two-part test set out in *United States v. Gaubert*, 499 U.S. 315 (1991)). Under this test, the Court first determines “whether the challenged act involves an element of judgment or choice, or whether a statute, regulation, or policy specifically prescribes a course of action for an employee to follow.” *Searles*, 171 Vt. at 563 (citation and quotation marks omitted). If the latter, then “the discretion requirement is not met.” *Lane v. State*, 174 Vt. 219, 224 (2002).

If the former, then the Court determines “whether that judgment is of the kind that the discretionary function exception was designed to shield.” *Searles*, 171 Vt. at 563 (citation and quotation marks omitted). The exception is designed to protect “governmental actions and decisions based on considerations of public policy.” *Id.* (citation omitted). “[W]hen established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a government agent to exercise discretion, it must be presumed that the agent’s acts are grounded in policy when exercising that discretion.” *Lane*, 174 Vt. at 225.

The question then turns to whether the plaintiff can come forward with facts showing that the discretion exercised is not the type that is based on considerations of public policy. *Id.* “The focus of the court’s inquiry . . . is not on the official’s specific subjective intent in exercising the discretion conferred, but on the general nature of the actions taken and on whether they are susceptible to policy analysis.” *Estate of Gage v. State*, 2005 VT 78, ¶ 5, 178 Vt. 212, 216 (citation and quotation marks omitted).

#### 4. Analysis

The Board found that VTrans decided to deal with the deterioration of Route 100 in the relevant area, particularly during pothole season, by filling potholes as agency employees (including extra staff) became aware of them, knowing that the longer term solution awaited the 2019 repaving project. VTrans has broad statutory discretion over how it manages and maintains Vermont’s transportation infrastructure. *See, e.g.*, 19 V.S.A. §§ 7, 10, 10b, 10c, 10g. In contrast to this broad discretion, the Board made no determination to the effect that there is any statute, regulation, or policy that prescribed a specific course of action for an employee to follow in the situation VTrans confronted with the deterioration of Route 100 in February 2018. Because VTrans’ decisions appear to be discretionary in that regard, it must be presumed that its discretion was grounded in public policy and, therefore, immune to tort claims. *See Lane v. State*, 174 Vt. 219, 225 (2002) (decision whether to close road due to hazardous conditions a protected

discretionary function); *Searles v. Agency of Transp.*, 171 Vt. 562, 564–65 (2000)

(decision to place signs at intersections subject to discretionary immunity).

The record in this matter, however, is limited and in conflict as to whether or not there is evidence to counter that presumption. The Board’s ruling acknowledges that the State has limited resources to address problem roadways and that the VTrans officials involved sought and obtained additional personnel to address the roadway at issue. Board Decision at 5–6. Nevertheless, it also determined that “VTrans does not argue that it made a public policy decision to not repair potholes, or to allocate resources needed to repair potholes to other needs.” *Id.* at 6. Neither side has obtained a transcript of the proceedings, and the Board made no additional findings in that regard. The Court believes it critical to have additional findings in order to assess whether the maintenance policy followed for this portion of Route 100 was adopted in keeping with VTrans’ discretionary authority and for “policy” reasons. Similarly, the Board did not address the applicability of discretionary function to the State’s decision as to placement of the warning signs referenced in the negligence portion of the Board Decision.

Nor does the Board’s determination that this matter involves the “implementation” of policy dissuade the Court from its belief that additional findings are needed. The fact that a policy is implemented by State employees does not necessarily indicate that the discretionary function exception is inapplicable.

As our Supreme Court has held:

In reaching our conclusion [in *Estate of Gage v. State*, 2005 VT 78, ¶ 4, 178 Vt. 212], we rejected the plaintiff’s argument that mere “routine

ministerial tasks” were at issue, such as the removal of a beaver dam near the brook or the modest extension of a guardrail. *Id.* ¶ 12. We explained that “[m]inisterial maintenance decisions of the kind suggested by [the] plaintiff have been described as the mere implementation of a previous policy decision, or routine periodic maintenance mandated by explicit policy.” *Id.* (quotations omitted). We concluded that even if “the physical removal of a beaver dam . . . represent[ed] a routine maintenance operation, the actual decision to do so represent[ed] a policy judgment based on experience and the weighing of multiple factors.” *Id.* “This is precisely the kind of policy judgment that the discretionary-function exception was designed to protect from judicial second-guessing.” *Id.* (citing *Baum v. United States*, 986 F.2d 716, 724 (4th Cir. 1993) (holding that alleged negligence in maintaining guardrail posts implicated, at bottom, a decision “of how and when” to replace elements of highway system that was “inherently bound up in considerations of economic and political policy” within the discretionary-function exception)). We distinguished cases holding that the discretionary-function exception was inapplicable to “maintenance failures,” finding that these cases were “based on the absence of any evidence of an underlying policy judgment.” *Id.* ¶ 14.

*Lorman v. City of Rutland*, 2018 VT 64, ¶¶ 14–15, 207 Vt. 598, 608–09 (City’s decision to address failing water pipes through internal piping rather than full replacement is discretionary); see *Estate of Gage*, 2005 VT 78, ¶ 14, 178 Vt. at 220 (rejecting “planning” versus “operational” approach to discretionary function immunity and citing with favor *Hennes v. Patterson*, 443 N.W.2d 198, 204 (Minn.Ct.App.1989), for proposition that decision to remove snowbank from highway barrier was protected by sovereign immunity); *Brewer v. U.S.*, No. 08-196, 2011 WL 2708959, at \*7–8 (W.D. Pa. July 12, 2011) (applying discretionary immunity to insulate Park Service’s policy on addressing potholes in National Forest).

The Court retains authority to remand to an administrative body for additional proceedings and findings. *See, e.g., Town of Victory v. State*, 2004 VT 110, ¶ 24, 177 Vt. 383, 393 (“where court found property valuation methodology “fundamentally flawed,” court “should have remanded the matter back to PVR to determine the valuation anew after correcting the flaws the court found.”); *Conservation Law Foundation v. Burke*, 162 Vt. 115, 128 (1993) (noting that insufficient record for agency action typically warrants remand). It will follow that course in this case.

### ORDER

For the foregoing reasons, this matter is remanded to the Board for additional findings with regard to the issue of sovereign immunity. The Court will leave it to the Board to determine whether to accept additional evidence from the parties in connection with the remand.

Dated this \_\_ day of November 2019 at Montpelier, Vermont.

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Timothy B. Tomasi,  
Superior Court Judge