

SUPREME JUDICIAL COURT OF MAINE

Donovan v. City of Portland

2004 ME 70, 850 A.2d 319 · Decided June 1, 2004

OPINION

SAUFLEY, J.

SAUFLEY, C.J. [¶ 1] Kimberly Donovan appeals from a judgment of the Superior Court (Cumberland County, Humphrey, J.) granting the City of Portland's motion for summary judgment on the ground that the City was immune from suit because no exceptions to *320the immunity conferred by the Maine Tort Claims Act, 14 M.R.S.A. §§ 8101-8118 (2003 & Supp.2003), applied.

Donovan contends that the court erred when it held that the public building exception to the Maine Tort Claims Act, *id.* § 8104-A(2) (2003), did not apply, and that the Superior Court incorrectly struck her affidavit in support of her response to the City's statement of material facts.

Because we conclude that the Maine Tort Claims Act bars this action, we affirm the judgment. I. STANDARD OF REVIEW [¶ 2] "We review the grant of a motion for summary judgment *de novo*." *Lever v. Acadia Hosp. Corp.*, 2004 ME 35, ¶ 2, 845 A.2d 1178, 1179. "In our review, we consider the evidence and reasonable inferences that may be drawn from the evidence in the light most favorable to the party against whom the summary judgment has been granted in order to determine if the parties' statements of material facts and referenced record evidence reveal a genuine issue of material fact." *Id.* A genuine issue of material fact exists when sufficient evidence supports a factual contest requiring a fact-finder to choose between competing versions of the truth through a trial.

Burdzel v. Sobus, 2000 ME 84, ¶ 6, 750 A.2d 573, 575. [¶ 3] Consistent with our standard of review, we regard the facts presented by the parties in their statements of material facts in the light most favorable to Donovan. II. BACKGROUND [¶ 4] On November 9, 1999, Donovan went to Riverton Elementary School, a public building owned and maintained by the City, to pick up her children from an after-school program.

Donovan arrived at the school at 5:15 P.M. At that time it was dark and foggy. She parked in the U-shaped driveway in front of the main entrance, and began walking toward an entrance. While walking toward the entrance, Donovan fell and injured her arm. She had not reached the school building or its stairs when she fell.¹ [¶ 5] Donovan filed suit against the City alleging that the City was "negligent in its ownership, operation, maintenance or use of equipment, a building or appurtenances thereto, including but not limited to the maintenance of adequate lighting at the

Riverton School property.” There were several lights attached to the building near the entrance to the school, and Donovan alleges that’ the failure to have the lights illuminated was a cause of her fall. [¶ 6] The City filed a motion for summary judgment supported by a statement of material facts.

M.R. Civ. P. 56(h)(1). Donovan opposed the motion and filed an opposing statement of additional facts in which she referred to and included her own affidavit. M.R. Civ. P. 56(h)(2). The affidavit stated that there were six lights attached to the school at or near the entrance, but at her earlier deposition, Donovan had insisted that she did not remember how many lights were on the building.

In response, the City filed a motion to strike Donovan’s affidavit on the ground that it contradicted her past testimony. [¶ 7] After a hearing, the court ordered that Donovan’s entire affidavit be stricken from the record, and granted the City’s motion for summary judgment, holding that the City was immune and that the public building exception to the Maine *321 Tort Claims Act did not apply.

Donovan then brought this appeal. III. LEGAL ANALYSIS A. Governmental Immunity Pursuant to the Maine Tort Claims Act [¶ 8] The Maine Tort Claims Act provides that in general, “all governmental entities shall be immune from suit on any and all tort claims seeking recovery of damages.” 14 M.R.S.A. § 8103(1) (2003). Only express statutory exceptions will overcome a governmental entity’s immunity pursuant to section 8103(1).

Id. When we assess a claim of governmental immunity pursuant to the Maine Tort Claims Act, “ ‘immunity is the rule and exceptions to immunity are to be strictly construed.’ ” *Thompson v. Dep’t of Inland Fisheries & Wildlife*, 2002 ME 78, ¶5, 796 A.2d 674, 676 (quoting *New Orleans Tanker Corp. v. Dep’t of Transp.*, 1999 ME 67, ¶ 5, 728 A.2d 673, 675). [¶ 9] Donovan does not dispute that governmental immunity extends to sidewalks and parking lots.

Nor does she contend that her injuries were occasioned by a defect in the sidewalk or parking area itself. “A governmental entity is not liable for any defect, [or] lack of repair... in any... sidewalk, [or] parking area.... ” 14 M.R.S.A. § 8104-A(4) (2003); see also *Kitchen v. City of Calais*, 666 A.2d 77, 78 (Me.1995) (stating that “[a] parking area constitutes neither a public building nor an appurtenance to a public building”). [¶ 10] Instead, Donovan contends that the public building exception allows her claim to proceed because the lights that were not illuminated were appurtenant to the public building.

An exception to governmental immunity applies when a governmental entity is negligent in “the construction, operation or maintenance of any public building or the appurtenances to any public building.” 14 M.R.S.A. § 8104-A(2) (emphasis added).

Thus, according to Donovan, although the City is immune from liability for any defect in the area where she fell, when it attached lighting to the public building, it became responsible for any deficiency in that lighting, even in areas where immunity otherwise applied. [¶ 11] We are assisted in the analysis of this case by the instructive case of *Swallow v. City of Lewiston*, 534 A.2d 975 (Me.1987).

There, the plaintiff fell on the poorly lit curb between the walkway and parking area near a public building. *Id.* at 975-76. She alleged that she fell because of the inadequate exterior lighting of the building. *Id.* at 976.

We were called upon to determine whether the City of Lewiston had waived its immunity by maintaining insurance coverage. *Id.* Lewiston's insurance policy contained an exclusion providing that the insurance company would not cover injuries resulting from defects or lack of repair to sidewalks, among other things, and expressly stated that the exclusion coincided with the immunity provided pursuant to the predecessor to 14 M.R.S.A. § 8104-A(4).² *Swallow*, 534 A.2d at 976 & n. 2. [¶ 12] Noting that *Swallow's* claim was based on insufficient lighting, not a disrepair or defect in the sidewalk itself, we held that "any immunity granted the city for insufficient lighting of a walkway is created by the general declaration of immunity set forth in section 8103(1) and is not the subject of an exception in section 8104 [predecessor to current section 8104-A]." *Id.* at 977 (emphasis added).³ The statute then in effect also included an exception to immunity for a governmental entity's "operation, or maintenance of any public building or the appurtenances thereto." 14 M.R.S.A. § 8104(2) (1980), repealed and replaced by P.L.

1987, ch. 740, §§ 3-4. Thus, we unequivocally concluded in *Swallow* that the lighting over the walkway did not fall within the appurtenance provision of the public building exception.⁴ [¶ 13] Our analysis in *Swallow* clarifies that municipalities are immune from liability for injuries resulting from lighting deficiencies above sidewalks and parking areas pursuant to the general provision of governmental immunity, codified at 14 M.R.S.A. § 8103(1), to which no exception applies. [¶ 14] The First Circuit confronted this issue in a recent Maine case with nearly identical facts: *Campbell v. Washington County Technical College*, 219 F.3d 3 (1st Cir.2000).

There, the First Circuit affirmed the holding of the United States District Court for the District of Maine (Brody, J.) that the college was immune from suit for failure to adequately illuminate a fire lane that was not excepted from governmental immunity. *Id.* at 5-6.

The fire lane in that case provided the sole passageway to the second-floor apartments where the plaintiff lived. *Id.* at 5. Although lights on poles along the lane had once illuminated the lane, lights attached to the residence hall had replaced them. *Id.* When the plaintiff slipped and fell on the lane, she sought compensation from the college, claiming the lights on the building failed to illuminate the lane properly.

Id. The District Court held, and the First Circuit agreed, that because the college was immune from liability for any defects in the lane,⁵ its liability could not be expanded by assertions of inadequate lighting, even where the lighting was attached to a public building. Id. at 6. [¶ 15] Consistent with our holding in *Swallow*, and reaching a result that is consistent with the result in *Campbell*, we hold that the Maine Tort Claims Act's public building exception to governmental immunity does not apply when the plaintiff falls on a sidewalk or parking area while the exterior lights on a nearby public building are unlit.

If we were to hold otherwise, municipalities would be exposed to litigation in an increasing radius around any outdoor lighting that the municipalities might provide to ensure that stairs and other building appurtenances remain safe. Such a holding would run counter to the strict statutory construction required in interpreting the governmental immunity statutes.

See *Thompson*, 2002 ME 78, ¶ 5, 796 A.2d at 676. B. Striking of the Affidavit [¶ 16] Donovan also argues that the court erred in striking her affidavit. Whether or not the court properly struck her affidavit, however, the facts disputed by the affidavit do not affect our conclusion regarding the City's immunity.

The City is immune, regardless of the number of lights or the precise location of Donovan's fall (i.e., on the curb versus on the walkway). Because the facts placed in dispute by Donovan's stricken affidavit are immaterial to the question of governmental immunity, and because we affirm that the City is immune in the present case, we need not reach Donovan's contention that the court erred in striking her affidavit.

Any claimed error in that regard is harmless. See M.R. Civ. P. 61. The entry is: Judgment affirmed. ALEXANDER, J., files dissenting opinion, in which DANA and CALKINS, JJ., join.. The parties dispute whether Donovan fell on the curb or on the walkway. This question of fact is immaterial to the governmental immunity analysis that finally determines Donovan's tort claim..

The statute construed in *Swallow v. City of Lewiston*, 534 A.2d 975 (Me.1987), provided, in relevant part, that "[n]otwithstanding section 8104 ['Exceptions to immunity'], a governmental entity shall not be liable for any claim which results from... [a]ny defect, [or] lack of repair... in any... sidewalk, [or] parking area...." 14 M.R.S.A. § 8103(2)(J) (1980), as amended by P.L.

1985, ch. 569, § 3; P.L. 1985, ch. 758, § 2..Because insufficient lighting was not a defect in the sidewalk for the purposes of the predecessor to section 8104-A(4), immunity for the lighting defect was conferred not by that statute, but by the general grant of immunity to municipalities pursuant to section 8103(1). *Swallow*, 534 A.2d at 977.

As a result, we concluded that the coverage exclusion contained in the City's insurance policy did not apply because the coverage exclusion was limited by the policy language to being coextensive with the predecessor to section 8104-A(4), and was not coextensive with the general immunity

provisions of the statute. *Id.* We therefore concluded that although Lewiston was otherwise immune from liability for the lighting defect, it had waived its immunity by maintaining insurance that covered the lighting defect and was, therefore, liable to the extent of its insurance.

Id. To hold otherwise in the present case would require us to overrule our holding in *Swallow*. We concluded in *Swallow* that Lewiston was immune from suit pursuant to the general immunity provision of section 8103(1), not pursuant to the predecessor to section 8104-A(4), because any lighting deficiency was not a defect in the sidewalk. 534 A.2d at 977. By contrast, in *Campbell v. Washington County Technical College*, 219 F.3d 3, 6 (1st Cir.

2000), the First Circuit affirmed the District Court's holding that the public college's immunity arose from section 8104-A(4) because any lighting deficiency was a defect in the lane. We need not fully address this conflict between the cases because under either analysis, the governmental entity is immune.