

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SHIRLEY CAMPBELL and)
LAUREN CAMPBELL,)
)
Plaintiffs)
)
v.) Civil 98-cv-247-B
)
WASHINGTON COUNTY)
TECHNICAL COLLEGE, et al.,)
)
Defendants)

ORDER AND MEMORANDUM

BRODY, District Judge

In this slip and fall case, Shirley Campbell ("Campbell") alleges that Washington County Technical College ("WCTC" or "the College"), James R. Morrell ("Morrell"), and Maurice E. Marden ("Marden") were negligent in maintaining a fire lane upon which she slipped. Her husband, Lauren Campbell, files a claim for loss of consortium. Before the Court is Defendants' Motion for Summary Judgment, which asserts that all Defendants are immune from liability under the Maine Tort Claims Act. For reasons stated below, Defendants' Motion is GRANTED.

I. SUMMARY JUDGMENT

Summary judgment is appropriate in the absence of a genuine issue as to any material fact and when the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). An issue is genuine for these purposes if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A material fact is one that has "the potential to affect the outcome of the suit under the applicable law." Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st Cir. 1993). Facts may be drawn from "the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits.” Fed. R. Civ. P. 56(c). “Fed. R. Civ. P. 56 does not ask which party's evidence is more plentiful, or better credentialled, or stronger.” Greenburg v. Puerto Rico Maritime Shipping Auth., 835 F.2d 932, 936 (1st Cir. 1987). Rather, for the purposes of summary judgment the Court views the record in the light most favorable to the nonmoving party. See McCarthy v. Northwest Airlines, Inc., 56 F.3d 313, 315 (1st Cir. 1995).

II. STATEMENT OF FACTS¹

The Campbells operated a snack bar on the campus of WCTC, a college of the Maine Technical College System. As part of their arrangement with the College, they were provided with a second-floor rear apartment in a residence hall on campus. Shirley Campbell contends that on the evening of February 2, 1998, she was walking to this apartment when she fell on an icy and insufficiently illuminated fire lane.

The fire lane is a paved one-lane roadway that connects the back of the residence hall to a larger campus roadway. Installed at the same time the residence hall was built, the fire lane serves as the sole passage to the walkways and ramps leading to the entrances of the second floor apartments in the rear of the residence hall. Residents of these apartments use this fire lane to load and unload heavy items to and from their cars, and pedestrians use the fire lane as a walkway in order to reach the building's rear apartments. For emergency, maintenance, and police vehicles, the fire lane provides access to the backside of the residence hall.

Prior to 1992, WCTC illuminated the fire lane by placing lights on poles that extended alongside the length of the fire lane. In 1992, the College removed these poles and lights, and instead attached four lights to the residence hall for the purpose of illuminating the fire lane. The

¹ The Statements of Material Facts submitted by the parties were not in full compliance with Local Rule 56, requiring the Court to look to the record.

College repositioned the lights primarily to remedy poor and unsafe electrical service, but also to make plowing the fire lane easier.

At the time of Campbell's fall, WCTC's maintenance department was not responsible for plowing and sanding the fire lanes and parking lots on campus. Instead, the College hired two faculty members, Defendants James Morrell and Maurice Marden, to plow and sand those areas that winter. Morrell was an instructor in heavy equipment operations and Marden was an instructor in the automotive department. Plowing and sanding were not part of their duties as WCTC instructors. Nevertheless, since they were familiar with this machinery as instructors, the College asked them to provide this service.

The snow-removal contracts between WCTC and Morrell and Marden specified that, with regard to these duties, they were independent contractors and not employees of WCTC. These contracts provided that WCTC would pay Morrell and Marden \$25 per hour, but would not pay either of them more than \$3500 for the season's services. WCTC processed Morrell and Marden's pay for these services through the College's normal payroll system, and combined their plowing and teaching income in their paychecks. This combined income was used to calculate their group life insurance benefits. For their plowing services in the winter of 1997-1998, Marden was paid \$3140 and Morrell was paid \$2440.

For the most part, Marden and Morrell plowed and sanded when conditions required, deciding between themselves who would do what work. Occasionally, WCTC administrators told them to plow and sand certain areas of campus. The College provided Marden and Morrell with a plow truck and sander, and the town of Calais, through an arrangement with the College, provided the sand, which Morrell and Marden would pick up.

III. DISCUSSION

A. The Maine Tort Claims Act

The Maine Tort Claims Act ("MTCA" or "Act") provides that, "except as otherwise expressly provided by statute, all governmental entities shall be immune from suit on any and all tort claims seeking recovery for damages." 14 M.R.S.A. § 8103 (1980 & West Supp. 1998). As governmental entities, colleges of the Maine Technical College System are generally immune from tort suits under the Act. See § 8102(2), (4). The MTCA also exempts government employees from liability for discretionary functions and acts within the course and scope of their employment, see § 8111, but specifically excludes independent contractors from the definition of employees. See § 8102(1).

B. Immunity and WCTC

Section 8104 of the MTCA contains exceptions to the general rule of governmental immunity, and Plaintiffs allege that the specific exceptions contained in sections 8104-A(2) and 8104-A(4) preclude a finding that WCTC is immune in this case. Section 8104-A(2), the public building exception to immunity, provides that "[a] governmental entity is liable for its negligent acts or omissions in the construction, operation or maintenance of any public building or the appurtenances to any public building." Id. at § 8104-A(2). Section 8104-A(4) provides the roadway exception to immunity, and it states that:

A governmental entity is liable for its negligent acts or omissions arising out of and occurring during the performance of construction, street cleaning or repair operations on any highway, town way, sidewalk, parking area, causeway, bridge, airport runway or taxiway, including appurtenances necessary for the control of those ways including, but not limited to, street signs, traffic lights, parking meters and guardrails. A governmental entity is not liable for any defect, lack of repair or lack of sufficient railing in any highway, town way, sidewalk, parking area, causeway, bridge, airport runway or taxiway or in any appurtenance thereto.

Id. at § 8104-A(4).

The Maine Supreme Court has narrowly construed these exceptions to governmental immunity, see Swallow v. City of Lewiston, 534 A.2d 975, 976 (Me. 1987) (citing Clockedile v. State Department of Transportation, 437 A.2d 187, 189 (Me. 1981)), and has specifically refused to expand the exceptions involving public buildings and roadways. See Lovejoy v. State, 544 A.2d 750, 751 (Me. 1988) (declining "to stretch the 'public building' exception under the Maine Tort Claims Act"); Goodine v. State, 468 A.2d 1002, 1004 (Me. 1983) (refusing "to adopt a forced construction of section 8104(4) which would extend its operation beyond what the Legislature intended").

In asserting that the public building exception applies to this case, Plaintiffs argue that the fire lane and the lights that shone upon it were appurtenant to the residence hall. Plaintiffs contend that Defendants were negligent in the maintenance and operation of the fire lane, since ice was allowed to accumulate on an insufficiently illuminated fire lane. In support of this contention, Plaintiffs assert that the Court should define appurtenant according to its plain meaning, and reject the Black's Law Dictionary definition cited as appropriate by at least one Maine Court.² See O'Keefe v. Maine Technical College System, No. CV-98-118, slip op. at 2 (Me. Super. Ct. Mar. 31, 1999). For this proposition, Plaintiffs cite Goodine, which held that words "not expressly defined in the [Maine Tort Claims Act] must be given their plain and

² Black's Law Dictionary (5th ed. 1979), defines appurtenance as "[t]hat which belongs to something else, an adjunct, an appendage." Plaintiffs propose the following definition from The American Heritage Dictionary of the English Language (New College Ed. 1978):

appurtenance n. 1. Something added to another, more important thing: an appendage; accessory.

natural meaning and should be construed according to their natural import and approved usage." Goodine, 468 A.2d at 1004.

1. The Fire Lane

Relying on their "plain meaning" definition of appurtenance, Plaintiffs contend that the fire lane is appurtenant to the residence hall because it was installed at the time the residence hall was constructed, it serves as an access road to the residence hall for both emergency vehicles and pedestrians, and it is "wholly contained within the campus."

Maine Courts have defined the parameters of the public building exception, and these findings lead to the conclusion that the fire lane is not appurtenant to the residence hall. In Kitchen v. City of Calais, 666 A.2d 77 (Me. 1995), the Maine Supreme Court ruled that, as a matter of law, the raised curbing in a parking lot outside the Calais police station was not appurtenant to that building.³ See id. at 78. The court reasoned that to find the curbing in the parking area to be appurtenant to the police station under the public building exception would make the provisions of sections 8104-A(2) and 8104-A(4) redundant, since parking area liability is governed under section 8104-A(4). See id. at 78-79. Since there was no evidence of construction, street cleaning, or repair operations taking place in the parking area, the court found that no applicable immunity exception existed under section 8104-A(4) and upheld a lower court decision that ruled that the City was immune. See id. at 78.

³ The plaintiff, who was injured when she tripped over the curbing, alleged that the curbing also served as a flower box and was therefore appurtenant to the police station. See Kitchen, 666 A.2d at 78. The Maine Supreme Court found that the flower box allegation was not supported by reference to the record, and that, as a matter of law, the parking lot curbing was not appurtenant to the building. See id.

Recently, the Maine Superior Court for Cumberland County decided a case that was almost identical to the one before us. See O'Keefe v. Maine Technical College System, No. CV-98-118 (Me. Super. Ct. Mar. 31, 1999). In that case, the plaintiff, while on a student-guided tour of the campus, slipped on an icy paved walkway that extended from the Culinary Arts building to a campus driveway. See id. at 1. Citing Kitchen, the court granted summary judgment for the defendant and ruled that to find a paved walkway to be a physical appendage to a building would extend the statutory exception beyond its reach and would render section 8104-A(2) and section 8104-A(4) redundant. See id. at 3.

Kitchen and O'Keefe are consistent with other cases that have narrowly construed the public building exception to governmental immunity. See Stretton v. City of Lewiston, 588 A.2d 739, 741 (Me. 1991) (holding that, as a matter of law, a soccer field is not appurtenant to a school); Lovejoy, 544 A.2d at 751 (holding that, as a matter of law, a camouflaged underground assault shelter used for military training was not a public building). Given this precedent, the Court concludes that the fire lane is not appurtenant to the residence hall and therefore does not fall within the public building exception of section 8104-A(2).

If any exceptions to immunity apply with regard to the fire lane, they are the exceptions regarding various roadways in section 8104-A(4), not the exceptions regarding public buildings. The parties agree on the functions of the fire lane. It provides access to emergency vehicles, pedestrians, residents who are moving heavy items, maintenance vehicles, and police cars on patrol. These functions bring the fire lane within the purview of section 8104-A(4), which governs "highway[s], town way[s], sidewalk[s], parking area[s], [and] causeway[s]", not the public building exception of section 8102-A(2). Furthermore, the public building exception does

not apply merely because the fire lane was built at the time the residence hall was constructed. Parking lots, which clearly fall within section 8104-A(4), are usually constructed along with the building that they are meant to service. Finally, the fact that the fire lane is contained wholly within the WCTC campus does not bring the fire lane within the public building exception, since parking lots, sidewalks, and public buildings are often all located on the same piece of government-owned property.

As Plaintiffs appear to concede in their Memorandum in Opposition to the Motion for Summary Judgment, the exceptions to governmental immunity under section 8104-A(4) for roadway construction, street cleaning, or repair operations do not exist in this case. There is no evidence that Defendants were engaged in any of those activities. Moreover, the Maine Supreme Court has specifically held that snow and ice removal do not fall within the definition of "street cleaning." See Goodine, 468 A.2d at 1004 (construing section 8104(4), the predecessor to section 8104-A(4)).

2. The Lighting

Plaintiffs also allege that since the lights that illuminated the fire lane were attached to the residence hall, they were appurtenant to it, and therefore WCTC was negligent for providing insufficient lighting of the fire lane.

As already noted, since Campbell's fall occurred on the fire lane, the public building exception does not apply, and no exception to WCTC immunity exists under section 8104-A(4). Furthermore, section 8104-A(4) explicitly provides that a governmental entity shall not be liable for "any defect" with regard to roadways and their appurtenances. See § 8104-A(4). If the failure

to make visible the ice on the fire lane constitutes a defect, then the College is immune.⁴

Additionally, it would be unreasonable to construe sections 8104-A(2) & (4) as providing the College with immunity as long as the lights that illuminated the fire lane were on poles, but once the College moved the lights to the building, it opened itself up to liability for accidents on the fire lane.

C. Immunity and James R. Morrell and Maurice E. Marden

With regard to Morrell and Marden, Plaintiffs argue that they were independent contractors, not state employees, and as such are not granted immunity under the Maine Tort Claims Act. Maine Courts apply an eight-factor test to determine whether or not a worker is an independent contractor or an employee.⁵ The test was laid out in Murray's Case, 154 A. 352 (1931) and is as follows:

- (1) the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price;
- (2) independent nature of his business or his distinct calling;
- (3) his employment of assistants with the right to supervise their activities;
- (4) his obligation to furnish necessary tools, supplies, and materials;
- (5) his right to control the progress of the work except as to final results;
- (6) the time for which the workman is employed;

⁴ In Swallow v. City of Lewiston, 534 A.2d 975 (Me. 1987), the Maine Supreme Court decided that insufficient lighting of a walkway did not constitute a defect warranting immunity under section 8103(2)(J), a since-repealed section of the MTCA that provided examples of immunity notwithstanding section 8104. Id. at 977 (construing 14 M.R.S.A. § 8103(2)(J) (1980) (repealed 1987)). Because that case relied on a repealed section of the MTCA that contained different wording than current section 8104-A(4), and because the essence of that case dealt with an insurance coverage dispute, Swallow does not preclude this Court from finding that the insufficient lighting of the fire lane was a defect under section 8104-A(4).

⁵ Plaintiffs' claim that WCTC's plowing contracts with Morrell and Marden, which labeled them as "independent contractors", control this issue. How the parties label their status does not determine their legal relationship.

- (7) the method of payment, whether by time or by job;
- (8) whether the work is part of the regular business of the employer.

Id. at 354. The most important factor is the right to control, see Taylor v. Kennedy, 719 A.2d 525, 528 (Me. 1998) (citations omitted), although no one factor is decisive. See Northeast Ins. Co. v. Soucy, 693 A.2d 1141, 1144 (Me. 1997).

The first factor weighs in favor of employee status. Both Morrell and Marden did plow and sand under a contract, but they were not paid a fixed price, despite Plaintiffs' assertions that Morrell and Marden each received lump-sum contracts for \$3500. The facts clearly demonstrate that they contracted for, and were paid, \$25.00 per hour. Their contracts with WCTC did limit their total seasonal intake to \$3500 each (the equivalent of 140 hours of work), which suggests that they took some risk if snow removal required them to work more than 140 hours. The record shows, however, that they were paid well under that amount, with Morrell earning \$2440 for the 1997-1998 season, and Marden earning \$3140 for same period.

The second factor also weighs in favor of employee status. Plowing and sanding were not independent callings for Morrell and Marden. They were instructors in heavy equipment and automotive technology, and taking on this seasonal activity for their employer was a natural outgrowth of their positions in those departments. Indeed WCTC hired them because of their familiarity with these machines from their classes.

The third factor weighs in favor of independent contractor status. The contract provided that Morrell and Marden could hire their own personnel to help them plow and sand campus roadways. It appears that neither of them did hire outside help.

The fourth factor weighs strongly in favor of employee status. Plaintiffs cite the first page of the form contract, which specified that Marden and Morrell were to provide "all necessary . . .

facilities, materials, and services," to argue that they were independent contractors. However, a rider, referenced in the very next sentence of the contract, provided that WCTC was to provide the plow truck and the sander. The evidence clearly shows that WCTC did provide the plow truck and the sander used by Morrell and Marden.

The fifth factor is not dispositive. Plaintiffs argue that Morrell and Marden decided when and where to work, and how to divide up their responsibilities. It is more accurate to say that the weather dictated when they worked, for the contract required them to plow "as needed." At times, WCTC administrators contacted them to tell them if an area needed plowing and/or sanding.

The sixth factor weighs in favor of employee status. Both Morrell and Marden were full-time employees of WCTC. They took on these plowing duties because they taught courses that involved the relevant machinery.

The seventh factor also weighs in favor of employee status. The hourly wages that Morrell and Marden received for this work were included in their regular teaching paychecks from WCTC. The College deducted state and federal taxes from the wages it paid these men for the plowing. Their plowing and sanding wages were added to their teaching salary in order to calculate their group life insurance benefits. Independent contractors are typically not entitled to such benefits.

The eighth factor is not dispositive. It is true that the College is not in the business of plowing. Nonetheless, college campuses operate in many ways like a municipality. As such, colleges must have maintenance departments to provide for a fully functioning campus.

No one of these factors is controlling. The evidence establishes that two teachers were asked to take on some extra responsibility for their employer on a seasonal basis. They were

familiar with WCTC's plowing and sanding equipment, making them the logical choice to provide these services. Morrell and Marden were not professionals who hired their plowing and sanding services out to the highest bidder. The fact that they signed a form contract labeling them as independent contractors is not dispositive or even relevant. It appears that Morrell and Marden signed those contracts merely for accounting purposes. Their pay for these services was included in their regular teaching paychecks, with federal and state taxes deducted, and their pay from this work increased some of their benefits. Therefore, the Court concludes that Morrell and Marden were employees, and not independent contractors, of WCTC. As government employees, they are entitled to immunity under the Maine Tort Claims Act. See 14 M.R.S.A. §§ 8102(1), 8111.

For these reasons, Defendants' Motion for Summary Judgment is GRANTED.⁶

SO ORDERED.

MORTON A. BRODY
United States District Judge

Dated this 28th day of October, 1999.

⁶ Since Lauren Campbell's loss of consortium claim is derivative of Mrs. Campbell's claim, his claim must also be denied.