IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

ROBIN BARTLEY and ROBERT BARTLEY,	:	
	:	**C.A. No: 08C-08-017 (RBY)**
Plaintiff,	:	
v.	:	
NORFOLK SOUTHERN CORPORATION, NORFOLK SOUTHERN RAILWAY COMPANY and TOWN OF TOWNSEND, DELAWARE,	:	
Defendants.	:	

Submitted: June 17, 2009
Decided: August 6, 2009

Alexander W. Funk, Esquire, Hudson, Jones, Jaywork & Fischer, LLC, Dover, Delaware for Plaintiff.

Daniel F. Wolcott, Jr., Esquire, Potter, Anderson & Corroon LLP, Wilmington, Delaware, for Defendants Norfolk Southern Corporation, Norfolk Southern Railway Company.

Lauren A. Pisapia, Murphy & Landon, Wilmington, Delaware for Defendant Town of Townsend, Delaware.

Upon Consideration of Defendant
Town of Townsend's Motion for Reconsideration
DENIED

OPINION AND ORDER

Young, J.

Bartley v. Norfolk Southern Corporation, et al.
C.A. No: 08C-08-017 (RBY)
August 6, 2009

I: SUMMARY

This is the Court's reconsideration of Defendant Town of Townsend's motion for summary judgment. The Court informed the parties that it would decide the motion on the basis of the submitted legal memoranda and arguments from the motion hearing. After considering the presented facts and the statutory immunity available to Townsend, the Court **DENIES** Townsend's motion.

II: FACTS

On August 22, 2006, Robin Bartley was getting out of her car in the parking lot adjacent to the United States Post Office in Townsend, Delaware. While walking across the lot from her car to the Post Office, she fell. The fall allegedly resulted in several injuries. Bartley claims to have tripped over a pothole or debris that was in the lot.

The parking lot was in an area owned by Norfolk Southern Railway Company. Norfolk allowed people to park in the lot for the purposes of using the Post Office. Bartley's Answers to Form 30 Interrogatories noted that there was a gentlemen's agreement concerning the maintenance of the parking lot. This agreement gave Townsend control of the lot, including the responsibility of cleaning and maintaining the parking lot. In exchange, Norfolk allowed Post Office patrons to use its lot.

III: STANDARD OF REVIEW

Motions for summary judgment require the moving party to show that there are no genuine issues of material fact and that the moving party is entitled to judgment

as a matter of law.[1] The Court must consider the facts and reasonable inferences drawn therefrom in a light most favorable to the non moving party.[2] Summary judgment is appropriate when, after analyzing the evidence, the Court finds no disputes of fact and an entitlement to judgment.[3] "If it seems desirable[,]" however, "to inquire more thoroughly into the facts to clarify the application of the law to the circumstances[,]" summary judgment will not be granted.[4]

IV: ANALYSIS

Initially, the Court denied summary judgment, holding that Plaintiff's accident fit within an exception to County and Municipality Tort Immunity.[5] The Court reasoned that because the exceptions listed in 10 *Del. C.* § 4012 were finite and direct, those exceptions defeated the immunity granted in 10 *Del. C.* § 4011.[6] Section 4011(b) specifically states that the examples of immunity listed therein are **notwithstanding** the exceptions listed in section 4012. Section 4011 goes on to state

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[1] Super. Ct. Civ. R. 56(c).

[2] *Singleterry v. H.H. Moore, Jr., Trucking Co., Inc.*, 1996 WL 527313, at *1 (Del. Super.) (citing Super. Ct. Civ. R. 56(c)).

[3] *See* Super. Ct. Civ. R. 56(c).

[4] *Singleterry*, 1996 WL 527313, at *1 (citing *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962)).

[5] *Bartley v. Norfolk S. Corp.*, Del. Super., C.A. No. 08C-08-017, Young, J. (June 15, 2009) (Mem. Op.).

[6] *Id.*

that the list included in 4011(b) is not intended to be an exclusive list, giving the impression that County and Municipality Immunity operates as a blanket immunity to the acts of those authorities.

The exact language of section 4011(b) is:

> (b) Notwithstanding § 4012 of this title, a governmental entity shall not be liable for any damage claim which results from:
> (1) The undertaking or failure to undertake any legislative act, including, but not limited to, the adoption or failure to adopt any statute, charter, ordinance, order, regulation, resolution or resolve.
>
> (2) The undertaking or failure to undertake any judicial or quasi-judicial act, including, but not limited to, granting, granting with conditions, refusal to grant or revocation of any license, permit, order or other administrative approval or denial.
>
> (3) The performance or failure to exercise or perform a discretionary function or duty, whether or not the discretion be abused and whether or not the statute, charter, ordinance, order, resolution, regulation or resolve under which the discretionary function or duty is performed is valid or invalid.
>
> (4) The decision not to provide communications, heat, light, water, electricity or solid or liquid waste collection, disposal or treatment services.
>
> (5) The discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalines, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water, except as provided in subdivision (3) of § 4012 of this title.
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> (6) Any defect, lack of repair or lack of sufficient railing in any

> highway, townway, sidewalk, parking area, causeway, bridge, airport runway or taxiway, including appurtenances necessary for the control of such was including but not limited to street signs, traffic lights and controls, parking meters and guardrails.
>
> Paragraphs (1) to (6) of this subsection to which immunity applies are cited as examples and shall not be interpreted to limit the general immunity provided by this section.

Townsend's argument for summary judgment is two fold. First, Townsend claims that the exception in section 4012(2) is not applicable. Townsend argues that Townsend did not own or lease the Post Office building or parking lot, therefore section 4012 cannot be applied to it. This argument seems to stem from the requisite narrow application of section 4012 advanced through the case law. In support of this argument, Townsend presents an authority addressing injuries which occurred in or on property owned by the county or municipality.

Townsend's second argument is that, even if the Court allows the exception of 4012(2) to apply to buildings not owned by the town, section 4012(2) is insufficient to establish liability because section 4011(b) is **notwithstanding** section 4012. Townsend contends that this means section 4011(b)'s general blanket immunity supersedes any exception forwarded in section 4012. This dispute was central to Townsend's motion for re-argument.

With respect to Townsend's public building argument, the previous decision on the issue remains.[7] In its most basic sense, "public building" means any building

[7] *Id.*

held open for use by the general public.[8] A Post Office certainly is within that definition.

This still leaves two conclusions for the Court to reach on Townsend's motion for summary judgment. First, does Plaintiff's fall fit within section 4012(2)'s exception? If so, does section 4011(b)'s non-exclusive list of immunities supersede section 4012's exceptions, working to preclude the possibility of Plaintiff's recovery from Townsend?

The Court cannot determine at this stage whether Plaintiff's injury falls within the exception of section 4012(2). That exception states that a governmental entity will be liable for negligent acts "(2) In the construction, operation or maintenance of any public building or the appurtenances thereto, except as to historic sites or buildings, structures, facility or equipment designed for use primarily by the public in connection with public outdoor recreation."[9] This does not appear to be a case concerning construction or operation. So, for Plaintiff's accident to fit within the exception, the fall must have been caused by Townsend's maintenance of the parking lot. The presented facts do not permit such a determination. It is unclear whether Plaintiff tripped over a pothole or trash or other debris.

If Plaintiff's fall were caused by a pothole, that arguably does not fall within the exception. A pothole is more akin to a defect, as referenced specifically in section

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[8] *Id.*

[9] 10 *Del. C.* § 4012(2).

4011(b)(6), than a lack of maintenance.[10] A lack of maintenance involves the deficient maintaining of something. A lack of maintenance reasonably could include a failure to clean or sweep up the lot.[11] It does not, especially when considering the strict application section 4012 must take,[12] stretch to the presence of a pothole.

Along the same lines, mere debris would not reach the level of a defect in the parking lot.[13] Therefore, if Plaintiff's accident occurred because of trash or debris scattered about the parking lot, it would not follow to hold that her fall was the result in a defect in the lot, which would trigger section 4011(b)(6) and seemingly defeat section 4012's exceptions.

It is necessary to inquire more into the facts of Plaintiff's fall at this point. Pursuant to the above standard of review, the Court will not grant summary judgment regarding whether Plaintiff's fall was caused by debris or a defect. That being said, if it is ultimately determined that Plaintiff's fall was the result of a pothole or other defect-like inconsistency in the surface of the parking lot, Townsend will not be foreclosed of the opportunity to make the necessary motions concerning the

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[10] *See Buckalew v. Cranston Heights Fire Co.*, 1987 WL 10272, at *2 (Del. Super.) ("The term 'defect' connotes an imperfection that arises at the birth of the object or area in which it is contained. It is present at the inception and is of a continuous nature. It is a structural or integral imperfection." (internal citations omitted)).

[11] *See Id.* at *3 (holding that failure to remove snow and ice may have been a lack of maintenance for purposes of municipal immunity).

[12] *See Fiat Motors of North America, Inc. v. City of Wilmington*, 498 A.2d 1062, 1066 (Del. 1985).

[13] *Buckalew*, 1987 WL 10272, at *2.

applicability of section 4011(b).

The more pressing issue is whether the language of section 4011(b) supersedes any exceptions in section 4012. Section 4011(b)'s declaration that the examples are notwithstanding section 4012 raises a difficulty in determining the proper application of the County and Municipal Tort Claims Act.[14] At least facially, the inclusion of several specific exceptions to municipal immunity would lead to the conclusion that the exceptions apply to enervate section 4011(b)'s immunity. When exceptions exist, they generally limit the legislation to which those exceptions apply. The Court must contrast that theory with the language of section 4011(b), however. Because section 4011(b) states that it is "notwithstanding" section 4012, it would appear to apply immunity in those situations regardless of what exceptions are listed in section 4012.

It belies common sense that the legislature would enact one section of an act to include narrow and strict exceptions to a broader section that precedes it, when that preceding statute seems to indicate that it is applicable **regardless** of any exceptions created by the same legislature. In performing its duty of statutory interpretation, the Court cannot read one section, and completely disregard another when those sections work together to create an entire act.[15]

Furthermore, previous precedents have considered the application of a section

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[14] 10 *Del. C.* §§ 4010-4013.

[15] *See Daniels v. State*, 538 A.2d 1104, 1110 (Del. 1988) ("Statutes are passed by the General Assembly as a whole and not in parts. Consequently, each part of the statute must be read in context to produce a harmonious whole.").

4012 exception as it related to the more general section 4011.[16] In some of these cases, the Courts have been unwilling to extend the narrow section 4012 exceptions to certain fact patterns.[17]

In a seminal case on the County and Municipality Tort Claims Act, *Fiat Motors v. City of Wilmington*, the Delaware Supreme Court noted "that [section] 4011(b) lists specific examples of activities which are to be subject to municipal immunity, notwithstanding the exceptions to the broad rule of municipal immunity which are set forth in [section] 4012."[18] The Court also stated that:

> In [section] 4012 the legislature has listed the activities for which a municipal government is not to have immunity. This list includes those activities which were typically considered to be the high risk activities as to which the individual citizen should have a right to sue. Significantly, the General Assembly did not state that the list of these exceptions to immunity was non-exclusive, as it did with regard to the list of examples of immune activities, set forth in [section] 4011(b). In view of these statutory provisions, and in the absence of an explicit statute indicating otherwise, **the activities listed in [section] 4012 are the only activities as to which municipal immunity is waived**.[19] (emphasis added)

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[16] *Heaney v. New Castle County*, 672 A.2d 11 (Del. 1995); *Triple C Railcar Service, Inc. v. City of Wilmington*, 630 A.2d 629 (Del. 1993); *Sussex County v. Morris*, 610 A.2d 1354 (Del. 1992); *Sadler v. New Castle County*, 565 A.2d 917 (Del. 1989); *Fiat Motors*, 498 A.2d 1062.

[17] *Triple C*, 630 A.2d at 632; *Sadler*, 565 A.2d at 922.

[18] *Fiat Motors*, 498 A.2d at 1066.

[19] *Id*.

Though the Court was determining whether the exceptions applied to governmental or proprietary activities, the interpretation of the limited number of narrow exceptions to municipal immunity is clear.[20]

Another seminal case on municipal immunity is *Sadler v. New Castle County*.[21] In *Sadler*, the plaintiff brought suit for injuries sustained during an alleged negligent rescue performed by the Talleyville Fire Department.[22] The plaintiff attempted to avoid the County's immunity by invoking the exception in section 4012(1) concerning equipment.[23] Ultimately, the Delaware Supreme Court declined to waive immunity.[24]

> claim of injury [was] based on the judgment made by rescue personnel to transport him across the river, rather than to negotiate the climb to the top of the cliff. The equipment to be used in either course, or any other reasonably available, was incidental to the underlying judgment. . . . There [was] no claim that other more suitable equipment could have been used.[25]

In making this determination, the Court did not discuss the apparent conflict

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[20] *Id*.

[21] *Sadler*, 565 A.2d 917.

[22] *Id*. at 919.

[23] *Id*. at 521.

[24] *Id*. at 922.

[25] *Id*.

between sections 4011(b) and 4012, other than to note that

> in the Superior Court's ruling granting immunity to the governmental defendants, [it] focused on the equipment exception in section 4012, rather than on the basic grant of immunity conferred in section 4011. **While such an approach might be warranted where the equipment allegedly produces or was the instrument of the harm and the plaintiff's claim is based on an alleged defect or improper maintenance,** this is not such a case.[26] (emphasis added)

It appears that if the equipment actually had been connected with the plaintiff's injury, the Supreme Court would have allowed the section 4012 equipment exception to apply over section 4011's immunity.[27] That statement, when applied to the facts *sub judice*, seems to compel the implementation of a section 4012 exception over the "notwithstanding" language of section 4011(b).

Also instructive is *Heaney v. New Castle County*.[28] In *Heaney*, the Delaware Supreme Court analyzed the statutory scheme of municipal and county immunity.[29] The Court stated that "[t]he statutory scheme creates two hurdles for plaintiffs asserting claims against local government entities. The claim must (1) fit within a statutory exception to the general grant of immunity and (2) not result from a

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[26] *Id*.

[27] *See id.*

[28] *Heaney*, 672 A.2d 11.

[29] *Id*. at 14.

discretionary duty or function."[30] The Court continued that past cases finding "specific exceptions in [s]ection 4012 for the claims, stand only for the proposition that local governments are not immune if the claim results from a non-discretionary activity excepted under [s]ection 4012."[31]

Applying that logic to the case at bar precludes the Court, at least at this stage, from finding that Townsend is immunized from Plaintiff's suit. *Triple C Railcar Service v. City of Wilmington* is instructive on this point.[32] Though the equipment exception of section 4012(1) was not applied in *Triple C* (as the Delaware Supreme Court held that a tidegate was not equipment within the meaning of the statutory exception), the Court's analysis is helpful.[33] In *Triple C*, the company sued the city for damages to the company's property.[34] The company alleged that the damage was caused when a nearby creek flooded.[35] The company argued that the flood was caused when a tidegate malfunctioned due to trash and debris blocking its movement.[36] The Court held that a tidegate was not equipment for the narrow

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[30] *Id*.

[31] *Id*. at 15.

[32] *Triple C*, 630 A.2d 629.

[33] *Id*. at 632.

[34] *Id*. at 630.

[35] *Id*.

[36] *Id*.

purposes of section 4012(1)'s exception.[37] The Court did, however, state that "the requirement that the City keep the tidegates free of debris to permit them to serve their intended function is so clearly a routine maintenance obligation that the failure of the City to remove debris, on its face, is an act of ministerial negligence."[38]

This is similar to this situation. Plaintiff allegedly tripped over trash or other debris, which may or may not have been Townsend's responsibility to clear. If it was Townsend's responsibility, the failure to clear it would be the failure to perform a ministerial act under the logic of *Triple C*. Further, failure to clear debris or trash fits within the exception of 4012(2), under the maintenance of a public building. Therefore, even when considering the end result in *Triple C*, it is instructive to apply section 4012(2)'s exception to municipal immunity to Townsend's acts or failure to act.

It is difficult to balance the language of sections 4011 and 4012. On the one hand, section 4011(b) claims to be notwithstanding section 4012. Then section 4011(b) gives six examples of when that immunity exists, noting that the list is non-exclusive. Whether Plaintiff's fall fits within section 4011(b) is questionable, as mentioned, depending on whether what Plaintiff tripped over was a defect. However, given the non-exclusivity of section 4011(b), the question as to extent exists. Additionally, "defects" mentioned specifically may include similar things to be protected because of the non-exclusivity.

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[37] *Id*. at 632.

[38] *Id*. at 631.

On the other hand, section 4012 is a very exclusive list, containing the only three exceptions to municipal immunity. That vagueness of section 4011(b) should not override the specificity contained in section 4012. The exceptions contained in section 4012 would be irrelevant if the immunity of section 4011(b) were held to be a blanket type immunity. Therefore, the Court finds that section 4011(b)'s "notwithstanding" language is not determinative of the application of section 4012's exceptions.

V: CONCLUSION

Because exception (2) of 10 *Del. C.* § 4012 applies to defeat Townsend's municipal immunity, and none of the examples in 10 *Del. C.* § 4011(b) apply explicitly at this point in discovery, Townsend's motion for summary judgment is **DENIED.**

SO ORDERED.

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J.

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