

STATE OF MAINE
MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. PEN-24-551

AMARYLIS FISHER

v.

CITY OF BANGOR, et al.

APPEAL
FROM THE PENOBSCOT COUNTY SUPERIOR COURT

**BRIEF OF APPELLANTS TOWN OF HAMPDEN, TOWN OF VEAZIE,
TOWN OF ORONO, CITY OF OLD TOWN, AND CITY OF BREWER**

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INTRODUCTION

This case arises from an unfortunate incident that occurred on August 15, 2020, when Appellee Amarylis Fisher was physically struck by a City of Bangor bus while she was visiting Bangor as a tourist and utilizing its pedestrian crosswalk near the intersection of Main Street and Hammond Street. The only bases for Fisher's negligence claim against all seven defendants are the acts or omissions of the bus driver. That bus driver was, however, an employee of only the City of Bangor, and the Maine Tort Claims Act (MTCA) contains no applicable exception to the immunity that it provides to Appellants Town of Hampden, Town of Veazie, Town of Orono, City of Old Town, and City of Brewer (collectively, Municipal-Appellants).

STATEMENT OF FACTS & PROCEDURAL HISTORY

A. Statement of Facts

The Community Connector is a fixed-route public transit system that operates within the urbanized areas of Bangor, Brewer, Veazie, Orono, Old Town, and Hampden.¹ (A. 58, 72 at ¶¶ 11-12). The Community Connector does not own its own buses; all of the buses that operate on Community Connector routes are owned by the City of Bangor and registered with municipal plates to the City of Bangor. (A. 58-59, 73-74 at ¶¶ 17, 21.)

¹ The Community Connector also provides service to the University of Maine. (A. 58, 72 at ¶ 13.)

The Community Connector also does not have its own employees; instead, the City of Bangor hires and makes all employment decisions regarding the bus drivers that operate any buses on Community Connector routes. (A. 58-59, 74 at ¶¶ 18, 20.) To that end, it is the City of Bangor that provides legal services, finance, and human resources for the operation of the Community Connector (A. 58, 74 at ¶ 19), and the City of Bangor's Assistant City Manager provides direction to the City of Bangor employees who staff the Community Connector (A. 59, 75 at ¶ 23).

The City of Bangor's municipal buses do not exclusively operate on Community Connector routes, and on August 15, 2020, the bus that struck Fisher was not operating on a Community Connector route; it was operating as an intracity bus, with its route limited to the confines of only the City of Bangor. (A. 57, 70-71 at ¶¶ 6, 9.) In addition to being operated as an intracity bus, the bus that struck Fisher was owned by the City of Bangor and operated by a City of Bangor employee. (A. 57-59, 70-74 at ¶¶ 4, 6, 9, 17-18, 20.)

Each Municipal-Appellant is a member of the Property and Casualty Pool administered by the Maine Municipal Association (MMA). (A. 64-67, 85-92 at ¶¶ 53-54, 56-57, 59-60, 62-63, 65-66.) Municipal-Appellants' MMA member coverage certificates each provide limited liability coverage as follows:

LIMITS OF LIABILITY: \$400,000 per occurrence combined single limit of liability for causes of action seeking tort damages pursuant to the provisions of the Maine Tort Claims Act (14 M.R.S.A. 8101, et seq.). Coverage is limited to those areas for which governmental

immunity has been expressly waived by 14 M.R.S.A. 8104-A, as limited by 14 M.R.S.A. 8104-B, and 14 M.R.S.A. 8111. Coverage amounts for causes of action seeking tort damages pursuant to the provisions of the Maine Tort Claims Act are limited to those specified in 14 M.R.S.A. 8105 and 8104-D. Liability coverage shall not be deemed a waiver of any immunities or limitation of damages available under the Maine Tort Claims Act, other Maine statutory law, judicial precedent, or common law. This coverage limitation for causes of action seeking tort damages pursuant to the provisions of the Maine Tort Claims Act shall serve as the written statement required pursuant to 14 M.R.S.A. 8116.

(A. 64-67, 85-92 at ¶¶ 53-54, 56-57, 59-60, 62-63, 65-66.) Such limited liability coverage through the MMA is the only coverage available to Municipal-Appellants for Fisher’s negligence claim. (A. 64-67, 85-92 at ¶¶ 53-54, 56-57, 59-60, 62-63, 65-66.)

B. Procedural History

Fisher filed a three-count Complaint, dated July 18, 2022, against the five Municipal-Appellants, the City of Bangor, and Community Connector. Count I asserts a negligence claim against all seven defendants based on the alleged “negligent acts and omissions of Defendants’ agent” while acting “within the scope and course of her agency as a bus driver.” (A. 22-23 at ¶¶ 7-8.) Specifically, Fisher alleges that the bus driver “failed to yield the right of way as required, . . . failed to observe Plaintiff in the crosswalk, failed to exercise due care in turning, failed to note and follow the traffic signals, and failed to note that the bus had struck Plaintiff and knocked her down before she was run over by the bus.” (A. 22 at ¶¶ 5-6.)

Fisher’s negligence claim against all seven defendants is therefore premised only on the theory of respondeat superior.

Count II alleges a “joint enterprise” among the City of Bangor and all five Municipal-Appellants by virtue of the Community Connector. Fisher acknowledges that this is not a separate claim but rather a basis for joint and several liability for the same alleged acts or omissions of the City of Bangor employee while acting “within the scope and course of her agency as a bus driver.” (A. 22 at ¶ 7); Pl.’s Mtn. to Dismiss the Appeal at 2 (representing that the assertion of joint venture/joint enterprise is an allegation that defendants are “jointly and severally liable for Ms. Fisher’s injuries.”)).

Count III also does not assert a separate cause of action, alleging only that the defendants entered into “agreements with federal agencies to receive federal funds for the Community Connector, with requirements to comply with applicable federal laws and regulations,” including those that Fisher suspects could require insurance coverage. (A. 25-27 at ¶¶ 18, 22.) Fisher surmises that, if any of the Municipal-Appellants have received federal funds, perhaps they have some form of federally required insurance that could operate as a waiver of the MTCA’s limit on liability. *See* 14 M.R.S. §§ 8105; 8116.

By Motion dated December 28, 2023, Municipal-Appellants moved for summary judgment on Fisher’s Complaint, asserting, principally among other

arguments, that they are immune from Fisher’s negligence claim under the MTCA. (A. 37-39.) Specifically, Municipal-Appellants argued that there was no exception to their immunity under the MTCA because they did not have “ownership, maintenance, or use” of the City of Bangor bus when it struck Fisher. *See* 14 M.R.S. § 8104-A(1)(A) (providing, as an exception to MTCA immunity, that a “governmental entity is liable for its negligent acts or omissions in its ownership, maintenance or use of any motor vehicle”).

By Order dated July 16, 2024, the Superior Court (Penobscot, *Mallonee, J.*) denied Municipal-Appellants’ Motion for Summary Judgment, seemingly deciding, implicitly, that the issue of a joint enterprise created a dispute of fact as to whether the exception to immunity under 14 M.R.S. § 8104-A(1)(A) applied to Municipal-Appellants. (A. 10-18.) Municipal-Appellants filed a Motion for Reconsideration on July 30, 2024, (A. 47-55), and an in-person oral argument on that Motion was scheduled but never held, (A. 7).

By Order dated November 11, 2024, the Superior Court (Penobscot, *Mallonee, J.*) denied Municipal-Appellants’ Motion for Reconsideration (A. 19), and Municipal-Appellants thereafter timely appealed (A. 7).

On March 7, 2025, Fisher filed in this Court a Motion to Dismiss the Appeal, arguing that there are “underlying factual questions” that preclude this Court from considering this interlocutory appeal. Pl.’s Mtn. to Dismiss the Appeal. Municipal-

Appellants opposed that motion because Fisher’s belief that there are underlying factual questions assumes the trial court’s conclusions of law, which this Court reviews de novo. Appellants’ Opp. to Mtn. to Dismiss Appeal. This Court agreed that Fisher’s arguments were “inextricably intertwined with the merits of the appeal” and denied her Motion to Dismiss the Appeal.

ISSUE PRESENTED

- 1. Whether it was error of law for the trial court to conclude that Municipal-Appellants are not entitled to immunity under the Maine Tort Claims Act.**

SUMMARY OF THE ARGUMENT

This Court can review the denial of Municipal-Appellants’ Motion for Summary Judgment, asserting immunity under the MTCA, because the undisputed and uncontroverted facts in the summary judgment record show that Municipal-Appellants are entitled to such immunity. Municipal-Appellants put forth admissible evidence in the summary judgment record showing that they did not waive such immunity by virtue of insurance coverage, and Fisher produced no evidence to the contrary. At the summary judgment stage, Fisher cannot continue to rely on the mere suspicion that Municipal-Appellants have some other form of insurance coverage in an effort to circumvent their immunity from suit.

The undisputed facts show that there is no applicable exception to this Court’s starting premise that Municipal-Appellants are immune under the MTCA. In particular, none of the Municipal-Appellants had “use” of the bus, within the

meaning of 14 M.R.S. § 8104-A(1), when it struck Fisher. Where the basis for a plaintiff's negligence claim is respondeat superior, a governmental entity cannot be liable for "*its* negligent acts or omissions" in "*its*" use of a bus when it is undisputed that it did not have any control over the employee operating the bus. 14 M.R.S. § 8104-A(1) (emphases supplied).

Fisher's attempt to escape this result by alleging a "joint enterprise" between the City of Bangor and Municipal-Appellants does not create a dispute of material fact as to immunity because there is no inquiry into Municipal-Appellants' negligence if they are immune from suit and, in any event, any joint enterprise inquiry here ultimately turns on the same principles of agency that Fisher cannot show with respect to Municipal-Appellants.

ARGUMENT

I. This Court Can Reach the Merits of this Appeal

"[A]ppeals based on a denial of a dispositive motion asserting immunity from suit are immediately reviewable," and this Court's review is de novo. *Rodriguez v. Town of Moose River*, 2007 ME 68, ¶¶ 16, 19, 922 A.2d 484. Specifically, an "interlocutory appeal is not barred by the final judgment rule" when, as here, it "raises a claim of immunity pursuant to the Maine Tort Claims Act." *Est. of Fortier v. City of Lewiston*, 2010 ME 50, ¶¶ 1, 14 & n.7, 997 A.2d 84 (explaining that the "doctrine of sovereign immunity embodied in the MTCA relieves the State from the

costly and time-consuming burden of defending itself at trial against tort claims, except in those cases where the Legislature has explicitly waived immunity”).

Here, Municipal-Appellants are all “governmental entities” entitled to immunity under the MTCA for Fisher’s singular tort claim, *see* 14 M.R.S. §§ 8102-8103, and the basis for this appeal is whether the trial court erred when it concluded that Municipal-Appellants are not entitled to such immunity. This Court can reach the merits of that issue on an interlocutory basis because, here, the undisputed or uncontroverted facts in the summary judgment record show that Municipal-Appellants are entitled to immunity.² *See v. Dep’t of Env’t Prot.*, 1998 ME 198, ¶ 5, 716 A.2d 212 (explaining that “a defendant who has been denied a summary judgment due to the existence of an issue of fact” can “concede *arguendo* the facts found to be disputed and take an interlocutory appeal on a legal claim that the defendant is nevertheless entitled to . . . immunity on facts not controverted” (alterations and quotation marks omitted)); *Rodriguez*, 2007 ME 68, ¶ 17, 922 A.2d 484 (explaining that this Court would reach the merits of an appeal where there was no dispute of facts as to whether the party was entitled to immunity).

Although the MTCA provides that a governmental entity can waive its immunity if it has insurance coverage in substantive areas for which it would

² Municipal-Appellants do not rely in this appeal on any of the statements of fact that the trial court took issue with by virtue of what it deemed to be deficiencies in the Linscott Affidavit. (A. 14.)

otherwise be immune, 14 M.R.S. § 8116, the uncontroverted facts here include sufficient record evidence for this Court to conclude that Municipal-Appellants lack such insurance coverage such that it is not premature to decide immunity in this appeal, *cf. Bean v. City of Bangor*, 2022 ME 30, ¶ 6, 275 A.3d 324 (city's immunity under the MTCA was unreviewable on an interlocutory basis when city asserted that it had insurance but failed to put forth evidence in the summary judgment record showing that such coverage did not waive immunity under 14 M.R.S. § 8116).

The uncontroverted facts show that the only insurance coverage Municipal-Appellants have is their limited liability coverage through the MMA, which does not provide insurance coverage when, as here, the Municipal-Appellants are immune from suit under the MTCA.

A. Municipal-Appellants' Limited Liability Coverage Through the MMA Does Not Provide Insurance Coverage for Substantive Areas in which Municipal-Appellants are Immune

Municipal-Appellants have limited liability coverage in only those areas in which they do not enjoy immunity under the MTCA. (A. 64-67, 85-93 at ¶¶ 53-54, 56-57, 59-60, 62-63, 65-66.) These facts were all properly supported by statements in Municipal-Appellants' Statement of Material Facts with citations to record evidence consisting of affidavits from the Town of Orono Finance Manager, the City of Old Town City Manager, the Finance Director of the City of Brewer, the Town Manager of the Town of Hampden, and the Town Manager of the Town of Veazie.

(A. 64-67, 85-93 at ¶¶ 53-54, 56-57, 59-60, 62-63, 65-66.) Each of these municipal officials attached their MMA member coverage certificate to their affidavit. (A. 132-199.)

The plain language in those member coverage certificates is clear: “[c]overage is limited to those areas for which governmental immunity has been expressly waived by 14 M.R.S.A. [§] 8104-A Liability coverage shall not be deemed a waiver of any immunities or limitation of damages available under the Maine Tort Claims Act, other Maine statutory law, judicial precedent, or common law.” (A. 135, 148, 171, 182, 193.) This Court has previously concluded that this exact language in a member coverage certificate is sufficient to preserve a governmental entities’ immunity from suit under the MTCA. *See Doucette v. City of Lewiston*, 1997 ME 157, ¶¶ 8, 10, 697 A.2d 1292 (affirming summary judgment, granting immunity under the MTCA, where member coverage certificate in the summary judgment record was sufficient to show that governmental entity had not waived its MTCA immunity).

B. Fisher Did Not Create a Dispute of Fact as to Municipal-Appellants’ Lack of Insurance

Fisher did not properly controvert Municipal-Appellants’ statements that their MMA limited liability coverage is the only available coverage, offering only unsupported argument that (1) Municipal-Appellants have some other form of insurance by virtue of federal requirements and (2) the MMA coverage certificate

includes additional coverage.³ *Cf.* M.R. Civ. P. 56(h)(4) (explaining that statements of fact are properly controverted only by specific citations to record evidence).

These arguments do not dispute Municipal-Appellants' lack of insurance coverage. First, Fisher failed to produce any record evidence to support her theory that Municipal-Appellants have some other form of insurance pursuant to federal requirements or otherwise.⁴ Fisher cannot rely on only suspicion at the summary judgment phase, *see, e.g., Express Scripts Inc. v. State Tax Assessor*, 2023 ME 68, ¶¶ 28, 304 A.3d 239, and, absent specific evidence from Fisher to the contrary, it is undisputed that Municipal-Appellants' limited liability coverage through the MMA is the only applicable insurance that they possess, (A. 64-67 at ¶¶ 53, 56, 59, 62, 65); *see* M.R. Civ. P. 56(h)(4) (statements of fact deemed admitted unless properly controverted).

³ Fisher also objected on the basis that the affidavit testimony of the municipal officials was insufficient to prove the contents of the member coverage certificates. *See* (A. 86-93 at ¶¶ 54, 57, 60, 63, 66). This objection fails: the member coverage certificates are attached to the affidavits of those municipal officials, and Municipal-Appellants' statements of material fact specifically cite to the portions of those affidavits in which the affiant described the document and noted its attachment as an exhibit to his or her affidavit. (A. 64-67 at ¶¶ 53-54, 56-57, 59-60, 62-63, 65-66.)

⁴ Fisher makes a series of logical leaps to hypothesize that Municipal-Appellants have some other form of applicable insurance coverage: she suspects that (i) Municipal-Appellants have applied for and received federal funds in connection with the Community Connector, (ii) such federal funds require Municipal-Appellants to carry some additional form of insurance, and (iii) Municipal-Appellants carry such insurance. *See, e.g.,* (A. 24-27). Fisher did not even prove the initial step in this chain of suspicion because she did not controvert Municipal-Appellants' statements that they have never applied for or received federal funding with respect to the Community Connector; her record citations to that end support only that Community Connector staff, who she admits are employed by the City of Bangor, have applied for some form of discretionary grant funding. (A. 87-93 at ¶¶ 55, 58, 61, 64, 67.)

Second, the plain language of the MMA coverage certificate unequivocally shows that it does not provide Municipal-Appellants with some kind of additional coverage, such as the “\$2 million coverage for claims not subject to the MTCA” that Fisher attempts to argue applies here, *see* (A. 85-92 at ¶¶ 53, 56, 59, 62, 65). It does not: as Fisher herself acknowledges, that coverage applies to claims “*not subject to the MTCA*,” and Fisher has never disputed that her negligence claim is subject to the MTCA, nor can she. *See* (A. 135, 148, 171, 182, 193 (providing coverage up to “\$2,000,000 . . . for each wrongful act or series of . . . wrongful acts for all causes of action seeking damages pursuant to federal law or state law *for which immunity or limitation of damages is not provided by the provision of the Maine Tort Claims Act*” (emphasis supplied))).

Because Municipal-Appellants’ lack of insurance is uncontroverted, this Court should reach the merits of this appeal because the other undisputed facts show that, as a matter of law, Municipal-Appellants are entitled to immunity under the MTCA.

II. Municipal-Appellants Are Entitled to Immunity Under the MTCA

A. This Court’s Review is De Novo

“The trial court’s denial of a motion for summary judgment seeking immunity is reviewed for errors of law.” *Est. of Fortier*, 2010 ME 50, ¶ 9, 997 A.2d 84. Specifically, “whether . . . a governmental entity is entitled to immunity is a question

of law that [this Court] review[s] de novo.” *Klein v. Univ. of Me. System*, 2022 ME 17, ¶ 6, 271 A.3d 777. This Court’s interpretation of a statute, such as section 8104-A of the MTCA, is also a question of law that this Court undertakes de novo. *See, e.g., Morrill v. Me. Tpk. Auth.*, 2009 ME 116, ¶ 5, 983 A.2d 1065.

“Summary judgment is appropriate when review of the parties’ statements of material facts and the record evidence to which the statements refer, considered in the light most favorable to the nonmoving party, demonstrates that there is no genuine issue of material fact.” *Remmes v. The Mark Travel Corp.*, 2015 ME 63, ¶ 18, 116 A.3d 466. In resisting summary judgment, the nonmoving party must “demonstrate that the summary judgment record affirmatively supports the existence of a genuine issue of material fact, and cannot simply rely on conclusory allegations, improbable inferences, and unsupported speculation.” *Express Scripts*, 2023 ME 68, ¶ 28, 304 A.3d 239 (quotation marks omitted).

Here, the trial court made an error of law when it implicitly determined that any dispute as to Municipal-Appellants’ involvement in a joint enterprise precluded their immunity under the MTCA.

B. The Undisputed Facts Show That There is No Exception to Immunity Under the MTCA

i. Fisher Did Not Controvert the Undisputed Facts

“Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by [Rule 56], shall be deemed admitted

unless properly controverted.” M.R. Civ. P. 56(h)(4). In addition to the facts that Fisher admitted outright, *see* (A. 58-59, 88-89 at ¶¶ 18-20), the following facts are deemed admitted because Fisher did not controvert them.

First, Fisher did not controvert the fact that the driver of the bus that struck Fisher was a City of Bangor employee. (A. 57, 70-71 at ¶¶ 4, 8.) Fisher cited no record support for her qualifying argument that the driver was a “Community Connector employee,” (A. 70 at ¶ 4), nor did she cite sufficient record support for her other qualification about the City of Bangor’s funding sources, (A. 71 at ¶ 8). Even assuming there was proper record support, the source of the City of Bangor’s funding to pay its employees does not controvert the fact that the employee is nevertheless that of the City of Bangor. Moreover, Fisher admits that (i) the City of Bangor hires and makes all employment decisions regarding drivers who operate any buses for the Community Connector; (ii) the City of Bangor provides human resources for the Community Connector system; and, (iii) the Community Connector uses the City of Bangor’s Tax ID number. (A. 58-59, 74 at ¶¶ 18-20.)

Second, Fisher did not controvert the fact that the bus that struck Fisher was owned by the City of Bangor and was being operated as an intracity transit bus within the confines of the City of Bangor. (A. 57-58, 70-73 at ¶¶ 6, 9, 17.) Fisher’s qualifying argument that the bus was at times used as part of a regional transportation system or was funded, in part, through the City of Bangor’s receipt of federal funds

does not controvert the fact that the City of Bangor owns the bus or that, at the time the bus struck Fisher, the bus was operating as an intracity bus. (A. 70, 73 at ¶¶ 6, 17.) Nor does Fisher cite any record evidence to support her qualifying assertion that the bus was operating as part of the Community Connector system when it struck her. (A. 71 at ¶ 9.) In fact, the cited page of the MaineDOT Transit Management Plan, which Fisher cites in an attempt to support her assertion, states that “the City of Bangor owns and operates the public transportation system, commonly known as the Community Connector.” (A. 71 at ¶ 9 (citing page 1 of Ex. 6 to the Gilbert Affidavit)).

Given the undisputed facts, Fisher cannot show that there is an exception to Municipal-Appellants’ MTCA immunity.

ii. The Motor Vehicle “Ownership, Maintenance, or Use” Exception to Immunity Does Not Apply

“The MTCA expressly provides that, as a general rule, governmental entities are immune from suit on any and all tort claims seeking recovery of damages.” *Klein*, 2022 ME 17, ¶ 8, 271 A.3d 777; *see also* 14 M.R.S. § 8103(1). Thus, “[i]n construing section 8104-A, [this Court] recognize[s] that the MTCA employs an exception-to-immunity approach rather than an exception-to-liability approach.” *Est. of Fortier*, 2010 ME 50, ¶ 8, 997 A.2d 84. This Court’s analysis therefore “starts from the premise that immunity is the rule and exceptions to immunity are to be strictly construed.” *Id.* (alterations omitted).

Here, section 8104-A(1) is the only possible exception to the starting premise that Municipal-Appellants are immune from suit and, employing that strict exception-to-immunity approach, the undisputed facts show that, within the meaning of section 8104-A(1), Municipal-Appellants did not “use” the motor vehicle that struck Fisher.

Title 14 M.R.S. § 8104-A(1) provides that

A governmental entity is liable for its negligent acts or omissions in its ownership, maintenance or use of any: (A) Motor vehicle . . . ; (B) Special mobile equipment . . . ; (C) Trailers . . . ; (D) Aircraft . . . (E) Watercraft . . . ; (F) Snowmobiles . . . ; and (G) Other machinery or equipment, whether mobile or stationary.

When interpreting a statute, “[t]he underlying purpose . . . is to give effect to the intent of the Legislature.” *Morrill*, 2009 ME 116, ¶ 5, 983 A.2d 1065 (quotation marks omitted). In so doing, this Court will “construe the whole statutory scheme of which the section at issue forms a part so that a harmonious result, presumably the intent of the Legislature, may be achieved.” *McPhee v. Me. State Ret. Sys.*, 2009 ME 100, ¶ 23, 980 A.2d 1257 (quotation marks omitted).

This Court has previously undertaken this very task when deciding what it means for a governmental entity to “use” the vehicles, machinery, or equipment in section 8104-A(1). *See Est. of Fortier*, 2010 ME 50, ¶¶ 12-13, 997 A.2d 84. In *Fortier*, this Court looked to the “restrictive meanings” of “ownership” and “maintenance” in the same clause as “use” in section 8104-A and explicitly held that

“in providing for liability resulting from negligence in the ‘use of any . . . aircraft,’ . . . the Legislature intended to waive immunity in situations where a governmental entity has some measure of direct control over the aircraft or its pilot.” *Id.* ¶ 15. Accordingly, the City of Lewiston had not “used” an aircraft “for MTCA purposes simply by paying for three [students’] seats on [the aircraft]” when it “did not own or maintain the plane, or train, test, or employ its pilot” and thus had “no direct control over the . . . aircraft or its pilot.” *Id.* ¶¶ 14-15.

Likewise, here, it is undisputed that Municipal-Appellants did not own or maintain the bus that struck Fisher, nor did they train, test, or employ the bus driver. The bus that struck Fisher was owned by the City of Bangor and operated by a City of Bangor employee, for whom only the City of Bangor can make employment decisions. (A. 57-59 at ¶¶ 4, 6, 8, 17-18, 21.) Moreover, at the time the bus struck Fisher, it was operating as an intracity bus on a route within only the City of Bangor. (A. 57 at ¶ 9.) Municipal-Appellants therefore did not “use” the bus as a motor vehicle for MTCA purposes. *Est. of Fortier*, 2010 ME 50, ¶¶ 14-15, 997 A.2d 84.

And although Fisher does not allege negligence based on “ownership” or “maintenance” of the bus that struck Fisher,⁵ the undisputed facts nevertheless show that Municipal-Appellants did not “own” or “maintain” the bus. *See Est. of Fortier*, 2010 ME 50, ¶ 12, 997 A.2d 84 (explaining that “ownership” and “maintenance”

⁵ Fisher alleges negligence based on acts or omissions of the bus driver. (A.22 at ¶¶ 5-6.)

each require “positive control” by the governmental entity, which can “only be liable for ‘*its* negligent acts or omissions’ in ‘*its* maintenance’ of equipment if its own employees perform the maintenance.” (alterations omitted and emphases in original)).

This same conclusion of immunity that is dictated by *Fortier* is also reached by considering the “gravamen” of Fisher’s claim against defendants. For example, where the “gravamen” of a plaintiff’s claim was about a town’s imprudent tactical decisions in the course of fighting a fire, the town’s “use” of a motor vehicle in the course of making such decisions did not create an exception to the town’s immunity pursuant to section 8104-A(1). *Day’s Auto Body, Inc. v. Town of Medway*, 2016 ME 121, ¶ 11, 145 A.3d 1030. This Court reasoned that “[s]ection 8104-A(1) cannot be used to end a governmental entity’s immunity from tort claims simply because vehicles or equipment were involved in the conduct that allegedly caused harm.” *Id.*

Here, the “gravamen” of Fisher’s claim against defendants is that of respondeat superior, based on the alleged omissions of the bus driver in failing “to yield the right of way as required, . . . to observe Plaintiff in the crosswalk, . . . to exercise due care in turning, . . . to note and follow the traffic signals, and . . . to note that the bus had struck Plaintiff and knocked her down before she was run over by the bus.” (A. 22 at ¶¶ 5-6.) Fisher’s negligence claim is therefore grounded exclusively in the conduct of the bus driver, who was an employee of only the City

of Bangor. Accordingly, any conclusion that Municipal-Appellants had “use” of the bus when they undisputedly had no control over any employment decisions related to the bus driver would run contrary to the principle that the “use” exception is not implicated by “the mere fact that a vehicle or piece of equipment or machinery is involved in the conduct that allegedly caused harm,” *Day’s Auto Body*, 2016 ME 121, ¶ 9, 145 A.3d 1030.

Moreover, the statutory scheme of the MTCA requires inquiry into the events of the *particular* incident giving rise to the harm. *See, e.g.*, 14 M.R.S. § 8103 (providing immunity as the general rule “[e]xcept as otherwise *expressly provided by statute*” (emphasis supplied)); 14 M.R.S. § 8104-D (imposing a limitation on the personal liability of employees for claims “arising out of a *single occurrence*” (emphasis supplied)); 14 M.R.S. § 8105 (imposing a limitation on damages based on “claims arising out of a *single occurrence*” (emphasis supplied); *see also Est. of Fortier*, 2010 ME 50, ¶ 10, 997 A.2d 84 (examining whether the city was “using” the aircraft within the meaning of section 8104-A(1) from the perspective of whether the city was “using” the aircraft *at the time the deceased students’ flight took off*). Here, it is undisputed that the bus that struck Fisher was not operating as part of the Community Connector system but was operating as an intracity bus for only the City of Bangor.

It therefore cannot be said that Municipal-Appellants had “use” of the bus that struck Fisher within the meaning of the strictly construed exception to immunity in 14 M.R.S. § 8104-A(1).

C. The Alleged Joint Enterprise Does Not Create a Dispute as to “Use” Under Section 8104-A(1)

The trial court erred when it seemingly determined that any “joint enterprise” dispute precluded a finding of immunity under the MTCA.

First, Fisher’s “joint enterprise” theory is a means of proving negligence, and underlying questions of negligence are separate and secondary to the threshold question of whether a governmental entity is immune. *Fortier*, 2010 ME 50, ¶¶ 10, 14, 997 A.2d 84. For example, in *Fortier*, the plaintiff-estates of the deceased students attempted to “obscure the inescapable result” of immunity under the MTCA by “conflating the question of the City’s ‘use’ of the aircraft” with the separate question of the negligence of the city employee who permitted the students to fly on the aircraft that crashed. *Est. of Fortier*, 2010 ME 50, ¶¶ 10, 14, 997 A.2d 84. This Court rejected that argument, explaining that those “are two separate and distinct questions, and the use question must be answered first.” *Id.* ¶ 14. This Court furthermore explained that such a broad reading of the term “use” would eliminate the purpose of immunity under the MTCA given that a governmental entity “would be required to go to trial and defend against the allegation of negligence” in “any

suit” where a plaintiff could establish a governmental entity’s utilization of equipment to which the statute applies “in virtually any way.” *Id.* ¶ 14 & n.7.

Here, too, Fisher tries to “obscure the inescapable result” of Municipal-Appellants’ immunity by attempting to create a dispute of fact with regard to a “joint enterprise” between the City of Bangor and Municipal-Appellants. Whether Municipal-Appellants were engaged in a joint enterprise such that they are jointly and severally liable for the alleged negligence, however, is secondary to the issue of immunity under the MTCA. Therefore, because Municipal-Appellants are immune under the MTCA, this Court need not even consider whether the alleged joint enterprise creates a material dispute of fact—it does not.

Second, even considering that secondary issue, Fisher’s joint enterprise theory fails as a matter of law because her negligence claim is premised on the alleged failures of the bus driver and yet the undisputed facts show that the bus driver was a City of Bangor employee for whom only the City of Bangor could make employment decisions. (A. 57-59, 70-74 at ¶¶ 4, 8, 18, 20.) This Court’s joint enterprise doctrine turns on principles of agency: a joint enterprise requires that “each participant has authority to act for all in directing and controlling the means of agency employed.” *Morey v. Stratton*, 2000 ME 147, ¶ 7, 756 A.2d 496 (quoting *Illingworth v. Madden*, 135 Me. 159, 164, 192 A. 273, 276 (1937)).

This inquiry is furthermore fact-specific to the harm alleged, requiring inquiry into the relationship between defendants on the day and time of the incident with respect to the specific harm asserted; it is not merely an inquiry, as the trial court here conducted, into the overall relationship among defendants. *See Libby v. Perry*, 311 A.2d 527, 534-35 (Me. 1973) (considering the particular involvement of each members' participation in the harm alleged and determining that one member could not be held liable "on the mere evidence that he was a member" of the common interest association); *Morey*, 2000 ME 147, ¶ 7, 756 A.2d 496 (explaining that a "common pecuniary interest" is insufficient to show a joint enterprise and the inquiry instead focuses on the authority to direct and control "the means of agency employed"); *see also Illingworth*, 135 Me. at 164, 192 A. at 276 (determining that, although youth had a common interest in undertaking of toboggan-riding, negligence could not be imputed to them when, in the context of the particular incident, they had not "assumed any . . . control over [the automobile's] operation" and the driver had not at any time "surrendered his personal control over the automobile to" them).

Fisher therefore cannot prove negligence by virtue of Municipal-Appellants' mere involvement with Community Connector when the specific negligence alleged is respondeat superior and the undisputed facts show that the bus driver was an agent of only the City of Bangor and that, moreover, the bus that struck Fisher was operating only as an intracity bus for the City of Bangor.

The alleged joint enterprise therefore does not create a dispute of material fact as to Municipal-Appellants' immunity because (1) it is a distinct issue from the threshold question of immunity and, in any event, (2) Fisher's joint enterprise theory fails as a matter of law because Municipal-Appellants had no control over the "means of agency" with respect to the City of Bangor employee who was operating the bus that struck Fisher.

CONCLUSION

The undisputed facts show that there is no applicable exception to Municipal-Appellants' immunity under the Maine Tort Claims Act, and there are no material disputes of fact that preclude this Court from reaching that decision now as a matter of law. The Court should vacate the order denying Municipal-Appellants' Motion for Summary Judgment and remand for entry of summary judgment in Municipal-Appellants' favor.

Dated: March 28, 2025

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CERTIFICATE OF SERVICE

I, Susan M. Weidner, hereby certify that on this 28th day of March, 2025, I served an electronic copy of the foregoing Brief of Appellants Town of Hampden, Town of Veazie, Town of Orono, and City of Brewer upon Appellees by email as follows:

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Paper copies will be served on Appellees at the above mailing addresses pursuant to M.R. App. P. 7(c)(4).

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