

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

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

Mark V. Franco, Bar No. 2967
Susan M. Weidner, Bar No. 10083

*Counsel for Appellants Town of
Hampden, Town of Veazie, Town of
Orono, City of Old Town, and City of
Brewer*

DRUMMOND WOODSUM
84 Marginal Way, Suite 600
Portland, Maine 04101-2480

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....3

ARGUMENT4

 I. The Alleged “Joint Venture” Does Not Create a Material
 Dispute of Fact.....4

 II. There is No Dispute of Fact as to Coverage.....7

CONCLUSION.....8

CERTIFICATE OF SERVICE9

TABLE OF AUTHORITIES

Cases

Tex. Dept. of Transp. v. Able, 25 S.W.3d 608 (Tex. 2000) 6, 7

Doucette v. City of Lewiston, 1997 ME 157, 697 A.2d 1292 7

Cf. Est. of Fortier v. City of Lewiston, 2010 ME 50, 997 A.2d 84 7

Statutes

14 M.R.S. § 8104-A(1) 4

ARGUMENT

I. The Alleged “Joint Venture” Does Not Create a Material Dispute of Fact

Fisher remains fixated on a purported “joint venture” among the City of Bangor and Municipal-Appellants but fails to address in her brief how, as a matter of law, Municipal-Appellants had “use” of the City of Bangor bus, within the meaning of 14 M.R.S. § 8104-A(1), when the undisputed facts show that the bus driver was an employee of only the City of Bangor.¹ Fisher’s failure to address this undisputed fact is significant given that her negligence claim is based only on the acts or omissions of the bus driver.

Instead of addressing this issue, Fisher argues that “the basic principles of imputed liability of joint venturers” is “sufficient . . . to conclude that the various joint venturers ‘owned, maintained or used’ the bus that struck Ms. Fisher,” characterizing the trial court’s analysis of this issue as “sound” and of a kind that “should not be disturbed on appeal.” (Red Br. 28.) This argument is wrong as a matter of law. As an initial matter, the trial court did not assess this issue; in fact, the trial court did not undertake at all the threshold question of whether Municipal-Appellants had “use” of the City of Bangor bus within the meaning of the MTCA.

¹ Fisher mischaracterizes the City of Bangor bus as a “Community Connector bus” without citing any record support. (Red Br. 6, 9.) In fact, the summary judgment record shows that the bus was operating as an intracity bus, with its route limited to the confines of only the City of Bangor, and that it was furthermore 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.)

Second, although Fisher attempts in her brief to argue that any purported “joint venture” creates a “use” of the bus, that joint venture argument only goes to Fisher’s theory of negligence against Municipal-Appellants; it does not, however, go to the threshold issue of Municipal-Appellants’ “use” of the City of Bangor bus such that there is an exception to immunity under the MTCA. Fisher’s conflation in this regard is demonstrated by her argument that the MTCA “did not alter the common law rules of agency,” which Fisher notably supports by citation only to cases in which governmental entities lacked immunity for the acts of *their agents or employees*. (Red Br. 27-28.) By contrast, here, the bus driver was not an agent or employee of Municipal-Appellants.

Fisher furthermore mischaracterizes Municipal-Appellants’ argument in this appeal, stating that Municipal-Appellants “argue that there is insufficient evidence on which to base a finding of a joint venture” and contending that Municipal-Appellants did not meet “their burden to establish the absence of a joint venture.” (Red Br. 16-17.) To be sure, this is not Municipal-Appellants’ argument on appeal; Municipal-Appellants contend that any alleged joint enterprise does not create a dispute of material fact as to immunity because it does not create a dispute as to whether Municipal-Appellants had “use” of the City of Bangor bus within the meaning of the MTCA. Again, Fisher conflates the threshold question of immunity under the MTCA with the secondary question of negligence, and Municipal-

Appellants need not carry the burden of establishing the “absence of a joint venture” in order to show that they are immune under the MTCA.

Fisher’s reliance on a Texas Supreme Court case is likewise imprecise with respect to the threshold question of immunity. In *Able*, the case relied upon by Fisher (Red Br. 18-23), the basis for the plaintiff’s negligence claim was *a premises defect in the state highway*, and the Texas Department of Transportation could be liable for that theory of negligence based on a joint enterprise given that it had entered into an agreement with Metro *to operate and maintain the state highway*. *Tex. Dept. of Transp. v. Able*, 25 S.W.3d 608, 612-14 (Tex. 2000). Thus, in *Able*, there was a nexus between the alleged negligence (premises defect) and the joint enterprise (an agreement to maintain the premises). Whereas, here, Fisher put forth no evidence, nor has she ever contended, that Municipal-Appellants were at all involved in controlling the bus driver’s alleged acts or omissions.

Able is even furthermore distinguishable given that, contrary to Fisher’s contention (Red Br. 19), the Texas Tort Claims Act is not comparable to that of Maine in this case. The Texas Supreme Court determined that the Texas Department of Transportation could have waived its immunity by virtue of a joint enterprise given a specific statute in the Texas Tort Claims Act that waives governmental immunity when the governmental entity caused personal injury by way of a real property condition *and the governmental entity “would be liable according to Texas*

law.” *Able*, 35 S.W.3d at 613. Given this statute, the immunity inquiry was conversely not separate and distinct from the joint enterprise inquiry. *Cf. Est. of Fortier v. City of Lewiston*, 2010 ME 50, ¶ 14, 997 A.2d 84 (explaining that the question of the City’s “use” of the aircraft within the meaning of the MTCA was separate from the question of the negligence of the city employee).

Fisher’s attempt to create a material dispute of fact out of a purported joint enterprise is unavailing as a matter of law.

II. There is No Dispute of Fact as to Coverage

Also contrary to Fisher’s argument (Red Br. 13, 29-30), there are no material disputes of fact regarding insurance coverage that preclude this Court from reaching the issue of immunity on appeal. Fisher merely recounts the trial court’s erroneous interpretation of the plain language of the Municipal-Appellants’ member coverage certificates, and she fails to address the way in which those certificates, (A.132-199), contain language identical to that in *Doucette v. City of Lewiston*, 1997 ME 157, ¶¶ 8, 10, 697 A.2d 1292, wherein this Court deemed such language in a member coverage certificate sufficient to show on summary judgment that the governmental entity had not waived its MTCA immunity.

Fisher has failed to controvert Municipal-Appellants’ showing that they lack coverage, and this Court can thus reach the issue of immunity.

CONCLUSION

For these reasons as well as those stated in Municipal-Appellants' principal brief, this Court should vacate the order denying Municipal-Appellants' Motion for Summary Judgment and remand for entry of summary judgment in Municipal-Appellants' favor.

Dated: June 9, 2025

/s/ Mark V. Franco

Mark V. Franco
Maine Bar No. 2967
mfranco@dwmlaw.com

/s/ Susan M. Weidner

Susan M. Weidner
Maine Bar No. 10083
sweidner@dwmlaw.com

DRUMMOND WOODSUM
84 Marginal Way, Suite 600
Portland, Maine 04101-2480
(207) 772-1941

*Counsel for Appellants Town of
Hampden, Town of Veazie, Town of
Orono, City of Old Town, and City of
Brewer*

CERTIFICATE OF SERVICE

I, Susan M. Weidner, hereby certify that on this 9th day of June, 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:

Charles E. Gilbert III, Esq.
Gilbert Law Offices
88 Hammond St., #321
Bangor, ME 04402-2339
service@yourlawpartner.com
ceg@rjb.law

Daniel J. Stevens, Esq.
Stevens & Day, LLP
82 Winthrop Street
Augusta, ME 04330
dstevens@stevensdaylaw.com

Jonathan W. Brogan, Esq.
Norman Hanson DeTroy
Two Canal Plaza
PO Box 4600
Portland, ME 04112-4600
broganservice@nhdlaw.com

Frederick W. Costlow, Esq.
Richardson Whitman Large & Badger
81 Main Street, Suite 400
PO Box 2429
Bangor, ME 04402-2429
fcostlow@rwlb.com

Aaron Michael Frey, Esq.
Office of the Maine Attorney General
6 State House Station
Augusta, ME 04333-0006
aaron.frey@maine.gov

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

Dated: June 9, 2025

/s/ Susan M. Weidner
Susan M. Weidner
Maine Bar No. 10083
sweidner@dwmlaw.com
DRUMMOND WOODSUM
84 Marginal Way, Suite 600
Portland, Maine 04101-2480
(207)772-1941

*Counsel for Appellants Town of
Hampden, Town of Veazie, Town of
Orono, City of Old Town, and City of
Brewer*