Circuit Court for Calvert County
Case No. 04-C-15-000014

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 832

September Term, 2016

YVETTE PARRAN

v.

BOARD OF COUNTY COMMISSIONERS
OF CALVERT COUNTY, MARYLAND

Graeff,
Arthur,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: September 26, 2017

Yvette Parran, appellant, filed a complaint in the Circuit Court for Calvert County, alleging negligence against the Board of County Commissioners of Calvert County (the "Board"), appellee, for injuries she sustained after she was walked out of the Northeast Community Center in Chesapeake Beach, Maryland. Prior to the start of trial, the Board made an oral motion to dismiss on the basis of governmental immunity. Because the parties introduced evidence, the motion was converted to one for summary judgment.[1] The circuit court granted the Board's motion, and subsequently denied Ms. Parran's motion to alter or amend the judgment.

On appeal, Ms. Parran presents two questions for this Court's review,[2] which we have consolidated, as follows:

> Did the circuit court err in dismissing Ms. Parran's complaint based on governmental immunity?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

[1] Pursuant to Maryland Rule 2-322(c), "[i]f, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." Here, there is no dispute that the court considered matters outside the pleadings and treated the motion as one for summary judgment.

[2] Ms. Parran presented the following questions in her brief:

I. Whether the circuit court erred in dismissing appellant's claim based on governmental immunity?

II. Whether the circuit court erred in concluding that the boardwalk was not a proprietary function[?]

FACTUAL AND PROCEDURAL BACKGROUND

Ms. Parran alleged in her complaint that the Board, through its agent, the Calvert County Parks and Recreation Department, operated a community center in Chesapeake Beach that offered services to the general public, and therefore, the Board was responsible for the maintenance and safety of visitors/invitees to the community center. On January 7, 2012, at approximately 7:20 p.m., Ms. Parran "walked out of the community center and was walking on a boardwalk walkway and entering the driveway in an attempt to leave the community center, when, through no fault of her own, she stepped off of the boardwalk to the pavement and fell in the driveway, walkway, parking area." The complaint alleged that "there were no signs warning visitors/invitees in the area of the dangerous situation and condition, that the walkway and the driveway, were not level and required a step down," and "there was little if any, lighting in the area . . . to discern any difference." Ms. Parran alleged that the Board "should have known of the driveway, walkway condition and absence of warnings, notices or signs and minimal, if any, lighting provided a dangerous situation," and the Board breached its duties and was negligent in, *inter alia*, "failing to use ordinary care and to keep the drive way, walk way, road, parking area in a reasonably safe condition," failing to warn her of the defective and dangerous conditions, and "failing to take adequate or any preventable measures to protect visitors from injury," despite having "knowledge of the defect or dangerous conditions."

Prior to trial, the Board moved to dismiss the complaint, arguing that it had governmental immunity because the community center was a parks and recreational

building that served a "purely governmental function designed for the health and benefit of the community." Counsel for Ms. Parran argued that, because the accident happened on a walkway or sidewalk, "that takes it out of the governmental function" and "gets into the proprietary interest, where they have to keep up their sidewalks and their walkways." The Board offered several photographs into evidence, asserting that the photographs depict a "boardwalk" that does not connect one thoroughfare to another thoroughfare, and it is not a "sidewalk" as defined by Md. Code (2012 Repl. Vol.) § 21-101(w) of the Transportation Article ("TR") or case law. Rather, the boardwalk was part of the community center, and therefore, governmental immunity applied.

The Board then called as a witness Marc W. Limberg, the former recreation facility coordinator for the Northeast Community Association. He testified that he refers to the area at issue as the "deck," the "area on which people walk up to" the community center building. The deck is owned by Calvert County.

Ms. Parran testified that she walked into the community center via the boardwalk. She stated that cars would drop people off in the circle in the roadway and would let people out to walk into the community center.

The court gave its ruling from the bench. It stated that the issue was "what is the area where the plaintiff fell, is it a walkway, is it a sidewalk . . . or is it part of this building, and as a part of the building, is it covered by the governmental immunity." The court noted that "[n]obody disputes that if Ms. Parran had fallen inside of the building, there would be governmental immunity." The question in this case was whether the area where Ms. Parran

fell was a sidewalk, which is "a walkway adjacent to a roadway, a public roadway." After noting that Mr. Limberg called the area a deck, and the court referred to it as a porch, the court stated:

> And that's really how I think of this. This is a planked area underneath the roof of the Community Center, and it's held up by columns or posts and a rail, just like my porch is. I think the analogy can be drawn between my house, the porch and the house, and this, it's called a deck, I called it a porch, a covered porch, and the building. I understand that it may lead to other areas such as the true boardwalk, which looks like a ramp with rails . . . leading back toward the water, and a concrete area, concrete walkway leading to the water park. And I will even say that . . . the porch leads back to another looks like part of a parking lot . . . .
>
> At any rate, it seems, and I am going to rule, that the covered deck is part of the building. It is not a walkway, and that it's not a sidewalk, and governmental immunity applies to this area because it is part of the building. . . . [T]hat's the conclusion that I have drawn, that this deck, this porch is part of the building and that governmental immunity applies to it.

Additional facts will be discussed as necessary in the discussion that follows.

STANDARD OF REVIEW

In *Toliver v. Waicker*, 210 Md. App. 52, 60, *cert. denied*, 432 Md. 213 (2013), this Court set forth the applicable standard of review of a motion for summary judgement:

> Maryland Rule 2-501(f) governs motions for summary judgment and provides that a trial court "shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." *Accord Reiter v. Pneumo Abex, LLC*, 417 Md. 57, 67 (2010). A determination "[w]hether a circuit court's grant of summary judgment is proper in a particular case is a question of law, subject to a non-deferential review on appeal." *Tyler v. City of College Park*, 415 Md. 475, 498 (2010). Thus, the standard of review of a trial court's grant of a motion for summary judgment on the law is *de novo*. *D'Aoust v. Diamond*, 424 Md. 549, 574 (2012). When we consider a circuit court's order granting summary judgment, we "review the record in the light

> most favorable to the non-moving party and construe any reasonable inferences that may be drawn from the facts against the moving party." *Rhoads v. Sommer*, 401 Md. 131, 148 (2007). *Accord Reiter*, 417 Md. at 67 ("'[W]e independently review the record to determine whether the parties properly generated a dispute of material fact and, if not, whether the moving party is entitled to judgment as a matter of law.'") (quoting *Livesay v. Baltimore County*, 384 Md. 1, 10 (2004)).

(parallel citations omitted).

DISCUSSION

Before addressing Ms. Parran's specific contentions, we briefly discuss Maryland law regarding governmental immunity. As this Court has explained:

> Under Maryland common law, a local government is immune from tort liability when it functions in a "governmental" capacity, but it enjoys no such immunity when it is engaged in activities that are "proprietary" or "private" in nature. *See Mitchell v. Hous. Auth. of Baltimore City*, 200 Md. App. 176, 186 (2011). "'[T]here is no universally accepted or all-inclusive test to determine whether a given act of a municipality is private or governmental in its nature, but the question is usually determined by the public policy recognized in the jurisdiction where it arises.'" *Rios v. Montgomery Cnty.*, 386 Md. 104, 128 (2005) (quoting [*Mayor and City Council of Baltimore v. State, ex rel. Blueford*, 173 Md. 267, 275-76 (1937)]). Guidelines from the Court of Appeals establish that the activity of a local government is considered governmental in nature "'[w]here the act in question is sanctioned by legislative authority, is solely for the public benefit, with no profit or emolument inuring to the municipality, and tends to benefit the public health and promote the welfare of the whole public, and has in it no element of private interest[.]'" *Rios*, 386 Md. at 128-29 (quoting *Blueford*, 173 Md. at 276).

Zilichikhis v. Montgomery Cnty., 223 Md. App. 158, 192, *cert. denied*, 444 Md. 641 (2015).

Accord Tadjer v. Montgomery Cnty., 300 Md. 539, 546-47 (1984).

With that general law in mind, we turn to Ms. Parran's contention that the circuit court erred in finding that her claim was barred by governmental immunity. First, she

asserts that the court did "not make any findings as to whether this was a governmental or proprietary function," as it was required to do pursuant to *Blueford*. Second, she asserts that the circuit court erred in finding, as a matter of law, that the area in question was not a sidewalk.

The Board disagrees. With respect to the first contention, it argues that the claim is not preserved for this Court's review because Ms. Parran never made this argument in the circuit court. It asserts that, during the hearing below, Ms. Parran agreed that the community center itself enjoyed governmental immunity, and her "sole contention during the hearing was that the sidewalk exception to governmental immunity applied." With respect to the second contention, the Board argues that the "circuit court was legally correct in finding that the location of the incident was not a sidewalk as a matter of law."

We begin with the first ground of error, that the circuit court failed to address the specific factors that determine whether an activity is a governmental or proprietary function. We agree with the Board that the issue is not preserved for this Court's review.

At the hearing below, counsel for the Board argued:

> With regards to the motion to dismiss, as Your Honor is aware, there is governmental immunity for a parks and recreational building because it is purely a government function. And under the Blueford line of cases the reasoning following thereon it's a purely governmental function designed for the health and benefit of the community, and the cases have consistently held that that type of facility would get immunity.
>
> Now, the issue that's been raised by opposing counsel is that because this happened on the boardwalk area immediately outside the doors of the community center, it's his belief that this falls underneath the sidewalk exception to governmental immunity.

Counsel then pointed out that, in chambers prior to the hearing, counsel for Ms. Parran had argued that the area was a public sidewalk on a roadway.

Although Ms. Parran now suggests that the circuit court was required to discuss the various factors set forth in *Blueford*,[3] our review of the transcript from the hearing below indicates, as the Board argues, that the issue whether there was governmental immunity was framed solely in the context of whether the area in question was a sidewalk, which counsel for Ms. Parran argued would "take[] it out of the governmental function."

Accordingly, Ms. Parran's argument on appeal that the court's ruling did not discuss other factors relating to whether there was governmental immunity is not preserved for this Court's review, and we will not address it. *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court.").

We thus turn to the contention that is properly preserved for review, i.e., that the court erred in ruling, as a matter of law, that governmental immunity applied because the area where Ms. Parran fell was not a sidewalk, but rather, it was a deck/porch that was part of the community center. Ms. Parran asserts that there was "a genuine dispute of material

[3] As indicated, *supra*, the Court of Appeals has set forth guidelines for determining whether actions are governmental in nature, stating that they are considered governmental in nature "'[w]here the act in question is sanctioned by legislative authority, is solely for the public benefit, with no profit or emolument inuring to the municipality, and tends to benefit the public health and promote the welfare of the whole public, and has in it no element of private interest.'" *Zilichikhis v. Montgomery Cnty.*, 223 Md. App. 158, 192 (quoting *Rios v. Montgomery Cnty.*, 286 Md. 104, 128-29 (2005) (quoting in turn *Mayor and City Council of Baltimore v. State, ex rel. Blueford*, 173 Md. 267, 276 (1937))), *cert. denied*, 444 Md. 641 (2015) (parallel citations omitted).

fact as to whether [the area] was a sidewalk, walkway, public way or a porch," which determines whether there was governmental immunity.

The Board contends that "the circuit court was legally correct in finding that the location of the incident was not a sidewalk as a matter of law." It states that there is no dispute that the "covered deck was not a sidewalk, but rather part of the Community Center."

The parties here agree that the operation of a community center is a governmental function. Accordingly, if the fall happened inside the community center, the Board was covered by governmental immunity. *See Zilichikhis*, 223 Md. App. at 192 (A local government is immune from liability when it functions in a "governmental" capacity.). As the parties recognize, however, "a municipality has a 'private proprietary obligation' to maintain its streets, as well as the sidewalks, footways and the areas contiguous to them, in a reasonably safe condition." *Id.* at 196 (quoting *Higgins v. City of Rockvill*e, 86 Md. App. 670, 678 (1991)). The issue in dispute here is whether the area in which Ms. Parran fell was a part of the community center, in which case maintenance of the area was a governmental function and governmental immunity applies, or whether it was a sidewalk, in which case maintenance of the area was a proprietary function and there was no governmental immunity.

The term "sidewalk" is defined in TR § 21-101(w), as "that part of a highway: . . . (1) That is intended for use by pedestrians; and (2) That is between: (i) The lateral curb lines or, in the absence of curbs, the lateral boundary lines of a roadway; and (ii) The

adjacent property lines." The Court of Appeals has observed that "[a] sidewalk has been said to be a walkway *set apart at the side of the street* for the use of that part of the public which travels by foot, usually embracing the area between the building or property line and the curb." *Lipphard v. Hanes*, 232 Md. 405, 408 (1963) (emphasis added). Similarly, Merriam-Webster defines a sidewalk as "a usually paved walk for pedestrians *at the side of the street*." *Webster's Ninth New Collegiate Dictionary* 1095 (1987) (emphasis added). All of these definitions refer to a "sidewalk" as a path by the side of a road.

Ms. Parran argues that the "use and application" of the term "sidewalk" in TR § 21-201(w) is inappropriate in this case because it is not a motor vehicle case to which the Transportation Article applies. Although it is true that this is not a motor vehicle case, and therefore, the definition of the term "sidewalk" in the Transportation Article may not be dispositive, it does not follow that we cannot consider the General Assembly's definition of the term sidewalk, particularly when it is consistent with the definition set forth in case law and in the dictionary.

Ms. Parran next asserts that the area in question should be viewed as a walkway to facilitate access to the community center and the water park, and the "only difference between" a sidewalk and a walkway is that a "walkway does not have to be near the street." Other than that, she contends, "the terms have the same relative meaning," and "since the walkway serves the same purpose as the sidewalk and the [Board] agreed to maintain it, it is equivalent to the sidewalk and therefore it is a proprietary obligation of the [Board] to maintain the property."

The Board contends that this attempt to expand the definition of a sidewalk should be rejected, noting that this Court rejected an attempt to expand the definition of a sidewalk to an area of public travel in *Bagheri v. Montgomery Cnty.*, 180 Md. App. 93, 102, *cert. denied*, 406 Md. 112 (2008). In that case, involving an accident inside a public garage, this Court upheld the grant of summary judgment, stating that, to accept the argument that accidents occurring in "an area of public travel" negate governmental immunity, "greatly expand the 'street, sidewalk, footway' exception to the usual rule that a municipality is immune from suit" under the *Blueford* guidelines. *Id.* at 101-02.

Here, we agree with the circuit court and the Board that the covered walkway, which did not run adjacent to a street, was not a sidewalk. Rather, the area involved here was a part of the community center, akin to a porch/deck. Accordingly, the circuit court did not err in deciding as a matter of law that the Board was immune from suit, and it properly granted the motion for summary judgment.

JUDGMENT OF THE CIRCUIT COURT FOR CALVERT COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.