2013 IL App (1st) 110743-U

FOURTH DIVISION
August 22, 2013

No. 1-11-0743

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

STANLEY RANKIN, Plaintiff-Appellee, v. CHICAGO PARK DISTRICT, Defendant-Appellant, CITY OF CHICAGO, CHICAGO CONTRACT CLEANING AND SUPPLY CO., NATIONAL WASTE SERVICES, INC., ALLIED WASTE TRANSPORTATION, INC. AND MB REAL ESTATES SERVICES, LLC., Defendants. (MILLENNIUM PARK JOINT VENTURE, LLC, Third-Party Defendant.)	)	Appeal from the Circuit Court of Cook County. No. 09 L 10433 The Honorable Jeffrey Lawrence, Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Congealed garbage constitutes a condition of public property under section 3-106 of the Tort Immunity Act. Because plaintiff's injury was caused by a condition of the property,

not a mishandling of the property, the Park District was immune from liability. This court answered the certified questions and remanded the case for proceedings consistent with this order.

¶ 2 Defendant Chicago Park District (Park District) filed this interlocutory appeal in connection with a lawsuit filed by respondent Stanley Rankin, against the Park District, the City of Chicago, Chicago Contract Cleaning and Supply Company, National Waste Services, Inc., Allied Waste Transportation, Inc., and MB Real Estates Services, LLC[1]. Rankin filed suit to recover damages from injuries allegedly sustained when he slipped on the access ramp to the Park Grill (Grill) located in Millennium Park. This happened as Rankin prepared to clean the ramp after the Park District had allegedly left debris there when it removed the Grill's garbage earlier in the morning. Following the partial denial of its summary judgment motion, the Park District filed a motion to certify three questions, which the circuit court granted and certified for our review pursuant to Illinois Supreme Court Rule 308 (eff. Feb. 26, 2010).

¶ 3 "1. Does congealed garbage allegedly left by Chicago Park District employees on a service ramp to a concessionaire's restaurant located at Millennium Park constitute 'a condition of any public property' under Section 3-106 of the Tort Immunity Act (the Act)?

2. Is congealed garbage allegedly left on a service ramp to a Millennium Park concessionaire's restaurant 'affixed' to the property so as to constitute part of the property's 'mode or state of being' under the *Stein v. Chicago Park District* case's interpretation of Section 3-106 of the Tort Immunity Act?

3. After the Second District's decision in *Callaghan v. Village of Clarendon Hills*, is *Stein*

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[1]The Park District is the only remaining defendant in the underlying case. The other defendants were voluntarily dismissed or dismissed after settling with respondent. The Park District has a third-party complaint for contribution pending against the Millennium Park Joint Venture (Park Grill).

v. Chicago Park District's interpretation of Section 3-106 holding that 'public property' must be 'affixed to the property' so as to become part of its 'mode or state of being' still good law in Illinois?"

¶ 4 Although we initially declined to accept the Park District's petition seeking our review of these questions, the supreme court in light of *Moore v. Chicago Park District*, 2012 IL 112788, has by supervisory order directed us to accept the appeal and answer the certified questions. Although respondent has not filed a responsive brief in this appeal, we may proceed in our review based on the principles cited in *First Capitol Mortgage. Corp. v. Talandis Construction Corp.*, 63 Ill.2d 128 (1976). We conclude that the "congealed garbage" at issue here constitutes a condition of the public property under *Moore* and the Park District is immune from liability. *Moore* necessarily disposes of the remaining questions.

¶ 5 BACKGROUND

¶ 6 We recite only those facts necessary to understand the issues raised on appeal. On February 5, 2008, Rankin filed his third-amended complaint alleging, in pertinent part, that the Park District acted negligently in maintaining, operating and inspecting public property in Millennium Park when it removed garbage accumulated by Rankin's employer, the Grill. Rankin also alleged willful and wanton conduct against the Park District.

¶ 7 Several depositions were taken during discovery. Rankin testified that on the day of the incident, August 29, 2004, he had worked at the Grill as a steward for 90 days. The Grill used a small underground service area for a supply entrance and garbage storage. One could access this area by a concrete ramp that descended from Monroe Street to the floor of the service area. The Grill stored garbage in several wheeled garbage bins and loose garbage bags in a garbage room located in the service area. Park District employees routinely came each morning to collect

garbage from the previous day's activities. Employees collected garbage by using a John Deere Gator to pull the wheeled garbage bins up to street level where they were loaded into a truck. During this process, garbage routinely fell on the service area floor and ramp.

¶ 8 Rankin's usual duties consisted of bringing supplies in from delivery trucks with a forklift and maintaining the premises inside and out. Beginning in August, Rankin's employer directed him to clean up debris on the ramp, sidewalk and street. Rankin routinely observed debris left behind by the Park District. On the day of the incident, after the Park District removed the garbage, Rankin pushed a cart with cleaning supplies up the ramp and injured himself when he slipped on "some like gooey stuff from the garbage can." He admitted that he knew from his work experience that "the ramp could be slippery."

¶ 9 Frank Amato, the Park District's Park Operations Supervisor, testified that in addition to trash removal at the Grill, Park District employees cleaned fallen garbage using a shovel, rack or broom. The Park District, however, was not equipped to remove liquid waste, which would have required a power washer.

¶ 10 Michael Bean, the Park District's maintenance foreman, testified that the Park District required employees to remove any garbage spillover left on the ground because it could be a safety hazard to patrons. During garbage removal, sometimes the weight of the bag from the food would break the bag open and the food or liquid waste would spill on the ground. The liquid on the ground occasionally attached to the Gator's wheels and would get on the ramp. Bean's laborers were responsible for cleaning up all solid garbage, but not liquid garbage. In addition, more than thirty trucks used the ramp for delivery and other purposes.

¶ 11 On November 10, 2008, the trial court granted in part and denied in part the Park District's motion for summary judgment. The trial court ruled that the Park District did not act

willfully and wantonly in maintaining the service ramp, as Rankin alleged. The court, however, in a written order relying on *Stein v. Chicago Park District*, 323 Ill. App. 3d 574 (2001), denied the Park District's motion for summary judgment on the remaining negligence claim. *Stein* held that for a condition to trigger immunity under section 3-106, the condition must be affixed to the public property. In *Stein*, the appellate court determined that the watering hose was not a condition of the property because it was moved from place to place within the park, and thus, it was not part of the property's "mode or state of being." *Stein*, 323 Ill. App. 3d at 577.

¶ 12 ANALYSIS

¶ 13 This certified question followed. Generally speaking, the scope of our review is limited to the certified questions, which we review *de novo*. *Simmons v. Homatas*, 236 Ill. 2d 459, 466 (2010). We are first asked to consider whether congealed garbage constitutes a condition of any public property under section 3-106 of the Tort Immunity Act (Act), which provides:

> "Neither a local public entity nor a public employee is liable for an injury where the liability is based on the existence of *a condition of any public property* intended or permitted to be used for recreational purposes, including but not limited to parks, playgrounds, open areas, buildings or other enclosed recreational facilities, unless such local entity or public employee is guilty of willful and wanton conduct proximately causing such injury." 745 ILCS 10/3-106 (West 2010) (emphasis added).

¶ 14 In deciding whether congealed garbage is a condition of the property for purposes of section 3–106, *Moore*, 2012 IL 112788, is dispositive.[2] In *Moore*, an elderly woman tripped on a pile of snow that was created from the leavings of snow plowed by employees of the Park

[2]We note that no question was raised regarding whether the property at issue was "intended or permitted to be used for recreational purposes."

District; the woman subsequently died, and her estate filed suit. The supreme court held that this unnatural accumulation of snow and ice constituted a condition of the property under section 3–106. In reaching that determination, the court distinguished *McCuen v. Peoria Park District*, 163 Ill. 2d 125, 127 (1994), where several plaintiffs were thrown from a hayrack sustaining injuries when a park district employee slapped a strap over the body of one of the mules causing the mule team to bolt and run off. The mishandling of a mule-team-drawn hayrack was an unsafe activity that did not immunize the park district. Unlike in *McCuen*, *Moore* held that the existence of snow and ice was not an activity conducted on the Park District's property, but rather a condition of the property. The *Moore* court reasoned that "if otherwise safe property is misused so that it is no longer safe, but the property itself remains unchanged, any danger presented by the property is due to the misuse of the property and not to the condition of the property." *Moore*, 2012 IL 112788 at ¶ 14.

¶ 15 Thus, following the dictates of *Moore*, to determine whether something is a condition of public property under section 3-106, we must consider whether a plaintiff's injury was caused by the property itself or an activity conducted on the property. Unlike the employee's mishandling of the mule team in *McCuen*, there is no evidence here demonstrating an active mishandling of the property. Garbage clean-up was clearly a routine practice, and garbage, a passive characteristic of the property, much in the same manner as efforts in snow removal. It is irrelevant that Park District employees may have left congealed garbage on the ramp prior to Rankin's injury. The defective condition was allegedly created at some time before the incident, just as the plowing of the ice and snow in *Moore*.

¶ 16 In addition, we note that while the trial court relied on *Stein* in making its determination, *Moore* expressly overruled *Stein*. The *Moore* court determined that, according to the plain language of section 3-106, a condition does not need to be affixed to the property for immunity to

attach. *Moore*, 2012 IL 112788 at ¶ 21; see also *Callaghan v. Village of Clarendon Hills*, 401 Ill. App. 3d 287, 299 (2010) (where the court determined that since section 3-101 of the Act defined "public property" to include both real and personal property, and given that public property may be moveable personal property, it was inconsistent to interpret "condition" to mean being affixed or immoveable). In addition, current case law does not require a condition to be affixed to the property to immunize a defendant under section 3-106. See *Moore*, 2012 IL 112788 at ¶ 20 and cases cited therein; see also *Grundy v. Lincoln Park Zoo*, 2011 IL App (1st) 102686, ¶ 11 (where the plaintiff tripped over a moveable sign at a zoo's outdoor café). Thus, congealed garbage constitutes a condition of public property regardless of its moveable characteristic.

¶ 17 For these reasons, we answer the first certified question in the affirmative. Congealed garbage constitutes a condition of public property under section 3-106 of the Act because Rankin's injury was caused by the property itself not a misuse of the property. In answer to questions two and three, *Moore* overruled *Stein*, and thus, *Stein* is no longer good law. The supreme court interpreted "conditions" in section 3-106 to include items that were not affixed to the property. Whether congealed garbage was affixed to the property is therefore irrelevant.

¶ 18 CONCLUSION

¶ 19 Certified questions answered; cause remanded.