

No. 1-12-2934

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

NATHALY RODRIGUEZ, a Minor, By Her	)	Appeal from the
Mother and Next Friend, Magaly Torres;	)	Circuit Court of
MAGALY TORRES and SERGIO RODRIGUEZ,	)	Cook County.
Individually, as Parents of Nathaly Rodriguez,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	
	)	No. 11 L 13022
THE CITY OF CHICAGO and KATHLEEN	)	
BIAMONTE, as Agent and Employee of The City	)	
of Chicago,	)	
	)	
Defendants-Appellees	)	
	)	
(Tricia Pace,	)	Honorable
	)	Kathy M. Flanagan,
Defendant).	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.  
Justices Cunningham and Delort concurred in the judgment.

**ORDER**

¶ 1 **HELD:** Claims against municipal defendant and its employee were properly dismissed, where the defendants were immune from liability pursuant to the Local Governmental and Governmental Employees Tort Immunity Act.

¶2 The plaintiffs-appellants, Nathaly Rodriguez, a minor, by her mother and next friend, Magaly Torres (Nathaly), and Magaly Torres and Sergio Rodriguez, individually, as parents of Nathaly Rodriguez (parents), filed the instant personal injury lawsuit to recover damages after Nathaly was struck by an automobile driven by the defendant, Tricia Pace. The accident occurred while Nathaly was crossing a street at which the defendant-appellee, Kathleen Biamonte, as agent and employee of the City of Chicago, was employed as a crossing guard by the defendant-appellee, the City of Chicago (the City).<sup>1</sup>

¶3 The circuit court granted a motion to dismiss the plaintiffs' claims against the City defendants, concluding that they were protected from liability under certain provisions of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act). 745 ILCS 10/1-101 *et seq.* (West 2010). The plaintiffs have appealed from that decision and, for the following reasons, we affirm.

¶4 I. BACKGROUND

¶5 The plaintiffs' complaint alleged that, on morning of December 2, 2010, Nathaly and her sister were walking from their residence to board a school bus. The route from the minors' residence to the location where they would board the bus required the two minors to cross Pulaski Road at 58th Street, an intersection where Ms. Biamonte was employed by the City as a crossing guard.

¶6 When Nathaly and her sister arrived at the intersection, Ms. Biamonte was allegedly sitting inside her automobile and talking on her cellular phone. Ms. Biamonte allegedly refused Nathaly's

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<sup>1</sup> Collectively, Ms. Biamonte and the City will be referred to as the "City defendants."

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request to exit the vehicle and assist the two minors across the street. Nathaly and her sister then crossed Pulaski Road without any assistance from Ms. Biamonte, and Nathaly was struck by a vehicle driven by Ms. Pace. The complaint alleged that, as a result of the accident, Nathaly had suffered bodily injury, pain, discomfort, and mental anguish. Nathaly's parents were alleged to have incurred various medical expenses on behalf of their daughter.

¶ 7 The plaintiffs' complaint included a total of eight counts. The first two were directed at Ms. Pace and are not at issue on appeal. The remaining six counts were directed against the City defendants. Count III asserted that the City defendants had committed various acts of negligence with respect to the accident. Count V asserted that the City defendants had engaged in various acts of willful and wanton and/or reckless behavior with respect to the accident. Count VII was pled against the City only, and alleged that the City acted willfully and wantonly and/or recklessly in failing to properly train its crossing guards and in failing to institute or enforce a policy prohibiting crossing guards from talking on their cellular phones. Counts IV, VI, and VIII reasserted the allegations contained in the other three counts against the City defendants, and alleged a derivative claim on behalf of the parents to recover medical expenses paid on behalf of Nathaly. These claims were brought pursuant to section 15 of the Rights of Married Persons Act (750 ILCS 65/15 (West 2010)), often referred to as the "Family Medical Expense Act."

¶ 8 The City defendants filed a motion to dismiss the six counts against them, relying upon the Tort Immunity Act. The circuit court granted the motion to dismiss in a written order entered on August 31, 2012. The circuit court first found that Counts III, V, and VII should be dismissed after concluding that the provision of crossing guards is a police service, and that section 4-102 of the Tort

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Immunity Act (745 ILCS 10/4-102 (West 2010)) provided the City defendants with immunity for failing to provide police services and for providing inadequate police services. The circuit court also concluded that some of the allegations contained in Count VII, regarding the City's failure to institute or enforce a policy prohibiting crossing guards from talking on their cellular phones, were barred by the immunity for any failure to adopt or enforce any law or enactment contained in section 2-103 of the Tort Immunity Act. 745 ILCS 10/2-103 (West 2010).

¶ 9 In addition, the circuit court found that section 2-202 of the Tort Immunity Act (745 ILCS 10/2-202 (West 2010)), which does not provide immunity for willful and wanton conduct, was not applicable to this suit and—in any case—would not prevail over the immunity provided by section 4-102. The circuit court also concluded that any attempt by the plaintiffs to allege the so-called "special duty" doctrine against the City defendants would be unavailing, as that doctrine was both inapplicable to the facts of this case and insufficient to overcome the protections provided by the Tort Immunity Act.

¶ 10 Finally, the circuit court determined that Counts IV, VI, and VIII, asserting claims under the Family Medical Expense Act, should also be dismissed because they were merely derivative of the other three dismissed counts against the City defendants. The circuit court's order dismissing the claims against the City defendants indicated that it was with prejudice and that it was made pursuant to Illinois Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010)), with the circuit court further concluding that there was no just reason to delay the enforcement or appeal of that order. The plaintiffs filed a timely appeal on September 28, 2012.

¶ 11

## II. ANALYSIS

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¶ 12 On appeal, the plaintiffs mainly contend that the circuit court erred in dismissing their claims against the City defendants because: (1) section 4-102 of the Tort Immunity Act does not apply to the facts alleged in the plaintiffs' complaint; and (2) section 2-202 of the Tort Immunity Act is the only possible basis to find the City defendants immune from liability, and that section does not provide immunity for the willful and wanton misconduct alleged in the complaint. We disagree.

¶ 13 The City defendants filed their motion to dismiss pursuant to section 2-619(a)(9) of the Code of Civil Procedure (the Code) (725 ILCS 5/-2-619(a)(9) (West 2010)), which allows for involuntary dismissal where "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." Thus, a defendant moving for dismissal pursuant to section 2-619(a)(9) "admits the legal sufficiency of the complaint, but asserts an affirmative defense or other matter to defeat the plaintiff's claim." *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). "[I]mmunity under the Tort Immunity Act is an affirmative matter properly raised in a section 2-619 motion to dismiss." *DeSmet v. County of Rock Island*, 219 Ill. 2d 497, 504 (2006) (citing *Van Meter*, 207 Ill. 2d at 367).

¶ 14 When reviewing an order dismissing a complaint pursuant to a 2-619 motion, we will interpret the pleadings and supporting documents in the light most favorable to the plaintiff. *Seip v. Rogers Raw Material Fund, L.P.*, 408 Ill. App. 3d 434, 438 (2011). We review an order granting such a motion to dismiss *de novo*. *Id.* at 439.

¶ 15 The legislature passed the Tort Immunity Act in 1965. Ill. Rev. Stat. 1965, ch. 85, par. 1-101 *et seq.* (now 745 ILCS 10/1-101 *et seq.* (West 2008)). The Tort Immunity Act adopted the general principle that local governmental units are liable in tort, but limited this liability with an extensive

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list of immunities based on specific government functions. *Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill. 2d 335, 344 (1998). "By providing immunity, the legislature sought to prevent the diversion of public funds from their intended purpose to the payment of damage claims." *Bubb v. Springfield School District 186*, 167 Ill. 2d 372, 378 (1995).

¶ 16 When interpreting a provision of the Tort Immunity Act, "our primary goal is to ascertain and give effect to the intention of the legislature. We must seek the legislative intent primarily from the language used in the Tort Immunity Act." *Barnett v. Zion Park District*, 171 Ill. 2d 378, 388 (1996). When an immunity provision "is clear and unambiguous, we are not at liberty to depart from the plain language and meaning of the statute by reading into it exceptions, limitations or conditions that the legislature did not express." *DeSmet*, 219 Ill. 2d at 510.

¶ 17 Section 4-102 of the Tort Immunity Act provides:

"Neither a local public entity nor a public employee is liable for failure to establish a police department or otherwise provide police protection service or, if police protection service is provided, for failure to provide adequate police protection or service, failure to prevent the commission of crimes, failure to detect or solve crimes, and failure to identify or apprehend criminals. This immunity is not waived by a contract for private security service, but cannot be transferred to any non-public entity or employee." 745 ILCS 10/4-102 (West 2010).

¶ 18 As an initial matter, there is no question that the City is a "local public entity" and that Ms. Biamonte is a "public employee" as those terms are used in section 4-102 and as they are defined in the Tort Immunity Act. 745 ILCS 10/1-206 (West 2010) (" 'Local public entity' includes a \*\*\*

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municipality \*\*\*."); 745 ILCS 10/1-207 (West 2010) (" 'Public employee' means an employee of a local public entity."). Indeed, the plaintiffs' complaint itself alleged that Ms. Biamonte was "employed by the CITY OF CHICAGO as a crossing guard." Thus, we reject the plaintiffs' argument that section 4-102 is "an awkward fit—in fact not a fit at all—for crossing guards" because "crossing guards are not police officers." The plain language of section 4-102 indicates that it offers immunity to all public employees, without any requirement that those employees be police officers.

¶ 19 Furthermore, in *DeSmet*, our supreme court recognized that section 4-102 is "comprehensive in the breadth of its reach, addressing situations where no police protection is provided to the general public and those in which inadequate protection is provided. *DeSmet*, 219 Ill. 2d at 515. Moreover, section 4-102 contains no exception for willful and wanton misconduct." Our supreme court thus further recognized that section 4-102 "immunizes defendants against both negligence and willful and wanton misconduct." *Id.*; see also *Ries v. City of Chicago*, 242 Ill. 2d 205, 224-25 (2011) (reaffirming *DeSmet*'s conclusions regarding the scope of section 4-102 of the Tort Immunity Act).

¶ 20 Moreover, this court has long recognized that the immunity provided by section 4-102 applies in contexts beyond the "traditional police role of law enforcement, police protection, and apprehension of criminals \*\*\*." *Kavanaugh v. Midwest Club, Inc.*, 164 Ill. App. 3d 213, 221 (1987). Indeed, we have twice recognized the provision of crossing guards to be a police protection service subject to the immunity provided by section 4-102. *Hernandez v. Kirksey*, 306 Ill. App. 3d 912, 916-17 (1999) (finding immunity for city-employed school crossing guard alleged to have improperly instructed a child to cross the street despite oncoming traffic); *Goebig v. City of Chicago*, 188 Ill. App. 3d 614, 616 (1989) (immunity for city-employed school crossing guard who was allegedly

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absent from usual location, thus allowing student to cross intersection without assistance).

¶ 21 More recently, our supreme court specifically recognized "that the appellate court has held the police protection services immunity applicable in a variety of circumstances not directly involving police personnel." *Doe v. Chicago Board of Education*, 213 Ill. 2d 19, 25 (2004). Both *Hernandez* and *Goebig* were cited, along with a number of other cases involving different factual circumstances, as support for this proposition. *Id.* While the analysis in *Doe* did not require our supreme court to specifically affirm the holdings in *Hernandez* and *Goebig*, the court appears to have at least impliedly accepted the notion that section 4-102 was properly applied in each of the appellate court cases it cited. *Id.* ("While these cases did not involve services performed by police personnel, they all relate to functions traditionally performed by police, such as \*\*\* traffic control \*\*\*.").

¶ 22 Here, Count III of the plaintiffs' complaint alleged that Ms. Biamonte, as agent for the City, was negligent for failing to: (1) be present on the street at her scheduled time to stop traffic so that Nathaly could cross the street safely; (2) actually stop traffic so that Nathaly could cross the street safely; and (3) respond to the request of Nathaly and her sister for help in crossing the street, rather than continue talking on her cellular phone inside the automobile. Count III also alleged that the City was negligent in failing to: (1) ensure that a crossing guard was present on the street at the time of the accident; and (2) sufficiently train Ms. Biamonte as a crossing guard.

¶ 23 Contrary to the plaintiffs' arguments on appeal, all of these allegations relate to the City defendants' purported failure to provide the services of a crossing guard, or the failure to provide adequate crossing guard services. As explained above, such services are recognized to be subject to section 4-102, which provides immunity for the failure to provide any police protection services,

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or the provision of inadequate police protection services. Indeed, this includes the allegations involving the City's failure to train Ms. Biamonte. In *DeSmet*, our supreme court specifically recognized that such allegations "implicate the structural adequacy of police protection services," and are therefore barred by the immunity provided by section 4-102. *DeSmet*, 219 Ill. 2d at 513-14.

¶ 24 Count V of the plaintiffs' complaint alleged that Ms. Biamonte, as agent for the City, acted willfully and wantonly and/or recklessly in *deliberately* failing to take any of the specific actions described above. As we have already discussed, all of these allegations relate to the City defendants' purported failure to provide any police protection services or their failure to provide adequate police protection services. As such, the City defendants are protected by section 4-102 and it does not matter that Count V additionally claims these purportedly deliberate failures amounted to willful and wanton misconduct. *Ries*, 242 Ill. 2d at 224-25.

¶ 25 Count VII, asserted against the City only, first alleges that the City acted willfully and wantonly and/or recklessly in failing to properly train its crossing guards. Again, we have already concluded that allegations related to the City's failure to properly train its crossing guards are barred by section 4-102, and that the immunity provided by section 4-102 includes allegations of willful and wanton misconduct.

¶ 26 While Count VII additionally includes allegations regarding the City's failure to institute or enforce a policy prohibiting crossing guards from talking on their cellular phones, such allegations are also barred by section 4-102. After concluding that allegations of a failure to train employees are barred by section 4-102 because they "implicate the structural adequacy of police protection services," in *DeSmet*, our supreme court also recognized that allegations of a failure to "have in force

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procedures which would ensure that all emergency calls for assistance are responded to in a timely fashion" were also barred for the same reason. *DeSmet*, 219 Ill. 2d at 513-14.

¶ 27 The instant allegations regarding the City's failure to institute or enforce a policy prohibiting crossing guards from talking on their cellular phones are not materially different, likewise relate to the adequacy of police protection services, and are therefore barred by section 4-102. See *Doe v. Village of Schaumburg*, 2011 IL App (1st) 093300, ¶ 16 (noting that *DeSmet* generally stands for the proposition that a public entity that fails to "properly train and supervise employees, or to have in force procedures to ensure the adequate performance of their duties, \*\*\* is immune from liability under section 4-102"). Moreover, the circuit court also properly found the City immune from liability for such allegations under section 2-103 of the Tort Immunity Act, which provides that a "local public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law." 745 ILCS 10/2-103 (West 2010).

¶ 28 In light of the above discussion, we find that the circuit properly dismissed Counts III, V, and VII of the plaintiffs' complaint against the City defendants. Moreover, because Counts IV, VI, and VIII, asserting claims under the Family Medical Expense Act, are completely derivative of the other three counts against the City defendants, those counts were properly dismissed as well.

¶ 29 In so ruling, we briefly address a few remaining issues. First, we reject the plaintiffs' contention that it is actually section 2-202 of the Tort Immunity Act that applies here. That section of the Tort Immunity Act provides that a "public employee is not liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes willful and wanton conduct." 745 ILCS 10/2-202 (West 2010). The plaintiffs argue for the application of this section

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in an effort to salvage the allegations of willful and wanton conduct contained in their complaint.

¶ 30 However, our supreme court has made it clear that even where section 2-202 is potentially applicable to the allegations of a complaint, it does not provide a willful and wanton conduct exception to the comprehensive immunities provided in other sections of the Tort Immunity Act and will not prevail where other, more specific, immunities apply. *Ries*, 242 Ill. 2d at 220-27. As such, because we have already concluded that the more specific and comprehensive immunities provided in sections 4-102 and 2-103 of the Tort Immunity Act apply and fully protect the City defendants from liability in this case, any further consideration of section 2-202 is unnecessary.

¶ 31 Also unnecessary is any further consideration of the plaintiffs' reliance upon the so-called special duty doctrine, which is "a common law, judicially created rule which both establishes a duty on the part of a governmental entity *and* imposes liability for a breach of that duty." (Emphasis in original.) *Hess v. Flores*, 408 Ill. App. 3d 631, 639 (2011). As our supreme court has recognized, the special duty doctrine only allows courts to impose liability upon a municipality where the legislature has not granted immunity to the municipality. *Harinek*, 181 Ill. 2d at 347. That is simply not the case here.

¶ 32 Finally, we must reject the plaintiffs' argument that it is "inconceivable" that the provisions of the Tort Immunity Act would preclude any recovery against the City defendants in light of the facts alleged in their complaint. As our supreme court has stated, courts "'may not legislate, rewrite or extend legislation. If a statute, as enacted, seems to operate in certain cases unjustly or inappropriately, the appeal must be to the General Assembly, and not to this court.'" *Ries*, 242 Ill. 2d at 220 (quoting *DeSmet*, 219 Ill.2d at 510).

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¶ 33

### III. CONCLUSION

¶ 34 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 35 Affirmed.