2017 IL App (1st) 153650-U

FIRST DIVISION
May 22, 2017

No. 1-15-3650

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SYLVIA MALDONADO, Plaintiff-Appellee, v. CITY OF CHICAGO, a municipal corporation, Defendant-Appellant.	) Appeal from the Circuit Court of) Cook County, Law Division)))) No. 11 L 13290)))) Honorable Donald J. Suriano,) Judge Presiding

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Connors and Justice Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err when it found that defendant was not entitled to judgment as a matter of law on its defense that it owed plaintiff no duty of care. The trial court did not err when it gave the jury the opportunity to correct an inconsistent verdict.

¶ 2 Following a jury trial, plaintiff was awarded damages after she was injured by stepping into a large hole in a parking lane in Chicago. Both here and in the trial court, the City argued that it was entitled to judgment as a matter of law because it owed plaintiff no duty of care. The City also argues that the trial court erred when it ordered the jury to continue deliberations after

returning an inconsistent verdict. The jury eventually returned a verdict for the plaintiff, and the trial court entered judgment on that verdict. Finding no reversible error, we affirm.

¶ 3 BACKGROUND

¶ 4 The facts in the case are pretty straightforward and not in dispute. On December 22, 2010, plaintiff Sylvia Maldonado was injured after exiting a vehicle and stepping into a hole in the street.

¶ 5 Plaintiff was with her husband and children. They traveled to South Keating Avenue for a family birthday party. South Keating is a one-way, southbound street with parking lanes on both sides. It had snowed three or four inches that day. Plaintiff and her husband dropped the kids off in front of their relatives' house and proceeded to find parking. Plaintiff's husband found a spot on the west side of the street across from their destination. As plaintiff's husband was parallel parking, she asked to be let out so as to not be stepping into the snow as she exited the car.

¶ 6 As plaintiff exited the vehicle, her husband had the back end of the car close to the curb. The front end was angled-out into the street. The front end of the car was close to the vehicle that was parked in front of them, a red van. Plaintiff exited the car.

¶ 7 At this point, to the west, plaintiff was confronted with a curb and a strip of property that were covered in snow. She did not want to wade through the snow in an attempt to get to the sidewalk. To the east, she was blocked by the passenger side of her own car. To the north, she was blocked by the back end of her own car, as her husband had the back end of the vehicle near the curb in the process of parallel parking. So, plaintiff decided to go south, the direction the vehicle was facing. She could not go south to the front of her own vehicle and immediately cross the street in front of it because the front end was too close to the van parked in front of them. There was enough space for her to pass the van on its passenger side, so plaintiff walked

alongside the van—with it on her left and the curb on her right—with the plan of crossing the street in front of the van.

¶ 8 After walking past the van, plaintiff took a step to her left, east towards her relatives' house and her right leg went into a hole. It was not a minor pothole. The hole was 31 inches deep, 12 inches long, and 6 inches wide. When plaintiff stepped in it, she went in up to her mid-thigh. She was injured. Plaintiff did not see the hole because it was obscured by the snow.

¶ 9 Plaintiff admits that she could have climbed over the snow-covered curb and strip of property and walked down the end of the block to cross the street at a crosswalk. However, because the street was relatively clear of snow, she decided she would just cross in the middle of the street and go directly to her relatives' house.

¶ 10 The hole had been in that spot for several months before the incident. For about five months beforehand, there was a cone placed near the hole, but it had apparently been removed a couple weeks before plaintiff stepped in it. Plaintiff sued the City for her injuries.

¶ 11 The City filed multiple motions arguing that it owed plaintiff no duty of care. The court rejected them. After trial, the jury found plaintiff to be 49% responsible for her own injuries and the City responsible for the remainder. The jury awarded her $242,000 which ended up as an award of $118,580 after factoring in her contributory negligence. Arriving at that verdict was not without controversy.

¶ 12 The court gave the jury three verdict forms—a, b, and c. The court instructed the jury to use verdict form A if it found for the plaintiff and found her not to have been contributorily negligent at all. The court instructed the jury to use verdict form B if it found for the plaintiff, but found her to be less than 50% contributorily negligent. And the court instructed the jury to use verdict form C if it found plaintiff to be more than 50% responsible for her injuries and,

therefore, found the city not to be liable. The court also instructed the jury about the two special interrogatories they were charged with answering. One of the special interrogatories was "If Sylvia Maldonado was contributorily negligent was her contributory negligence more than 50 percent of the total proximate cause of the injury for which recovery is sought."

¶ 13 The jury delivered an inconsistent verdict. It used form B indicating that it believed plaintiff should recover and that she was less than 50% responsible. The jury also arrived at a conclusion on the amount of damages to which plaintiff was entitled. However, the jury indicated that plaintiff was 55% responsible for her own injuries and it answered the special interrogatory about her fault being more than half in the affirmative. Without disclosing the content of the verdict to the parties, the trial judge said to the jury: "I'm going to tell you to go back in there and look at this verdict carefully. And something is not right here. Okay? I don't want to tell you how to fill it out, but read the instructions a little clearer… Go back in." The court then re-instructed the jury consistent with the jury instructions originally given.

¶ 14 The jury then returned the verdict again. This time, it still used verdict form B, but had crossed out the 55% finding of contributory negligence and wrote 49%. The jury also crossed out their affirmative response to the special interrogatory and wrote "no." At the City's request, the trial court polled the jury, and each member confirmed the verdict. The jury was then dismissed. At that point, the court disclosed to counsel for both parties that the jury had changed the verdict forms after the admonishment it gave. The alterations are apparent on the verdict forms. The court refused to set aside the verdict, despite the City's urging, indicating that it did not influence the jury in any way. Instead, the court stated that it merely sent the jury back in and told them to take a closer look. Judgment was entered for the plaintiff, and the City's postjudgment motions were denied. The City appeals.

¶ 15 ANALYSIS

¶ 16 The City raises two principal issues on appeal: (1) that it was entitled to judgment as a matter of law because it owed plaintiff no duty of care; and (2) that the court should have entered judgment notwithstanding the verdict because of the verdict the jury originally returned.

¶ 17 I. Whether the City Owed Plaintiff a Duty of Care

¶ 18 In support of its argument that it did not owe plaintiff a duty of care, the City argues that plaintiff was not an "intended and permitted" user of the area where she fell. Under the Tort Immunity Act, the City is only liable for breaching its duty to maintain its property to those "people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used." 745 ILCS 10/3-102(a) (West 2012). Whether a person is an "intended and permitted user" is a question of law subject to *de novo* review. *Wolowinski v. City of Chicago*, 238 Ill. App. 3d 639, 641 (1992). Thus, we turn to whether plaintiff was an intended and permitted user of the area in which she fell.

¶ 19 The parties both rely on the same two Illinois Supreme Court cases for the general legal principles that pertain to intended and permitted users: *Vaughn v. City of W. Frankfort*, 166 Ill. 2d 155 (1995) and *Wojdyla v. City of Park Ridge*, 148 Ill. 2d 417 (1992). Those cases explain that pedestrians who are injured in the middle of the road outside of crosswalks are not owed a duty of care, but also that municipalities do have a duty to make crosswalks and parking lanes reasonably safe for pedestrian use.

¶ 20 Other precedent establishes that municipalities do not owe a duty of care to people walking in the streets, but there is a "narrow exception" for those that are entering or exiting a legally parked vehicle. *Sisk v. Williamson County*, 167 Ill. 2d 343, 351 (1995). Pedestrian use of the area around the parked vehicle for ingress and egress to and from the vehicle is intended and

permitted under the Tort Immunity Act. *Torres v. City of Chicago*, 218 Ill. App. 3d 89, 91 (1991).

¶ 21 The City argues that the "narrow exception" extending the City's duty to those entering and exiting legally parked vehicles does not apply to plaintiff. To support its position, the City argues that: (1) plaintiff's vehicle was not legally parked; (2) the defect was not in the immediate area of her vehicle; and (3) plaintiff's use of the street in the spot she was injured was not necessary for purposes of exiting the vehicle. We will address those arguments in turn.

¶ 22 Because plaintiff exited the vehicle before her husband finished parking the car, the City argues that the car was not "legally parked" so as to avoid the City's immunity. The City points out that the vehicle was not even "parked," it was "standing" for the purpose of plaintiff exiting. Also, at the time plaintiff exited, the front of the vehicle was still angled out into the street so the car was not in a final parked position where it could have legally remained.

¶ 23 The City points to sections of its municipal code to demonstrate that plaintiff's vehicle was not "parked" much less "legally parked." The City maintains that without demonstrating that the vehicle was legally parked, plaintiff is in no different legal position than anyone just walking in the middle of the street who is owed no duty of care. We reject the City's arguments and its selective and overly-strict reading of prior decisions.

¶ 24 The City's duty is not determined by what gear the car is in. The fact that the car might have been in drive or reverse rather than park does not entitle the City to judgment as a matter of law. The evidence showed that the car and the plaintiff were in an area designated for cars to park—the parking lane. Whether the parking process was completed when plaintiff exited or even when she encountered the defect is not outcome determinative. Technical violations of parking rules will not vitiate a municipality's duty to pedestrians exiting their vehicles. See

Curatola v. Village of Niles, 324 Ill. App. 3d 954, 959 (2001) (even though the vehicle was facing wrong direction when parked so that the parking was technically illegal, the pedestrian was still an intended and permitted user).

¶ 25 In fact, whether a particular use of property is permitted and intended for purposes of local Governmental and Governmental Employees Tort Immunity Act is determined by looking to nature of property itself. *Vaughn*, 166 Ill. 2d at 162-63; see also *Curatola v. Village of Niles*, 154 Ill. 2d 201, 211 (1993) ("we need look no further than the property itself which the plaintiff was using when injured to determine its intended use.") The City's intense focus on the status of the parking is misguided.

¶ 26 In this case, the nature of the property is such that people parking legally in the parking lanes must use a portion of the parking lane to leave the vehicle and depart for their destination. The result of our inquiry "depends on whether the municipality intended that the plaintiff-pedestrian walk in that part of the street where the injury occurred and permitted the plaintiff-pedestrian to do so." *Vaughn*, 166 Ill. 2d at 163. "Crosswalks and parking lanes are areas in which municipalities manifestly intend that pedestrians walk." *Id*. at 164.

¶ 27 Our focus is on the area in which the plaintiff is injured, not the exact location of the vehicle at the time she encountered the defect. Both plaintiff and the vehicle were in an area designated for street parking and were using it as intended. We assess the existence of a duty of care from the intent of the city, not the pedestrian. *Curatola*, 154 Ill. 2d at 216. The City's argument would seem to concede that if plaintiff would have exited from the red van parked in front of her, the City would owe her a duty of care. It is obvious, and conceded, that the City intended the area in which plaintiff fell to be used in the way that it was used. Plaintiff was using the parking lane and she is in the class that was intended and permitted to do so.

¶ 28 The cases also teach that the Local Governmental and Governmental Employees Tort Immunity Act is in derogation of common law and must be strictly construed against local government entity. *Vaughn*, 166 Ill. 2d at 158. Strictly construing the limitations on immunity against the City under the present circumstances, we are unpersuaded that the City should be held to be immune simply because plaintiff's husband was not finished parking the car.

¶ 29 The City's second point on why it owed plaintiff no duty of care is that the injury occurred outside of the immediate vicinity of the vehicle. When she exited the vehicle, plaintiff walked one car length southbound to avoid obstacles. Then, after taking one step away from the curb and into the parking lane in her attempt to cross the street, she stepped into the hole. The City argues that it owes plaintiff no duty of care because the defect was not located in the immediate vicinity of her own vehicle.

¶ 30 The Illinois Supreme Court has held that a duty of care is imposed on a municipality to maintain the street "immediately around" legally parked vehicles in a reasonably safe condition for pedestrians. *Curatola*, 154 Ill. 2d at 213. The City does not point to any specific authority regarding the geographic or temporal scope for entering or exiting a legally parked vehicle, but instead points us to cases that simply say the accident must be the "immediate vicinity" or the "area immediately around" the car for the duty to exist.

¶ 31 Because plaintiff fell down a car length away from where her car was parked, the City argues that her location was not sufficiently immediate so as to come within the exception to the City's immunity. We again reject the City's restrictive interpretation of the precedent. The analysis of this point coincides with the analysis of the City's third argument about whether plaintiff was owed a duty when she took an indirect route from her vehicle to her destination (see ¶¶ 34-38 *infra*). Both arguments concern plaintiff's use of the area where she was injured and

whether the area and plaintiff's use of the area are consistent with or in contravention of the City's statutory grant of immunity.

¶ 32 The defect that plaintiff encountered was in the parking lane. Plaintiff was within a matter of feet from where she exited her vehicle and she encountered the defect within a matter of seconds of her exit. Neither party points to any authority that details how far away from the parked vehicle or what time period after exiting would demonstrate or negate the existence of the duty. It would be unwise to set down any definitive measurements to create some kind of zone around a parked vehicle in which the municipality owes a duty to those exiting the vehicle. Suffice it to say, the City has not demonstrated that it is entitled to judgment as a matter of law simply because plaintiff was not injured while directly adjacent to her vehicle.

¶ 33 Accordingly, we reject the City's argument that it is immune because the defect plaintiff encountered was too far away from her parked vehicle.

¶ 34 The City's third point on why it owed plaintiff no duty of care is that when plaintiff encountered the defect, she was not in a place that she necessarily had to be in order to exit the vehicle and get to her destination. The City argues that the municipality only intends to authorize what is necessary for direct access to and from the vehicle, not for a pedestrian to "wander through the streets on their way to or from their vehicles." To support this argument, the City posits that requiring a pedestrian's travel to be necessary for ingress or egress to a parked vehicle allows for the municipality's duty to be predictable so that it does not "differ each time based on the plaintiff's own whim or fancy."

¶ 35 When plaintiff exited the car, she was blocked to her east and north by her own vehicle. She was impeded to the west by a curb and a strip of property covered with a few inches of snow. She took the clearest route she could at the time, which was southbound one car length

with the intent that she would then exit the parking lane. Plaintiff confronted the defect along her route of travel from her legal parking spot. The circumstances indicate that plaintiff employed a reasonable manner of egress.

¶ 36 It is not as if plaintiff took any substantial detour from the course of intended travel. Nor did she undertake any activity inconsistent with simply walking from the car to her destination. She was not wandering in the street. Plaintiff was injured in the process of exiting and departing the vehicle in a matter consistent with normal use. Her aim was to exit the parking lane at the first available and clear spot. There is no authority to dictate that a pedestrian is required to take the most exact route of egress from her vehicle in order for the City's duty to persist.

¶ 37 In hindsight, it is easy to say that plaintiff should have climbed over the curb and trudged through the four-or-so inches of snow to get to the sidewalk, walk to the end of the block, and cross the street in a crosswalk. But there is nothing to indicate that she acted unreasonably at the time. She had no reason to think the parking lane was safe at the spot she exited her vehicle but dangerous a few feet away. She was not meandering in the street on any kind of frolic, but rather, she took a short, sensible detour from the most direct route in order to have a clear path to her destination.

¶ 38 Precedent dictates that there is no requirement that a pedestrian's use of the property be absolutely necessary. For example, when a pedestrian used a parkway rather than a muddy sidewalk to traverse a street and fell into an uncovered manhole, the city was not immune. *Marshall By Marshall v. City of Centralia*, 143 Ill. 2d 1, 10 (1991). Here, plaintiff used a parking lane—an area the City undoubtedly has a duty to maintain in a reasonably safe condition—instead of a sidewalk. The jury rightfully had the opportunity to determine the amount of fault attributable to plaintiff and the amount attributable to the City. But the fact she did not take the

most direct route of egress from her vehicle does not entitle the City to judgment as a matter of law.

¶ 39 In addressing cases like the one here, our courts have also looked into the burden on the municipality to maintain areas for pedestrian use in a safe manner. See, *e.g.*, *Vaughn*, 166 Ill. 2d at 164. Those concerns are lessened, if not eliminated, in a case like this where the uncontradicted evidence pointed to the fact that the city probably knew of the defect in an area the City undoubtedly has a duty to maintain. See *Id*. ("Crosswalks and parking lanes are areas in which municipalities manifestly intend that pedestrians walk").

¶ 40 The testimony revealed that the hole had persisted for many months. This was not any ordinary kind of pothole. It was 31 inches deep. Victor Encarnacion, plaintiff's brother-in-law who lived across from the location of the hole, testified that an orange traffic cone had been placed in front of the hole for several months before the accident. It was, however, not there the night plaintiff encountered the defect. See *Rexroad v. City of Springfield*, 207 Ill. 2d 33, 46 (2003) (judgment as a matter of law inappropriate where, among other things, the city knows about the existence of a hole, but previously-erected barricades are removed before the dangerous condition is fixed). Foreseeability and the likelihood of harm—the foundational pillars of determining whether a duty of care exists—are heightened when there is some evidence that the city was aware of the defect and allowed it to persist. The City was not entitled to judgment as a matter of law on the basis that it owed plaintiff no duty of care.

¶ 41 II. The Jury's Verdict

¶ 42 The City maintains that it is entitled to judgment as a matter of law based on the verdict forms originally returned by the jury. After deliberations, the jury signed verdict form B which was the form they were instructed to use if they found for plaintiff and found her to be less than

50% contributorily negligent. However, the jury also responded to a special interrogatory in the affirmative that asked whether plaintiff's contributory negligence was greater than 50% of the proximate cause of her injuries. The City argues that the trial court committed reversible error when it did not enter judgment in favor of the City based on the response to the special interrogatory.

¶ 43 When the trial judge received the verdict from the jury, he looked at it and quickly noticed that the jury returned an inconsistent verdict. The trial judge indicated to the jury that something was not right with the verdict and sent them back to the jury room to take another look. The trial judge said to the jury: "I'm going to tell you to go back in there and look at this verdict carefully. And something is not right here. Okay? I don't want to tell you how to fill it out, but read the instructions a little clearer… Go back in."

¶ 44 The City's main focus is not on any inconsistency in the general verdict, but with the inconsistency between the verdict and the originally-returned special interrogatory. In doing so, the City points us to authority that explains the general role of special interrogatories and their control over general verdicts for specific factual issues (citing, *e.g.*, *O'Connell by Nelson v. City of Chicago*, 285 Ill. App. 3d 459, 464 (1996); *Sommese v. Maling Bros.*, 36 Ill. 2d 263, 268 (1966)). But those decisions hinged on the fact that someone (in those cases the plaintiff's attorney) "alerted the jury to the fact that its decision to assess damages would be nullified by an affirmative answer to the interrogatory." See *Sommese*, 36 Ill. 2d 263, 267-68 (1966). The City argues that the trial judge did the alerting here.

¶ 45 In support of its position on this issue, the City contends that the trial court's words and actions told the jurors to "harmonize or conform their interrogatory answer with their general verdict." Not so. The trial judge never mentioned the special interrogatory at all. The trial court

simply pointed out that something was amiss, re-read the jury instructions to the jury, and sent them back to deliberate. The City also contends that "[i]nstructing the jury that what was on the special interrogatory must match up to the general verdict form was erroneous as a matter of law." Again, that did not happen. The special interrogatory was not mentioned and the court only re-instructed the jury about what verdict form to use in order to express the intended verdict, whatever that was to be. There is no indication in the record that the court's decision to send the jury back for further deliberations had anything to do with the special interrogatory at all. So the City's insistence that the "factual finding" made by the jury by answering the special interrogatory must control over the jury's ultimate findings is unpersuasive.

¶ 46 The trial court did not influence the jury in any way about the verdict and findings with which it should return. After going back to the jury room, the jury just as easily could have used verdict form C and found for the City if it really believed that plaintiff was contributorily negligent to the extent that she should not recover. Instead, the jury reiterated its intent to find for the plaintiff by again returning verdict form B, but made its findings consistent with its intent and in accordance with the verdict form and jury instructions.

¶ 47 An inconsistent verdict can be corrected prior to recording and discharge and, when necessary, the court may send the jury back to reconsider. *Miller v. Pillsbury Co.*, 56 Ill. App. 2d 403, 412 (1965); see also *Lockett v. Board of Education for School District No. 189*, 198 Ill. App. 3d 252, 256-57 (1990). When the circumstances demand, the trial court is justified to find a verdict to be ambiguous, inconsistent, or otherwise defective and then give the jury an opportunity to correct the verdict or find another one before the jury is discharged and judgment is entered. *Tindell v. McCurley*, 272 Ill. App. 3d 826, 831 (1995) (citing approvingly 75B Am. Jur. 2d Trial § 1894 (1992), now located at 75B Am. Jur. 2d Trial § 1619 (February 2017

Update)); see also 75B Am. Jur. 2d Trial § 1607 (May 2017 Update) (discussing a trial court's options when special findings and general verdicts conflict).

¶ 48 At the time the verdict was entered and recorded, the parties and the judge seemed to understand that the jury intended to return a verdict for plaintiff, wanted her to recover, but also wanted to find that she was partially responsible. There is no indication whatsoever that the jury's ultimate verdict was coerced by the parties or the court. There was no dissention among jurors. The judge did not tell the jury what to do or even describe the problem. The trial court simply gave the jury the opportunity to render a verdict consistent with its intent. Indeed, at the City's urging, the trial court polled the jury at which time each member reaffirmed the verdict that had been unanimously agreed upon.

¶ 49 Moreover, it is not as if the City argues that it should get a new trial because the proceedings were unfair. Instead, it wants us to delve into what it conceives to be the jury's true intent, and cling to the initial answer to the special interrogatory in order to enter judgment in the City's favor outright. The City would have us hold that the trial judge's hands were tied and that he should have entered judgment on hopelessly inconsistent findings and clear mistakes made by the jury. The trial judge is not a potted plant. In this case, the jury made a mistake and the trial judge gave them an opportunity to properly express their findings, which they did. See 75B Am. Jur. 2d Trial § 1619; 75B Am. Jur. 2d Trial § 1607. The members of the jury, at the City's behest, then individually confirmed the verdict in open court in front of the parties and all present with no dissent. We see no reason to disturb the judgment.

¶ 50 CONCLUSION

¶ 51 Accordingly, we affirm.

¶ 52 Affirmed.