2017 IL App (1st) 16-1888-U

THIRD DIVISION
July 26, 2017

No. 1-16-1888

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ERICK LEWIS,	)	
	)	Appeal from the Circuit Court
Plaintiff-Appellant,	)	of Cook County, Illinois,
	)	County Department, Law Division.
v.	)	
	)	No. 15 L 3253
THE CITY OF CHICAGO, a Municipal Corporation,	)	
	)	The Honorable
Defendant-Appellee.	)	Lynn M. Egan,
	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Lavin and Cobbs concurred in the judgment.

ORDER

Held: The trial court properly granted summary judgment in favor of the City. Under section 3-102 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/3-102 (West 2014)) the City owed no duty of care to the plaintiff where the plaintiff fell into a pothole in the street as he stepped out of a bus.

¶ 1 This cause of action arises from a negligence action filed by the plaintiff, Erick Lewis, against, *inter alia*, the defendant, the City of Chicago, a Municipal Corporation (the City), after he fell and injured his ankle when he stepped into a pothole in the street when exiting a Chicago Transit Authority (CTA) bus. The plaintiff now appeals from the circuit court's order granting

summary judgment in favor of the City, finding that the City owed the plaintiff no duty of care under section 3-102 of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/3-102 (West 2014)) because he was not an intended and permitted user of the street. For the reasons that follow, we affirm.

¶ 2 II. BACKGROUND

¶ 3 The record before us reveals the following undisputed facts. The City holds in trust, for the benefit of the public, the street located immediately adjacent to the CTA bus stop at 26th Street and California Avenue. On April 17, 2014, the plaintiff rode CTA bus 60, which stops at this bus stop. The plaintiff was carrying a backpack with an oxygen tank to help him breathe and used his disability bus card to pay for his ride. Once at the destination, the bus stopped about a foot away from the curb. As the plaintiff exited from the rear door of the bus, he stepped into a pothole in the street and injured his ankle. The pothole was not in a crosswalk and was half covered by the bus so the plaintiff could not see it until he was on the ground. Prior to exiting the bus, the plaintiff saw nothing wrong with the curb that caused him any concern about stepping onto it.

¶ 4 On March 31, 2015, the plaintiff filed a two count complaint alleging negligence against the City and the CTA. The plaintiff alleged that the City had negligently maintained the street where he fell and that the CTA bus driver had negligently operated the bus. After discovery, which included the taking of plaintiff's deposition, both the CTA and the City filed motions for summary judgment (735 ILCS 5/2-1005(c) (West 2014)).

¶ 5 On June 13, 2016, in a written order, the trial court granted summary judgment in favor of both the City and the CTA. With respect to the City, the trial court ruled that the City was immune from liability because pursuant to section 3-102(a) of the Tort Immunity Act (745 ILCS

10/3-102 (West 2014)) it owed a duty to maintain the streets only for intended and permitted users. The court found that because the plaintiff, a pedestrian, was injured in the street outside of the crosswalk, he was not an intended and permitted user of the street. The plaintiff now appeals the trial court's grant of the City's motion for summary judgment.

¶ 6 II. ANALYSIS

¶ 7 Summary judgment is proper where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2014); see also *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12. In determining whether the City is entitled to summary judgment, we must construe the pleadings and evidentiary material in the record, in the light most favorable to the plaintiff and strictly against the City. *Schade v. Calusius*, 2016 IL App (1st) 143162, ¶ 17; see also *Happel v. Wal-Mart Stores, Inc*., 199 Ill. 2d 179, 186 (2002). In order to survive a motion for summary judgment, the plaintiff need not prove his case, but must present a factual basis that would arguably entitle him to a judgment. *Bruns*, 2014 IL 116998, ¶ 12. Our review of the trial court's entry of summary judgment is *de novo*. *Bruns*, 2014 IL 116998, ¶13.

¶ 8 It is axiomatic that in a negligence action, such as this one, the plaintiff is required to plead and prove: (1) the existence of a duty owed by the defendant to the plaintiff; (2) a breach of that duty, and (3) an injury proximately resulting from that breach. *Bruns*, 2014 IL 116998, ¶ 12.

¶ 9 The underlying facts here are not in dispute. The only issue is whether, under those undisputed facts, the City owed a duty to the plaintiff. The existence of duty is a question of law properly decided on a motion for summary judgment because, absent a legal duty, as a matter of

law, there can be no recovery in negligence. *Bruns*, 2014 IL 116998, ¶13; see also *Gerasi v. Gilbane Building Company, Inc.*, 2017 IL App (1st) 1333000, ¶ 40; *Vesey v. Chicago Housing Authority*, 145 Ill. 2d 404, 411 (1991) ("In the absence of a showing from which the court could infer the existence of a duty, no recovery by the plaintiff is possible as a matter of law and summary judgment in favor of the defendant is proper."). A duty exists where the plaintiff and the defendant stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff. *Bruns*, 2014 IL 116998, ¶13. The policy considerations that inform this inquiry involve: (1) the reasonable foreseeability of the injury, (2) the likelihood of the injury; (3) the magnitude of the burden of guarding against the injury; and (4) the consequences of placing that burden on the defendant. *Bruns*, 2014 IL 116998, ¶ 13.

¶ 10 The parties on appeal agree that under the Tort Immunity Act, the City owed a duty to maintain its streets only for users that are *both* permitted and intended. 745 ILCS 10/3–102(a) (West 2014). They disagree, however, as to whether the plaintiff here was an intended user of the street where he was injured. The City argues that the plaintiff was not an intended user because he was outside of the crosswalk when he fell into the pothole and injured his ankle. We agree.

¶ 11 Our supreme court has made clear that streets are intended to be used for vehicular traffic, not by pedestrians. *Curatola v. Village of Niles*, 154 Ill. 2d 201, 210 (1993). Consequently, because pedestrians are not intended users of streets, a municipality does not owe a duty of reasonable care to pedestrians who attempt to cross a street outside of crosswalks. *Sisk v. Williamson County*, 167 Ill. 2d 343, 347 (1995); *Vaughn v. City of Frankfort*, 166 Ill. 2d 155, 158–59 (1995) ("The general rule that has evolved in Illinois with regard to the duty of a municipality to maintain its streets in a reasonably safe condition is that since pedestrians are not

intended users of streets, a municipality does not owe a duty of reasonable care to pedestrians who attempt to cross a street outside the crosswalks."); see also *Curatola*, 154 Ill. 2d at 208.

¶ 12 A narrow exception to this general rule has been recognized in cases involving pedestrians entering or exiting legally parked vehicles. See *Sisk*, 167 Ill. 2d at 351; see also *Curatola*, 154 Ill. 2d at 210. However, this exception has been expressly limited to those situations where the municipality has taken some action, which manifests an intent that people should walk in that area. *Sisk*, 167 Ill. 2d at 351. The placement of signs, meters and pavement markings, which designate parking spaces are clear manifestations of intent that people park their vehicles as well as enter and exit their vehicles in such areas. *Sisk*, 167 Ill. 2d at 351. In carving out this exception, our supreme court has cautioned, however, that not every pedestrian use of the street that is necessary to a permitted use will be both permitted and intended, nor will necessity alone by a measure of whether such use is intended. *Curatola*, 154 Ill. 2d at 213.

¶ 13 Furthermore, this narrow exception has not been extended to pedestrians exiting buses into the street. In fact, our courts have repeatedly held that "no duty exits for a municipality when a pedestrian exits a city bus into the street" instead of onto the curb or the crosswalk. *Harden v. City of Chicago*, 20143 IL App (1st) 120846, ¶ 20; see also *Vance v. City of Chicago*, 199 Ill. App. 3d 652 (1990); *Wolowinski v. City of Chicago*, 238 Ill. App. 3d 639 (1992).

¶ 14 The decisions in *Vance v. City of Chicago*, 199 Ill. App. 3d 652 (1990) and *Wolowinski v. City of Chicago*, 238 Ill. App. 3d 639 (1992) are instructive.

¶ 15 In *Vance*, a plaintiff was riding in a CTA bus that allowed her to exit the bus at the bus stop, but where there was a pothole at the curb about one foot from the sidewalk. *Vance*, 199 Ill. App. 3d at 653. The plaintiff stepped off the bus into the pothole and twisted her ankle. *Vance*, 199 Ill. App. 3d at 653. The City filed a motion for summary judgment arguing that pursuant to the

Tort Immunity Act, it did not owe the plaintiff any duty of care because she was outside of the crosswalk when she exited the bus. *Vance*, 199 Ill. App. 3d at 654. The trial court granted the City's motion and we affirmed. *Vance*, 199 Ill. App. 3d at 654. In doing so, we noted a long line of cases holding that the City had no duty to reasonably maintain its streets for pedestrians who were injured while walking in the street outside the crosswalk. *Vance*, 199 Ill. App. 3d at 654 (citing *Mason v. City of Chicago*, 173 Ill. App. 3d 330 (1988); *Risner v. City of Chicago*, 150 Ill. App. 3d 827 (1986); and *Deren v. City of Carbondale*, 13 Ill. App. 3d 473 (1973)).

¶ 16 In addition, in affirming summary judgment in favor of the City, in *Vance*, we rejected the plaintiff's reliance on the appellate court's decision in *Di Domenico v. Village of Romeoville*, 171 Ill. App. 3d 293 (1988). In that case, the court found that the municipality owed the plaintiff a duty to maintain the streets, where the plaintiff was injured when he fell into a hole on the street while trying to remove something from the trunk of his legally parallel parked car. In distinguishing *Di Domenico*, in *Vance*, we noted that the village in *DiDomenico* had expressly allowed parking in the street and therefore "must have recognized a driver would have to walk in the street from his legally parked car to the sidewalk." *Vance*, 199 Ill. App. 3d at 654. In rejecting the application of *Di Domenico*, we noted that unlike the village, the City had not specifically allowed the CTA to drop off passengers in the street, and therefore "bus passengers were not intended and permitted users of the street" so as to impose a duty on the City to "keep the street in a reasonably safe condition for pedestrian traffic." *Vance*, 199 Ill. App. 3d at 654.

¶ 17 Two years later, in *Wolowinski*, we again found that the City owed no duty to a pedestrian, who stepped off a bus onto the street but outside of the crosswalk because she was not an intended user of the street. *Wolowinski*, 238 Ill. App. 3d at 642. In *Wolowinski*, the plaintiff exited a CTA bus, which had stopped about four or five feet from the curb, through the rear door.

Wolowinski, 238 Ill. App. 3d at 640. As she did so, the plaintiff stepped into a pothole in the street and injured her leg. *Wolowinski*, 238 Ill. App. 3d at 640. The City filed a motion for summary judgment arguing that the plaintiff's cause of action was barred by section 3-102(a) of the Tort Immunity Act. *Wolowinski*, 238 Ill. App. 3d at 640. The trial court granted the City's motion and we affirmed because the plaintiff was not an intended and permitted user of the street. *Wolowinski*, 238 Ill. App. 3d at 642. In coming to this decision, we relied on the City's ordinance requiring a bus driver to discharge passengers only at designated bus stops and to bring the bus within 18 inches of the curb. *Wolowinski*, 238 Ill. App. 3d at 641-42. We concluded that, "by requiring buses to discharge passengers within approximately 18 inches of the curb, the City evinced its intent that passengers step directly from the bus to the curb rather than use the street," and therefore the plaintiff was not a permitted and intended user of the street so as to impose any duty on the City. *Wolowinski*, 238 Ill. App. 3d at 642.

¶ 18 The facts of the present case are virtually indistinguishable from *Vance* and *Wolowinski*. Here, too, the plaintiff stepped from a bus into a pothole on the street and injured himself. The location of his injury was outside of a pedestrian crosswalk and about a foot away from the curb. As such, under well-established precedent, the plaintiff was not an intended user of the street when he exited the bus outside of the crosswalk. *Vance*, 199 Ill. App. 3d at 655; *Wolowinski*, 238 Ill. App. 3d at 642. Accordingly, the City owed the plaintiff no duty of care.

¶ 19 The plaintiff urges us not to follow *Wolowinski* and *Vance* by arguing that those decision have been "called into question" as focusing on whether bus passengers are permitted, rather than intended, users of the street, and therefore fail to adequately analyze municipal intent. In support of this position, the plaintiff cites to *Curatola*, 154 Ill. 2d at 210. We disagree and find the plaintiff's interpretation of the language in *Curatola* misplaced.

¶ 20 Contrary to the plaintiff's position, absolutely nothing in *Curatola* suggests that our supreme court viewed *Vance* and *Wolowinski* as containing any shortcomings. In *Curatola*, our supreme court listed numerous decisions that have denied relief to plaintiffs seeking recovery after having been injured on the street outside of the crosswalk. *Curatola*, 154 Ill. 2d at 210. Among the decisions and rationales cited, in one sentence the court described *Vance* and *Wolowinski* as decisions relying "primarily" on the failure to establish "permitted use of the street." *Curatola*, 154 Ill. 2d at 210. Contrary to what the plaintiff would have us believe, nothing in this succinct mention of *Vance* and *Wolowinski* indicates our supreme court's criticism of, or implicit acknowledgment of the limitations of those decisions. In fact, aside from the comment that those decision "primarily" relied on permitted uses of the street, *Curatola* neither discussed nor made any comment as to those portions of *Vance* and *Wolowinski* which addressed municipal intent.

¶ 21 Nor could it. As already demonstrated above, *Wolowinski* could not have been clearer that the City ordinance's requirement that buses stop within 18 inches of the curb "evinced [the City's] *intent* that passengers step directly from the bus to the curb rather than the street." *Wolowinski*, 238 Ill. App. 3d at 642. Similarly, in *Vance*, the court discussed the City's intent when it distinguished the facts of that case from those in *Di Domenico*. *Vance*, 199 Ill. App. 3d at 654. In that respect, as already discussed above, the *Vance* court noted that while the village had intended that drivers of vehicles use the street around the parked vehicle for ingress and egress to and from their vehicle, the City did not have any similar intent when it came to buses, since the City's ordinance, requiring buses to stop within 18 inches of the curb did "not specifically allow the CTA to drop passengers off in the street." *Vance*, 199 Ill. App. 3d at 654.

¶ 22 Accordingly, we find nothing in *Curatola* that undermines the decisions in *Vance* and *Wolowinski*, and we therefore continue to follow the well reasoned holdings of those decisions.

¶ 23 The plaintiff, nonetheless, asserts that he was an intended user of the street under the "safe harbor rule," exception which applies to impose a duty on the City where the City has manifested its intent, by way of an ordinance, that pedestrians will use certain portions of the street. The plaintiff contends that the City manifested such an intent by "imposing a mandatory directive to vehicular traffic that presupposed the presence of pedestrians on the street." In that respect, the plaintiff points to section 9-48-050 of the Chicago Municipal Code (Municipal Code of Chicago, Ill. §9-48-050 (amended Apr. 12, 1991) (City ordinance), which requires CTA buses without lifts to stop "approximately parallel" to and within 18 inches of the curb when accommodating pedestrians who are boarding or exiting the bus, as evincing such intent. In support, the plaintiff also cites to *Gustein v. City of Evanston*, 402 Ill. App. 3d 610 (2010); *Kavales, v. City of Berwyn*, 305 Ill. App. 3d 536, 543 (1999). For the reasons that follow, we disagree and find those cases inapposite.

¶ 24 Section 9-48-0509(b) of the City ordinance upon which the plaintiff relies, is the same ordinance provision that was at issue in *Wolowinski* and *Vance*. It provides:

> "The driver of a bus shall enter a bus stop or passenger loading zone on a public way only in such a manner that the bus when stopped to load or unload passengers shall be in a position with the right front wheel of such bus not further than 18 inches from the curb, or 30 inches from the curb if the bus is lift-equipped, and the bus approximately parallel to the curb so as not to unduly impede the movement of other vehicular traffic." Municipal Code of Chicago, Ill. §9-48-050(b).

¶ 25 In *Vance* and *Wolowinski* we twice considered and rejected the same argument raised here by the plaintiff, namely that section 9-48-050(b) of the City ordinance reflects an intent that bus passengers use the street when exiting a bus. See *Vance*, 199 Ill. App. 3d at 655 (holding that

"section 27-276(c) of the Chicago Municipal Code [the predecessor of section 9-48-050(b)] does not specifically allow the CTA to drop passengers off in the street. Therefore, bus passengers were not intended and permitted users of the street ***."); see also *Wolowinski*, 238 Ill. App. 3d at 642 ("We agree with the reasoning of the City and the court in *Vance* that by requiring buses to discharge passengers within approximately 18 inches of the curb, the City evinced its intent that passengers step directly from the bus to the curb rather than use the street. Therefore, the plaintiff was not an intended and permitted user of the street ***.")

¶ 26 We continue to agree with this rationale and see no reason to depart from it. The plain language of section 9-48-050(b) of the City ordinance neither specifically directs bus drivers to deposit passengers in the middle of the street, nor presupposes that they will be on the street when the bus stops, as it is required to, within approximately 18 inches of the curb. In fact, the plain language of the ordinance requires that buses stop close enough to the curb (specifically, 18 inches) to permit passengers to alight onto the curb, presumably quickly and safely so as not to unduly impede vehicular traffic.

¶ 27 The decisions in *Gustein*, 402 Ill. App. 3d 610, and *Kavales*, 305 Ill. App. 3d 536, cited to by the plaintiff, are inapposite. Contrary to the plaintiff's position each of these decisions creating a "safe harbor" exception and imposing a duty on the municipality has turned on more than an ordinance that presupposes pedestrian presence on the street. Rather, each decision has relied on either physical markings or laws that demonstrated the City intended a particular use that made it necessary for pedestrians to walk in a particular section of the street or alley.

¶ 28 In *Gustein*, the plaintiff was injured in an Evanston alley when she was bringing garbage to a waste bin located in the alley. *Gustein*, 402 Ill. App. 3d at 610. The court rejected the city of Evanston's argument that the plaintiff was not an intended user of the alley, not because the

Evanston city ordinance had presupposed pedestrian presence, but because the city had enacted an ordinance *requiring* residents place their trash containers in the alley for garbage pickup. *Gustein*, 402 Ill. App. 3d at 620-21.

¶ 29 Similarly, in *Kavales*, this court held that a pedestrian walking in the area where the sidewalk and alley intersected was an intended user of that space, not merely because the statue presupposed pedestrian presence, but because it referred to the space as the "sidewalk area" and *required* vehicles to yield the right of way to pedestrians at that juncture. *Kavales*, 305 Ill. App. 3d at 544 (citing 625 ILCS 5/11–1205 (West 1994)).

¶ 30 As already explained above, unlike in *Kavales* and *Gustein*, nothing in the City's ordinance, either required or directed the plaintiff to step into the street instead of onto the curb, so as to trigger the application of the "safe harbor" exception. Accordingly, we find the plaintiff's argument unavailing.

¶ 31 Lastly, the plaintiff attempts to argue that we should find that he was an intended user of the street because "it defies common sense" to conclude that the City legislators intended for "passengers to step directly from the bus to the curb when they are physically unable" to do so, and he was unable to do so because he is disabled. The plaintiff appears to argue that the City owed him a duty of care because the City should have foreseen that a disabled person, like him, would have to exit the bus into the street. We disagree.

¶ 32 Contrary to the plaintiff's assertion, pursuant to section 3-102 of the Tort Immunity Act (745 ILCS 10/3-102 (West 2014)), the City's duty with respect to its property is determined by the City's intent and not the circumstances of the plaintiff's individual situation. For that reason, where the City has not evinced an intent that pedestrians walk in the street, our courts have repeatedly held that the City is immune from liability even when pedestrians, for a variety

of reasons, encounter difficulties requiring them to walk on the street outside of the crosswalk. See e.g., *Harden*, 2013 IL App (1st) 120846, ¶ 21 (holding that the City owed no duty to a pedestrian crossing three feet outside of a the crosswalk where the pedestrian could not see the crosswalk lines because of snow); *Scerba v. City of Chicago*, 284 Ill. App. 3d 435, 438-39 (1996) (holding that the City owed no duty to a child crossing the street even thought the crosswalk was blocked by a bus); *Poindexter v. City of Chicago*, 247 Ill. App. 3d 47, 48 (1993); (holding that the City owed no duty to a pedestrian crossing the street when the sidewalk ended); Accordingly, even if the plaintiff here was unable to step from the bus directly onto the sidewalk, his particular circumstances shed no light on the City's intent concerning whether pedestrians were intended users of the street. see also *Sisk v. Williamson County*, 167 Ill. 2d 343, 349, 351 (1995) (holding that even where "it may have been impossible for the pedestrian to walk on a sidewalk or in a crosswalk," a pedestrian's use of a street will not be deemed an intended use absent some "manifestations of intent with regard to use of the property by pedestrians."); see also *Khalil v. City of Chicago*, 283 Ill. App. 3d 161, 164-65 (1996).

¶ 33 As already discussed above, section 9-48-050(b) of the City's ordinance demonstrates an intent that bus passengers exit onto the bus stop located at the curb and not into the street. Furthermore, that section of the City ordinance explicitly differentiates between buses that are lift-equipped and those that are not, and imposes a different bus-to-curb distance requirement for buses equipped with lifts. Municipal Code of Chicago, Ill. §9-48-050(b). As such, it does not defy common sense to conclude that the legislators contemplated individuals with disabilities and imposed the distance requirements accordingly, so as to accommodate disabled individuals and at the same time limit the City's intended use of streets.

¶ 34 This is particularly true where were we to adopt the plaintiff's argument that a duty should be

imposed on the City because it is foreseeable that disabled individuals will not be able to cross the 18 inches to the curb, we would essentially be requiring the City to make all areas of all streets next to bus stops safe for all pedestrians. Our courts have repeatedly rejected similar arguments based on the magnitude of the burden that such a duty would impose upon the City. See *e.g.*, *Ramirez v. City of Chicago*, 212 Ill. App. 3d 751, 758 (1991) ("it is clear that if we were to adopt plaintiff's argument that any foreseeable, unprohibited pedestrian use of Illinois roadways is both intended and permitted, Illinois municipalities would be required to make all areas of all roadways safe for pedestrian travel. *** The magnitude of making all Illinois roadways safe for pedestrian travel along with the consequential costs would be astronomical indeed. We therefore refuse to impose such a duty upon municipalities.").

¶ 35 Accordingly, absent a showing from which the trial court could have inferred the existence of a duty, no recovery by the plaintiff was possible as a matter of law, and the trial court properly granted summary judgment in favor of the City.

¶ 36 III. CONCLUSION

¶ 37 For all of the aforementioned reasons, we affirm the judgment of the circuit court.

¶ 38 Affirmed.