2018 IL App (1st) 172029-U

No. 1-17-2029

Order filed September 14, 2018

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

JENNIFER KOSATKA,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 15 L 006981
	)	
CITY OF CHICAGO,	)	Honorable
	)	Daniel T. Gillespie,
Defendant-Appellee.	)	Judge, Presiding.
	)	
	)	

JUSTICE HALL delivered the judgment of the court.
Justices Lampkin and Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court properly granted defendant's motion for summary judgment because under the Tort Immunity Act (745 ILCS 10/3-101 *et seq*. (West 2016)), defendant did not owe a duty of care to plaintiff.

¶ 2 Plaintiff Jennifer Kosatka brought a negligence suit against defendant City of Chicago for injuries she sustained after falling from her bicycle after the tire was stuck in a pothole on one of defendant's roadways. The trial court granted summary judgment in favor of defendant based on

the provisions of the Tort Immunity Act (Act). 745 ILCS 10/3-101 *et seq*. (West 2016). On appeal, plaintiff contends that: 1) summary judgment was inappropriate in this case; 2) strictly construed, the Act does not relieve defendant of liability; and 3) plaintiff was a permitted and intended user of the roadway at issue. For the reasons set forth herein, we affirm.

¶ 3 BACKGROUND

¶ 4 Plaintiff filed a complaint in the circuit court of Cook County on July 9, 2015, seeking damages from defendant, City of Chicago based on its negligent failure to adequately maintain a roadway within its city limits. Plaintiff alleged that on October 2, 2014, at approximately 10:00 p.m., plaintiff was riding her bicycle southbound near the intersection of Glenwood and Farwell Avenues in Chicago, and that she was an intended and permitted user of the roadway. While riding, plaintiff's bicycle tire became stuck in a pot hole (roadway defect) and she fell from her bike and sustained injuries. Plaintiff alleged that defendant was aware of the defect and had actual knowledge of it since August 7, 2014. Plaintiff alleged that defendant was negligent because it: 1) failed to provide a safe and proper place for her to travel on the roadway; 2) allowed and permitted a roadway defect to form and/or remain within the roadway after having knowledge of it for a period of time prior to October 2, 2014; 3) failed to fix, repair, replace or mend the defect when defendant knew that it was located in an area where the public at large would encounter it and that it was in need of repair; 4) failed to repair a known defect, which defendant knew posed an unreasonable risk of harm, in disregard for the public at large, and in particular, plaintiff; and 5) failed to properly or adequately repair a known defect.

¶ 5 On April 5, 2017, defendant filed a motion for summary judgment. In support of its motion, defendant noted that plaintiff testified at her deposition that: she was riding southbound

on a street whose name began with "Glen;" She did not recall whether she was on the right or the left side of the street, but more than likely she was in the middle of the street; it was raining and she saw a puddle that appeared to have an edge sticking out; she slowed her bicycle but continued forward and her bicycle tire got caught in the roadway, causing her to fall; and she did not know whether Glenwood Avenue was a bicycle route. Defendant noted in fact that there were no signs or roadway markings such as striping at that location to indicate that it intended for the street to be used by bicyclists. Defendant argued that plaintiff was not an intended and permitted user of the roadway in the location where her accident occurred, therefore it owed her no duty and was entitled to judgment as a matter of law.

¶ 6 In her response to defendant's summary judgment motion, plaintiff argued that she was a permitted user of the roadway pursuant to sections 11-1502 and 11-1505 of the Illinois Motor Vehicle Code (625 ILCS 5/11-1502, 11-1505 (West 2016)) and the Chicago Municipal Code (9-52-010). Additionally, plaintiff maintained that defendant had not presented any evidence that cyclists were specifically forbidden via signage or any other manner from cycling on Glenwood Avenue. Plaintiff also asserted that she was an intended user of the roadway as evidenced from the Chicago Municipal Code, direct statements from the Chicago Mayor's Office and the Chicago Department of Transportation, as well as the necessity of cyclists to use unmarked roads to get to and from marked bike lanes within the city.

¶ 7 Following oral argument on June 2, 2017, the circuit court issued a written memorandum opinion on July 19, 2017. In its opinion, the circuit court found that plaintiff failed to show that defendant owed her a duty of care necessary to establish a negligence action. Specifically, the court found that: her arguments were not persuasive and that plaintiff chose to ride down

Glenwood Avenue instead of another street; nothing in the Chicago Municipal Code's language manifested that the city intended for all roads to be used by cyclists; and this court's decision in *Latimer v. Chicago Park District*, 323 Ill. App. 3d 466 (2001) was controlling. The circuit court also found that plaintiff was not an intended user of the roadway. Specifically, the court found that because the roadway was not marked for bicycle use, cyclists were not intended users of the roadway and concluded that defendant was entitled to judgment as a matter of law because no duty could be established where the record did not show that plaintiff was both the intended and permitted user of the road.

¶ 8 Plaintiff filed her timely notice of appeal on August 11, 2017.

¶ 9 ANALYSIS

¶ 10 On appeal, plaintiff contends that: 1) summary judgment was inappropriate in this case; 2) strictly construed, the Act does not relieve defendant of liability; and 3) plaintiff was a permitted and intended user of the roadway at issue.

¶ 11 A complaint for negligence must establish that defendant owed the plaintiff a duty of care, that the defendant breached that duty, and that the plaintiff sustained an injury proximately caused by the breach. *Wojdyla v. City of Park Ridge*, 148 Ill. 2d 417, 421 (1992). Whether the defendant owes a duty of care to the plaintiff is a question of law to be determined by the court. *Wojdyla*, 148 Ill. 2d at 421. Summary judgment is appropriate if the pleadings, depositions, and admissions on file, together with affidavits, present no genuine issue of material fact and show the moving party is entitled to judgment as a matter of law. *Wojdyla*, 148 Ill. 2d at 420-21. Motions for summary judgment are reviewed *de novo*. *Monson v. City of Danville*, 2018 IL 122586, ¶ 12.

¶ 12 The duty of a municipality to maintain property is limited by section 3-102 of the Act. 745 ILCS 10/3-102 (West 2016). Under section 3-102(a), a municipality must "exercise ordinary care to maintain its property in a reasonably safe condition for the use * * * of people whom the entity intended and permitted to use the property." 745 ILCS 10/3-102(a) (West 2016). Thus, the duty of care of a municipality depends on whether the use of the property was a permitted and intended use. *Vaughn v. City of West Frankfort*, 166 Ill. 2d 155, 162 (1995). The intended use of the property may be determined by looking to the nature of the property. *Gutstein v. City of Evanston*, 402 Ill. App. 3d 610, 617 (2010). An intended user of property is, by definition, also a permitted user; a permitted user of property, however, is not necessarily an intended user. *Boub v. Township of Wayne*, 183 Ill. 2d 520, 525 (1998).

¶ 13 We find that the issues raised by plaintiff on appeal have previously been addressed by this court's decision in *Latimer v. Chicago Park District*, 323 Ill. App. 3d 466 (2001). In *Latimer*, just as here, a bicyclist brought a negligence action against the City of Chicago seeking damages for injuries sustained in a bicycle accident on a city street where the pavement was broken and uneven. *Latimer*, 323 Ill. App. 3d at 468. The court noted that the plaintiff did not dispute that the accident happened at a place on the street where there were no bicycle lane markings. *Latimer*, 323 Ill. App. 3d at 468.

¶ 14 In *Latimer*, this court relied on the supreme court's decision in *Boub*, and rejected many of the same arguments raised by plaintiff in the case at bar.

¶ 15 First, this court examined the plaintiff's argument that section 11-502 of the Illinois Vehicle Code (625 ILCS 5/11-1502 (West 1998)) supported the conclusion that cyclists are, like vehicle drivers, intended and permitted users of Illinois streets. *Latimer*, 323 Ill. App. 3d at 469.

This court rejected that argument under *Boub*, finding that such a conclusion was unsupported under section 11-1502, which was designed to ensure that cyclists obey traffic laws, for their own safety and for the safety of others. *Latimer*, 323 Ill. App. 3d at 469, quoting *Boub*, 183 Ill. 2d at 529-30.

¶ 16 Next, this court examined the argument that because cyclists' use of the roads is both customary and traditional, it must also be both permitted and intended. *Latimer*, 323 Ill. App. 3d at 469. That argument had been previously made and rejected in *Boub*, where the supreme court found that historical practice alone is insufficient to establish whether a particular use of a public property is an intended one. *Latimer*, 323 Ill. App. 3d at 469, quoting *Boub*, 183 Ill. 2d at 531.

¶ 17 Next, this court rejected an argument that the portion of the road where the accident happened was designated "a through street generally suitable for bicycling," finding that such designation was consistent with the conclusion that cyclists were not intended but merely permitted users of the road. *Latimer*, 323 Ill. App. 3d at 469, quoting *Boub*, 183 Ill. 2d at 532.

¶ 18 The supreme court in *Boub* looked to the nature of the property to determine whether the plaintiff was an intended and permitted user of the road and bridge where the injury occurred. The court found that the intent of the defendant [city] could be determined from the pavement markings, signs and other physical manifestations of the intended use of the property. *Boub*, 183 Ill. 2d at 528. Because there were no signs or markings to indicate that cyclists, like motorists, were intended to ride on the road and bridge, the supreme court held that the plaintiff was not an intended user and was not entitled to recover damages under the Act. *Boub*, 183 Ill. 2d at 535-36.

¶ 19 Applying the holding in *Boub*, this court noted that the street where plaintiff was injured did not have markings or signage to reveal an intent on the part of the city that plaintiff ride her bicycle there. *Latimer*, 323 Ill. App. 3d at 470. Just as in the case at bar, the *Latimer* plaintiff argued that certain parts of the Chicago Municipal Code show that defendant intended for bicyclists to use city streets. *Latimer*, 323 Ill. App. 3d at 470. The plaintiff argued that because the city included bicycles in its definition of traffic and provided that the streets were for general traffic circulation, the city expressed an intention that the streets be used by cyclists. *Latimer*, 323 Ill. App. 3d at 470-71. The plaintiff also argued that because the city prohibits adults from riding bicycles on the sidewalks, it therefore intends that adults ride bicycles on the streets. *Latimer*, 323 Ill. App. 3d at 471. This court rejected both arguments, finding that the legislature did not include the word "intended" within the definition of street; neither did the Municipal Code ever announce that cyclists are intended users of city streets. *Latimer*, 323 Ill. App. 3d at 471. This court also found the plaintiff's additional arguments under other sections of the Municipal Code unpersuasive, noting that defendant's regulation of permitted uses does not transform the permitted uses into intended uses. *Latimer*, 323 Ill. App. 3d at 472. This court ultimately held:

> "[b]ecause the street where plaintiff was injured was not marked or signed to suggest that it was intended for use by bicycles, and because the [Chicago Municipal] Code contains no provisions that suggest that defendant intends, rather than permits, bicyclists to use the city streets, plaintiff is not entitled to damages under the Tort Immunity Act."
>
> *Latimer*, 323 Ill. App. 3d at 473.

¶ 20 The same result is warranted here. The street where plaintiff rode her bike was not marked for bicycle use and plaintiff has not cited to any provision of the Chicago Municipal Code that suggests that cyclists are intended users of city streets without such markings. Plaintiff's assertion that direct statements from the Mayor's Office and the City's Department of Transportation that encourage cycling establish that cyclists are intended users of city streets is also unpersuasive. The municipality's intent is inferred from markings or signs; moreover, the language used by the legislature in drafting the Municipal Code is usually the best indication of the drafter's intent. *Latimer*, 323 Ill. App. 3d at 471. As such, we conclude that summary judgment was properly entered in favor of defendant as plaintiff has not shown that defendant owed her a duty of care as a bicyclist on a city street.

¶ 21 CONCLUSION

¶ 22 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 23 Affirmed.