2019 IL App (1st) 181203-U
No. 1-18-1203
Order filed June 25, 2019

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

JAMES MATTHEWS,	)	
	)	Appeal from the
Plaintiff-Appellant,	)	Circuit Court of
	)	Cook County.
v.	)	
	)	No. 15 L 11184
THE CITY OF CHICAGO, a Municipal Corporation,	)	
THOMAS WALSH, and LUCKY HORSESHOE	)	
LOUNGE,	)	Honorable
	)	Christopher E. Lawler,
Defendants-Appellants.	)	Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Lavin and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted summary judgment in the City of Chicago's favor where plaintiff's settlement with the City's agent extinguished his claims of vicarious liability against the City. The trial court also properly granted summary judgment in the Lucky Horseshoe Lounge's favor where plaintiff's settlement with it under the Workers' Compensation Act was his exclusive remedy and the facts did not establish a claim under the Dram Shop Act.

¶ 2 Less than an hour into his first night as a security guard for a North side Chicago bar, James Matthews had to break up a fight. A bar patron, later identified as an off-duty Chicago

police officer, had gotten into an argument with a friend, and Matthews stepped in to separate them when the officer pushed him to the ground. Matthews filed a six-count complaint against the officer, the City of Chicago (as the officer's employer), and the Lucky Horseshoe. He later settled with the officer, and also settled a Workers' Compensation Act claim against the Lucky Horseshoe.

¶ 3 Both the City and the Lucky Horseshoe moved for and were granted summary judgment. The City argued that, even if the officer had been acting within the scope of his employment, the officer's settlement with Matthews extinguished the vicarious liability claims asserted against the City. The Lucky Horseshoe, for its part, argued that it could not be held liable under the Dram Shop Act because: (i) it had resolved its liability under the Worker's Compensation Act, and (ii) it had served the officer, at most, one light beer. Agreeing with the trial court, we affirm.

¶ 4 Background

¶ 5 James Matthews learned of a security job opening at the Lucky Horseshoe Lounge through Michael Solis, an acquaintance who served as the bar's "head of security." According to Matthews, although he understood the Lucky Horseshoe to be his employer, the arrangement was fairly informal. Solis was the only one who interviewed Matthews. Once hired nobody asked Matthews to sign a contract or employment agreement, and Matthews was not given a handbook, training materials or issued work-related equipment.

¶ 6 Matthews's job title was "security guard." His primary duty was to "keep the peace." As part of that, Matthews would check the identification of patrons entering the bar, make sure that nobody left with alcohol, and escort out over-served patrons. No one told him what he should do

if he witnessed a physical altercation. Solis, however, remembered telling Matthews that if there was a fight, Matthews should come and get him rather than intervene himself.

¶ 7 The Bar Fight

¶ 8 November 29, 2013 was Matthews's first (and, as it turns out, last) day on the job. Matthews and Solis arrived at the Lucky Horseshoe together, at about 9:00 p.m. Matthews, who was to work at the back door of the bar, walked through the bar with Solis, who "introduced [him] to the bar manager and a Mr. Walsh."

¶ 9 As Matthews and Solis arrived at the rear of the bar, Solis had to break up a verbal dispute between Walsh and his friends. Matthews did not know much about this interaction, except to say that he saw Solis talking to three of the men and heard him telling them to calm down. At that point, Matthews says, no one in the group had put hands on each other. Solis then took Matthews to his post at the back door.

¶ 10 Within 30 minutes to an hour, Matthews saw Walsh "punching one of the patrons on top of the bar." Matthews had seen them arguing, but had not been able to hear what was said. The man Walsh punched was leaning on the bar, almost laying on it, and "Walsh was punching him in the face." After witnessing three or four punches, Matthews walked up and "put [his] hands in between them and pushed them away from each other." From Matthews's perspective it "wasn't a violent push. [He] just separated them."

¶ 11 Matthews turned to ask the apparent victim if he was okay, but before he could "[he] was attacked from [his] side. And the next thing [he] knew [he] was flying six-feet to eight-feet this way (indicating) and crashed into tables and beer bottles fell and everything and [he] hit the ground." Matthews said Walsh attacked him, but was unable to see what Walsh actually did:

"All I know is he [(Walsh)] made contact with me, and my body flew in the opposite direction." Although Walsh remembered the encounter differently, he agreed that Matthews made contact with him and that he "shrugged [Matthews] off [him]." When he did that Matthews "fell to the ground."

¶ 12 Solis came and helped Matthews up. At this point Walsh was yelling for Matthews to be removed from the bar, repeatedly referring to him with racial expletives. Matthews appeared ready to fight back, but Solis told him, "no, don't do that. This guy [(Walsh)] is an off-duty cop." Until then Matthews had not known of Walsh's employment, although Walsh remembered being introduced to Matthews as a "policeman." Solis brought Matthews out of the bar and, after a few minutes of waiting while Solis went to get Matthews's personal belongings, Matthews left.

¶ 13 Though his medical records are not in the record, Matthews says he had the most pain in his shoulder, and his head and right elbow also hurt. And he experienced vertigo. A couple weeks later, Matthews filed a workers' compensation claim against the Lucky Horseshoe.

¶ 14 As Matthews reflected on the incident, he came to his own conclusion that Walsh must have been acting as a police officer that night. According to Matthews, Walsh said, "he would have me arrested, he should have me arrested," which Walsh denied. Aside from Walsh's disputed remark about Matthews being arrested, there was "nothing that [Matthews] c[ould] think of" that made him think Walsh was acting as a police officer. Walsh was in plain clothes, did not have a badge, did not have a police vest, and did not have a weapon. He denied ever announcing his office during the fight.

¶ 15 Walsh's State of Mind

¶ 16 Walsh had not been on duty that day. He went to dinner with two friends, where he had two glasses of wine. He and his friends went straight from dinner to the Lucky Horseshoe, arriving about 9:00 p.m. Walsh went to the bar and ordered one Bud Light beer, which he never got the opportunity to finish.

¶ 17 Walsh described his own consumption of alcohol as minimal. Matthews denied having an opinion about whether Walsh was drunk. Solis had a different impression. He described Walsh's speech as "really bad" and noted the smell of alcohol. He said Walsh was red in the face and was "kind of slouched over *** suggesting that, you know, he wasn't as stable and strong stanced [*sic*] as he normally would be." One of the bartenders, James Fraley, also believed Walsh seemed "very intoxicated." Fraley explained that Walsh was "very loud, stumbling, just wasn't his normal self like [he'd] seen him before." Fraley added that he did not personally serve alcohol to Walsh and had no knowledge about how much Walsh had to drink either before arriving or at the Lucky Horseshoe.

¶ 18 The record also contains an affidavit from Dr. Evan Schwarz, a medical doctor who is board certified in toxicology and addiction medicine. Dr. Schwarz averred that the average alcohol absorption rate ranges from 30 minutes on an empty stomach to 90 minutes with food in the stomach. Since Walsh had a meal earlier that night, any alcohol he had at dinner would be continuing to absorb into his body. Additionally, any alcohol he consumed at the Lucky Horseshoe would have taken 60 to 90 minutes to absorb. Dr. Schwarz concluded that Walsh's alcohol consumption at the Lucky Horseshoe – one bottle of Bud Light beer – would not have contributed to intoxication.

¶ 19 The Lawsuit

¶ 20 Matthews filed a complaint against Walsh, the City of Chicago, and the Lucky Horseshoe. He alleged that Walsh had committed a battery, a hate crime, and intentional infliction of emotional distress. The complaint also included claims of vicarious liability against the City under theories of *respondeat superior* and indemnification. The City was liable, according to the complaint, because Walsh "was acting as an agent" of the City and "within the scope of his employment as a Chicago police officer." Against the Lucky Horseshoe, Matthews claimed that under the Dram Shop Act (235 ILCS 5/6-21), the Lucky Horseshoe "caused the intoxication of Defendant Walsh by reason of their selling alcoholic beverages to [him]."

¶ 21 During the pendency of the lawsuit, Matthews settled his workers' compensation claim with the Lucky Horseshoe, receiving $2,000 as a "full and final settlement of all claims for injuries and aggravations thereof resulting from [Matthews]'s accidental injuries described herein occurring on or about 11/29/2013." The settlement constituted "the full measure of [the Lucky Horseshoe]'s liability under the Illinois Workers' Compensation Act" and "a full and final resolution of all disputed issues to include any claim for temporary total disability, medical, and/or partial permanent disability benefits."

¶ 22 The Lucky Horseshoe moved for summary judgment, arguing that Matthews could not recover under the Dram Shop Act because he had already recovered against the Lucky Horseshoe under the Workers' Compensation Act, which provided his exclusive remedy. Matthews argued that Workers' Compensation Act did limit his recovery because the Lucky Horseshoe was acting in the "dual capacity" of an employer and bar. Alternatively, the Lucky Horseshoe argued that it could not be liable under the Dram Shop Act because it had served

Walsh, at most, one beer. Matthews disagreed, arguing that Solis's and Fraley's deposition testimony showed that Walsh had more than one beer at the Lucky Horseshoe.

¶ 23 The City also moved for summary judgment, arguing that it could not be vicariously liable as Walsh was not acting within the scope of his employment. Later, Matthews and Walsh also reached a settlement agreement. The written settlement agreement, if there is one, is not in the record. As a result, the trial court dismissed the claims against Walsh with prejudice.

¶ 24 After the dismissal of the claims against Walsh, the city argued that Matthews's settlement with Walsh extinguished its potential vicarious liability. Matthews responded, essentially conceding the general rule that settlement with an agent (Walsh) extinguished the liability of the principal (the City). He argued, however, that the indemnification provision of the Illinois Tort Immunity Act (745 ILCS 10/9-102) required the City to pay for any judgment or settlement of its employees. Accordingly his vicarious liability claims could go forward.

¶ 25 The trial court granted both the Lucky Horseshoe's and the City's motions for summary judgment. As to the Lucky Horseshoe, the trial court agreed that Matthews's worker's compensation settlement was his exclusive remedy. The court rejected his "dual capacity" argument as well, finding, "[t]he mere fact that Lucky Horseshoe sells alcoholic beverages does not bestow on it a second legal persona completely independent of, and unrelated to, its status as an employer." As to the City, the trial court found that the settlement with Walsh extinguished Matthews's *respondeat superior* claim. The trial court also rejected Matthews's indemnification claim finding that under Section 10/9-102 of the Tort Immunity Act, a municipality does not remain liable where the agent has already resolved the liability.

¶ 26 Analysis

¶ 27 We review a trial court's entry of summary judgment *de novo* to determine "if 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." *Christopher B. Burke Engineering, Ltd. V. Heritage Bank of Central Illinois*, 2015 IL 118955, ¶ 9. Unless there is a dispute as to a material fact, summary judgment is appropriate. *Id.* To the extent that our analysis requires us to interpret statutes, that review is likewise *de novo*. *Id.*

¶ 28 Matthews's Dram Shop Claim

¶ 29 Matthews argues that we should reverse the trial court's grant of summary judgment on his Dram Shop Act claim for two reasons: (i) the Workers' Compensation Act is not his exclusive remedy and the trial court misread *Reed v. White*, 397 Ill. App. 3d 975 (2010); and, (ii) even if the Workers' Compensation Act bars this claim, the trial court erred because the Lucky Horseshoe acted in a "dual capacity," employer and "an entity that is licensed to sell alcoholic liquor," giving rise to an independent basis for liability. We disagree with both arguments.

¶ 30 It is well established that "once an employee chooses to obtain compensation under the [Workers' Compensation] Act, any civil action is barred." *Reed*, 397 Ill. App. 3d at 979 (discussing *Fregeau v. Gillespie*, 96 Ill. 2d 479 (1983)). Equitable principles of estoppel prevent a plaintiff "who has availed herself [or himself] of the benefits of the Act from thereafter asserting that she [or he] falls outside its reach." *Wren v. Reddick Community Fire Protection Dist.*, 337 Ill. App. 3d 262, 267 (2003).

¶ 31 Matthews relies on *Reed* to assert that he can maintain his Dram Shop Act claim because the mere receipt of money in the form of a workers' compensation settlement does not trigger the Workers' Compensation Act's exclusivity. He misreads *Reed.*

¶ 32 The defendant employer in *Reed* "began voluntarily paying workers' compensation to plaintiff" for her injuries years before any legal action began. *Reed*, 397 Ill. App. 3d at 977. The plaintiff then filed a lawsuit and, while that suit was pending, the plaintiff filed a claim under the Workers' Compensation Act. *Id.* at 977-78. After negotiations resulted in defendants voluntarily reinitiating disability benefits, the plaintiff dismissed the workers' compensation claim. *Id.* at 978. The court found the benefits the employer provided had been made voluntarily and "[t]he mere acceptance of unsolicited benefits offered by an employer is insufficient to bar a plaintiff's common law claim." *Id.* at 980 (citing *Wren*, 337 Ill. App. 3d at 268). The court also found that the plaintiff had done no more than attempt to protect her rights under the Act by filing a claim before the expiration of the statute of limitations. *Id.* at 981.

¶ 33 Matthews's situation differs dramatically. As Matthews admits in his brief, and as his deposition testimony confirms, the Lucky Horseshoe never initiated voluntary payments to compensate him. Moreover, *Reed*'s rationale heavily focused on fairness—a plaintiff's suit cannot be barred by an employer's voluntary decision to initiate workers' compensation payments because this "would allow employers to send payments to injured parties or bereaved families, characterize the payments as workers' compensation benefits, and terminate any option the employee or family might have to avoid the exclusivity-of-remedy rule under the Act." *Id.* at 980 (quoting *Copass v. Illinois Power Co.*, 211 Ill. App. 3d 205, 211-12 (1991)). Since the

Lucky Horseshoe never initiated payments, no risk exists here of any similar gamesmanship. At all times, Matthews controlled the remedies he sought and the means by which he sought them.

¶ 34 Matthews seeks to avoid this effect by arguing that the Lucky Horseshoe acted in a "dual capacity," as both an employer and purveyor of alcoholic beverages. The dual capacity doctrine has a winding history in Illinois, one that is thoroughly summarized in *Hyman v. Sipi Metals Corp.*, 156 Ill. App. 3d 207 (1987). For our purposes, the winding path is less important than the destination: a two part test requiring that "(1) the employer was acting in two 'capacities' such that the second capacity confers upon him obligations unrelated to those flowing from the first, that of employer; and, (2) the employer was acting as a distinct separate legal persona." See *Garland v. Morgan Stanley & Co., Inc.*, 2013 IL App (1st) 112121, ¶ 40 (citing *Ocasek v. Krass*, 153 Ill. App. 3d 215 (1987)).

¶ 35 Matthews focuses entirely on the first part of the test, arguing that "the obligations imposed on the Lucky Horseshoe pursuant to the Dram Shop Act are totally unrelated to those imposed on it as an employer." But, our cases "have been clear that the second prong of the dual capacity doctrine test mandating that the employer have a 'distinct legal persona' is a requisite in and of itself and separate from the first one." *Garland*, 2013 IL App (1st) 112121, ¶ 41 (collecting cases). We have held that "the term 'persona' is not flexible" and carries the definition of "a person other than the employer" as opposed to merely "a person acting in a capacity other than that of employer. The question is not one of activity or relationship—it is one of identity." *Id.*, ¶ 42 (quoting Arthur Larson & Lex K Larson, Larson's Worker's Compensation Law § 113.01(2) (2007)).

¶ 36 An example of the second prong is the decision in *Smith v. Metropolitan Sanitary District of Greater Chicago*, 77 Ill. 2d 313 (1979). In *Smith*, the plaintiff was employed on a construction project run by a joint venture in which the defendant participated with another corporation. *Id.* at 315-16. The defendant leased a truck to the joint venture, which struck and injured the plaintiff. *Id.* at 316. The plaintiff sued alleging, in part, that the defendant was strictly liable for his injuries since he had leased an allegedly defective truck to the joint venture. *Id.* The defendant argued that, as a member of the joint venture, the plaintiff's exclusive remedy against it was under the Workers' Compensation Act and that he could not be strictly liable for the truck's alleged defects. *Id.* at 317.

¶ 37 Our supreme court disagreed, finding that the defendant's "coincidental status as a member of the joint venture" did not cloak his distinct legal persona as lessor of the truck. *Id.* at 320. The court reasoned that lessors of defective vehicles are strictly liable for damages caused by those vehicles, and that legal status was not diminished by the defendant's additional role as participant in the joint venture. *Id.* This situation is distinguishable from one discussed by the Fifth District in which the plaintiff's accidental injury was caused by an instrumentality (incidentally, also a truck) controlled by the defendant employer and within the employer's control. See *Romo v. Allin Exp. Service, Inc.*, 106 Ill. App. 3d 363, 365-66 (1982) (distinguishing *Smith*). Here, Matthews's accidental injuries were caused directly by his duties to control the environment in which the Lucky Horseshoe was selling alcohol.

¶ 38 Nothing in the record supports the proposition that the Lucky Horseshoe operated as a distinct legal entity when it was open for business as a bar versus when it employed Matthews as a security guard at that same bar. At oral argument, when asked about the Lucky Horseshoe's

distinct legal persona that would give rise to independent liability under the Dram Shop Act, Matthews's counsel argued: "I don't think that being an employer bars the different capacity that the bar holds when they are subject to the Dram Shop Act." Oral Argument at 10:00-10:15. This argument appears to be no more than a restatement of Matthews's claim under the *first* prong of the dual capacity doctrine—that the Dram Shop Act gave the Lucky Horseshoe distinct legal duties.

¶ 39 Finally, regardless of our conclusion about the exclusivity of the Workers' Compensation Act, the Lucky Horseshoe says that it cannot by liable under the Dram Shop Act. According to the Lucky Horseshoe, it supplied Walsh with only a *de minimis* amount of alcohol—less than one beer, which precludes its liability under the Dram Shop Act. Matthews responds, pointing to the evidence that Walsh was heavily intoxicated, and arguing it is circumstantial evidence that the Lucky Horseshoe caused his intoxication. We find summary judgment appropriate under the Dram Shop Act.

¶ 40 The Dram Shop Act provides a cause of action against a place that sells alcohol, which "causes the intoxication" of a person who then goes out and injures another. 235 ILCS 5/6-21. Our supreme court has interpreted the "causes the intoxication" language to mean that the bar "must not merely have furnished a negligible amount of liquor." *Kingston v. Turner*, 115 Ill. 2d 445, 457 (1987). In other words, the bar "may not be held liable for a *de minimis* contribution to an individual's intoxication." *Mohr v. Jig*, 223 Ill. App. 3d 217, 222 (1992). *Mohr*, applying *Kingston*, provides a useful example.

¶ 41 In *Mohr*, an intoxicated driver severely injured the plaintiffs. *Id.* at 218. They sued both the driver and the bar that the driver had come from. *Id.* While at the bar, the driver drank two or

three beers in about three hours. *Id.* at 222. There was no evidence that she was already drunk when she arrived; indeed there was no evidence that she drank alcohol anywhere else that day. *Id.* But when officers performed a breathalyzer her BAC was .12. *Id.* at 219. Based on this evidence, the appellate court reversed a jury verdict in the bar's favor. *Id.* at 223-24. The court reasoned that the only way the bar could not be liable would be to conclude that the driver became intoxicated before arriving at the bar and somehow stayed intoxicated, with a BAC of .12, for three hours. *Id.* Uncontradicted testimony established that she did not drink anything before arriving at the bar. *Id.* at 223. The court concluded that there was nothing contradictory about the driver's consumption of two to three beers and a BAC of .12. *Id.*

¶ 42 Viewing the evidence in a light most favorable to Matthews, as we must, we accept that Walsh was intoxicated at the time of the altercation. Both Solis and Fraley testified that he appeared to be stumbling, slouching, and acting belligerently in a way that caused them to believe him drunk. But, even viewing the evidence favorably to Matthews, both Solis and Fraley admitted that they did not know what Walsh had been served at the Lucky Horseshoe. Matthews also saw Walsh with a drink, but admitted that it could have been water. The only evidence about what Walsh drank at the Lucky Horseshoe was that he partially consumed a bottle of light beer. Also, distinguishable from *Mohr*, uncontradicted evidence shows that Walsh consumed alcohol before arriving at the Lucky Horseshoe—at dinner with his friends, Walsh had about two glasses of wine.

¶ 43 Unlike in *Mohr*, where the driver was at the bar for at least three hours, Walsh arrived at the Lucky Horseshoe about 30 minutes to an hour before the fight. The affidavit from Dr. Evan Schwarz, a board certified doctor in Toxicology and Addiction Medicine, explained that any

alcohol that Walsh consumed at the Lucky Horseshoe would have taken 60 to 90 minutes to absorb into his body. It was Schwarz's opinion, unrebutted by other evidence, that the partial light beer that Walsh consumed at the Lucky Horseshoe would not have been entirely absorbed "so as to contribute to his alleged intoxication" at the time of the fight. All of that to say, viewing the record favorably to Matthews and assuming Walsh's drunken behavior caused his injuries, there is no dispute as to the material fact of the cause of his intoxication. No evidence suggests that the alcohol he consumed at the Lucky Horseshoe was any more than a *de minimis* contributor to his intoxication.

¶ 44 Matthews's Vicarious Liability Claims

¶ 45 Matthews also argues that the trial court erred in granting summary judgment in favor of the City. He claims that the indemnification provision in the Illinois Tort Immunity Act (745 ILCS 10/9-102) made the City liable for Walsh's actions notwithstanding his settlement with Walsh. The City maintains that Section 10/9-102 has no effect on the general rule that a settlement with an agent (Walsh) extinguishes the liability of the principal (the City). See *e.g.*, *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 527-29 (1993). In the alternative, the City argues that Walsh was not acting in the scope of his employment as a Chicago Police Officer and so the City cannot be liable even if Section 10/9-102 applies. Matthews, addressing this argument only in his reply brief, maintains that even though Walsh's actions were "bordering on criminal, [they] were attempts to maintain the peace" and so fell within the scope of his employment.

¶ 46 Matthews focuses his argument on his indemnification claim, asserting that his settlement with Walsh did not extinguish the claim because the indemnification provision of the Illinois

Tort Immunity Act (745 ILCS 10/9-102) makes the city liable for Walsh's actions. He appears to have abandoned his claim based on the doctrine of *respondeat superior*. His opening brief makes one passing mention of the doctrine, and he makes no argument that Walsh was acting within the scope of his employment during the fight until his reply brief, a litigation strategy condemned by our Supreme Court rules. See Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018). We need not dwell on Matthews's arguable forfeiture because we find his settlement with Walsh to have extinguished his vicarious liability claims against the City, however they are described.

¶ 47 There is not much daylight between the parties' positions about the City's vicarious liability for Walsh's actions; indeed, one could be excused for making it most of the way through Matthews's argument thinking they were reading his opponent's brief. The parties agree, as do we, that we our governed by the general rule announced by our supreme court that "any settlement between the agent and the plaintiff must also extinguish the principal's vicarious liability." *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 527-29 (1993) (discussing *American National Bank and Trust Co. v. Columbus-Cuneo-Cabrini Medical Center*, 154 Ill. 2d 347, 355 (1992)). In these types of cases "an order should be entered to reflect the extinguishment of the principal's vicarious liability. To the extent that the principal's potential liability is solely derivative, the order should dismiss the principal from the action." *American National Bank*, 154 Ill. 2d at 355.

¶ 48 Matthews argues that we should not apply *Gilbert* and *American National Bank* to his vicarious liability claims because of the 2002 "enactment" of 745 ILCS 10/9-102, the indemnification provision of the Tort Immunity Act. The statute directs "local public entit[ies] *** to pay any tort judgment or settlement for compensatory damages *** for which it or an

employee while acting with the scope of his employment is liable." *Id.* According to Matthews, the statute takes "cases involving public entities such as the [City]" out of the *Gilbert* rule. The City responds that Section 9-102 was actually enacted long before *Gilbert* and only superficial amendments were made in 2002 after the *Gilbert* decision. Thus, according to the City, Section 9-102 has "nothing to do with the central holding in *American National Bank* and *Gilbert*." We agree that Matthews's settlement with Walsh extinguishes his vicarious liability claims.

¶ 49 Section 9-102 of the Illinois Tort Immunity Act provides: "A local public entity is empowered and directed to pay any tort judgment or settlement for compensatory damages (and may pay any associated attorney's fees and costs) for which it or an employee while acting within the scope of his employment is liable in the manner provided in this Article." 745 ILCS 10/9-102. The Act "does not bestow a right of action whereby a plaintiff may sue a municipality directly; rather it makes the municipality an insurer for its employees." *Horstman v. County of DuPage*, 284 F. Supp. 2d 1125, 1131 (N.D. Ill. 2003) (citing *Wilson v. City of Chicago*, 120 F.3d 681, 685 (7th Cir. 1997)). That is, a plaintiff only has a direct cause of action against the City when a judgment is entered against its agents and the City refuses to pay. See *Wilson*, 120 F.3d at 685. So plaintiffs may bring concurrent Section 9-102 actions against public entities along with their claims against the individual tortfeasors allegedly employed by those entities only because it is impossible to predict whether the public entity will agree to pay its agents' judgments. See *Perkins v. O'Shaughnessy*, No. 10 C 5574, 2011 WL 579333, at *3 (N.D. Ill. Feb. 9, 2011) (discussing *Wilson*, 120 F.3d at 685).

¶ 50 Matthews runs into a problem—there is no judgment left for the City to pay. We do not have the settlement agreement in the record, but Walsh's motion for good faith finding shows

that he is willing and able to pay the settlement himself through his personal insurance. We have found no cases, and Matthews has cited none, that would suggest that a municipality remains liable under Section 10/9-102 where the agent has settled or otherwise resolved the claim against him or her and is able to pay for the judgment themselves. To so hold would seem to sanction a double recovery, which public policy strongly disfavors. *Cf. Metropolitan Sanitary District of Greater Chicago ex rel. O'Keeffe v. Ingram Corp.*, 85 Ill. 2d 458, 473 (1981) (noting "long-standing policy against double recoveries").

¶ 51 As the City emphasized at oral argument, this interpretation accords with the broader purposes of the Tort Immunity Act. The express purpose of the Act is "to *protect* local public entities and public employees from liability arising from the operation of government. It grants *only* immunities and defenses." 745 ILCS 10/1-101.1(a) (emphasis added). The Act also reserves all common law defenses available to private entities, of which the *Gilbert* rule would be one, to public entities. 745 ILCS 10/1-101.1(b). Matthews argues that overemphasis on these purposes renders Section 9-102 superfluous. We disagree. Both the text of the statute and the precedent we have discussed interpret Section 9-102 to empower the public entity to enter settlements on its own or its agents' behalf and to only remain liable for independent judgments against its agents to the extent the agent cannot pay for him or herself.

¶ 52 We agree with the City that, even if Walsh was acting within the scope of his employment, his settlement with Matthews extinguished all claims for vicarious liability.

¶ 53 Affirmed.