2011 IL App (1st) 100988-U

FIRST DIVISION
FILED: NOVEMBER 21, 2011

No. 1-10-0988

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

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

OLGA PINA, as special administrator of the ESTATE OF RAUL PINA, deceased,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	
v.	)	No. 08 L 010129
CITY OF CHICAGO, a municipal corporation; CHICAGO POLICE OFFICER SOLLIS, Badge # 11022; CHICAGO POLICE OFFICER REMIGIO, Badge # 17459; and COMMONWEALTH EDISON COMPANY, an EXCELON CORPORATION,	)	
Defendants.	)	
(City of Chicago, Chicago Police Officer Sollis, and Chicago Police Officer Remigio, Defendants-Appellees.)	)	The Honorable Drella C. Savage, Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Karnezis and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in dismissing the plaintiff's claims against the defendants pursuant to the Local Governmental and Governmental Employees Tort Immunity Act.

¶ 2 The plaintiff, Olga Pina (as special administrator of the estate of the deceased Raul Pina), appeals from a judgment of the circuit court dismissing her fourth amended complaint against the defendants, the City of Chicago (City) and Chicago Police Officers Sollis and Remigio,[1] pursuant to sections 3-104 and 4-102 of the Local Governmental and Governmental Employees Tort Immunity Act (Act) (745 ILCS 10/3-104, 4-102 (West 2008)). On appeal, the plaintiff contends that neither section of the Act provides immunity to the defendants. For the reasons that follow, we affirm the circuit court's decision.

¶ 3 We draw the relevant facts from the plaintiff's fourth amended complaint. According to the complaint, at approximately 11:30 p.m. on December 31, 2007, the City was notified of a downed electrical wire covering a sidewalk, yet failed to remedy the condition, warn pedestrians of the danger, or notify the power company of the problem. The complaint further alleged that Officers Sollis and Remigio were aware of the problem but failed to take any action. The next morning, at approximately 2:21 a.m., Raul was fatally injured when he walked on the sidewalk near the downed power line.

¶ 4 Based on these facts, the plaintiff sought recovery against the City for negligence (Count I of the fourth amended complaint), wrongful death (Count II), loss of consortium (Count III), and willful and wanton misconduct (Count IV), as well as for willful and wanton misconduct by Officer Sollis (Count IX) and Officer Remegio (Count X). The defendants filed a motion to dismiss the above-listed counts pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS

[1]The plaintiff's claims remain pending against another defendant, Commonwealth Edison Company, which is not a party to this appeal.

5/2-619.1 (West 2008)). The defendants argued, among other things, that the claims were barred by section 3-104 of the Act, which provides immunity for claims based on the failure to provide proper traffic warnings, and by section 4-102 of the Act, which immunizes the failure to provide police services. In her response to the motion to dismiss, the plaintiff argued that the Act did not immunize the officers for their willful and wanton misconduct and that the City's duty to maintain its sidewalks overrode any immunity under the Act. The plaintiff's response did not mention section 3-104 of the Act. After hearing argument on the matter, the circuit court granted the defendants' motion to dismiss the counts against them but left the case pending as to the additional defendant Commonwealth Edison. In its order, the court found, pursuant to Rule 304(a) (eff. February 26, 2010), that there was no just reason to delay enforcement or appeal of the dismissal order. The plaintiff now timely appeals.

¶ 5 On appeal, the parties dispute whether the circuit court erred in granting the defendants' motion to dismiss based on their immunity under the Act. Immunity under the Act is an affirmative matter to be raised to defeat a complaint pursuant to section 2-619 of the Code. *Goldberg v. Brooks*, 409 Ill. App. 3d 106, 110, 948 N.E.2d 1108 (2011). A section 2-619 motion to dismiss admits, for purposes of the motion, the legal sufficiency of the complaint, but asserts an affirmative defense or other matter that avoids or defeats the claim. *Whetstone v. Sooter*, 325 Ill. App. 3d 225, 229, 757 N.E.2d 965 (2001). We review *de novo* a circuit court's decision to dismiss a complaint pursuant to section 2-619 of the Code. *Halverson v. Stamm*, 329 Ill. App. 3d 1206, 1215, 769 N.E.2d 1076 (2002). Likewise, to the extent the parties call upon us to construe the provisions of the Act, we will do so *de novo*. *Ries v. City of Chicago*, 242 Ill. 2d 205, 216, 950 N.E.2d 631 (2011).

¶ 6 The plaintiff begins her argument on appeal by noting the defendants', or at least the City's, duty to maintain sidewalks in a safe condition. Indeed, section 3-102 of the Act articulates this duty:

> "Except as otherwise provided in this Article, a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of 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, and shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition." 745 ILCS 10/3-102(a) (West 2008).

Significantly, however, the quoted provision's introductory clause allows liability for breach of this duty "[e]xcept as otherwise provided in this Article." Thus, to the extent the defendants may claim immunity based on another provision of the same article of the Act, the fact that they owed a duty does not leave them liable.

¶ 7 The defendants assert just such a claim of immunity here. On appeal, as in the circuit court, the defendants argue that they are immunized by section 3-104 of the Act, which provides as follows:

> " Neither a local public entity nor a public employee is liable under this Act for an injury caused by the failure to initially provide regulatory traffic control devices, stop signs, yield right-of-way signs, speed restriction signs, distinctive roadway markings or any other

traffic regulating or warning sign, device or marking, signs, overhead lights, traffic separating or restraining devices or barriers." 745 ILCS 10/3-104 (West 2008).

¶ 8 The plaintiff concedes that this provision has been held by this court to apply to the failure to warn or protect against dangers on pedestrian sidewalks. See *Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 811 N.E.2d 364 (2004) ("we find section 3-104 of the [Act] immunizes a municipality against liability arising from its failure to provide barricades or warning signs to pedestrians" on a sidewalk); *Bonner v. City of Chicago*, 334 Ill. App. 3d 481, 487, 778 N.E.2d 285 (2002) (holding that locality was immunized under section 3-104 from liability to pedestrian who tripped on sidewalk, "[b]ecause the term 'traffic' " as used in section 3-104 "includes pedestrians under [the Motor Vehicle Code]"). The plaintiff, however, offers an extensive argument as to why we should depart from *Prostran* and *Bonner* to hold that section 3-104 does not apply to pedestrian sidewalks.

¶ 9 In response, the defendants point out that the plaintiff failed to raise this argument to the circuit court, and they argue that she has therefore forfeited the issue. We agree. "It is well settled that issues not raised in the trial court are deemed [forfeited] and may not be raised for the first time on appeal." *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536, 662 N.E.2d 1248 (1996). We might overlook the plaintiff's forfeiture were it triggered only by the plaintiff's failure to raise her argument regarding *Prostran* and *Bonner*, since, after all, principles of vertical *stare decisis* would have foreclosed any chance that the circuit court could accept it. However, the plaintiff failed to raise *any* argument objecting to section 3-104's application to this case in response to the defendants' motion

to dismiss. Further, on appeal, the plaintiff offers no rejoinder in her reply brief to the defendants' forfeiture argument. For these reasons, we agree with the defendants that the plaintiff has forfeited her argument that section 3-104 should not apply to this case, and we therefore uphold the circuit court's decision to invoke section 3-104 to dismiss the plaintiff's claims to the extent they rely on the defendants' failure to remedy or warn of the condition of the sidewalk.

¶ 10 To the extent the plaintiff's claims rely on the allegedly inadequate police intervention by Officers Sollis and Remigio, we agree with the circuit court that the Act also immunizes the defendants from liability. Section 4-102 of the Act, which the defendants relied on to support their motion to dismiss, provides as follows:

> "Neither a local public entity nor a public employee is liable for failure to establish a police department or otherwise provide police protection service or, if police protection service is provided, for failure to provide adequate police protection or service, failure to prevent the commission of crimes, failure to detect or solve crimes, and failure to identify or apprehend criminals. This immunity is not waived by a contract for private security service, but cannot be transferred to any non-public entity or employee." 745 ILCS 10/4-102 (West 2008).

¶ 11 The plaintiff argues that the defendants' inaction does not constitute "police protection service" under the Act and thus does not qualify for immunity. We disagree. As the plaintiff acknowledges in her brief, the phrase "police protection service" has been interpreted to include not only investigatory and law enforcement functions, but also functions of community caretaking and providing aid to citizens. See *Dockery v. Village of Steeleville*, 200 Ill. App. 3d 926, 928-29, 558

N.E.2d 449 (1990). Thus, in *Dockery*, we held that the phrase "police protection service" included crowd control and traffic management at a fireworks display, so that negligent police management of the crowd and traffic at the display was immunized under the Act. See *Dockery*, 200 Ill. App. 3d at 929. Or, in *Long v. Soderquist*, 126 Ill. App. 3d 1059, 467 N.E.2d 1153 (1984), we held that section 3-104 immunity extended to an officer's failure to light flares, direct traffic, warn oncoming vehicles, and request assistance after seeing two cars stopped partially on a highway.

¶ 12 The plaintiff nevertheless offers here that the defendants' failure to inform the power company of the downed wire "has nothing to do with *** providing police rescue or aid." To support her position that this type of action does not constitute police aid and thus does not qualify for immunity under section 3-104, the plaintiff argues that the action "simply is not commonly recognized as an important part of police services." We disagree. The type of action the plaintiff describes epitomizes the concept of police aid.

¶ 13 Further, if we were to accept the plaintiff's position that this type of aid does not constitute a police service, the plaintiff's claim would fare no better. If we were to assume that this type of aid does not constitute a police service, it would not matter whether section 3-104 provides immunity, because, if the action were not a police service, police would have no duty in the first place to provide it. For these reasons, we reject the plaintiff's argument that section 3-104 does not immunize the defendants for any inadequate police intervention in this case.

¶ 14 The plaintiff's final argument is that the defendants may be held liable under section 2-202 of the Act, because the plaintiff has alleged that they committed willful and wanton misconduct, which section 2-202 excepts from tort immunity. Section 2-202 provides that "[a] public employee

is not liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes willful and wanton conduct." 745 ILCS 10/2-202 (West 2008). The defendants concede that the plaintiff has alleged willful and wanton misconduct here. However, as our supreme court has explained, section 2-202's exception allowing liability for willful and wanton misconduct generally in cases against public employees applies only where some other, more specific section of the Act does not apply in its stead. See *Ries*, 242 Ill. 2d at 220 ("a statute that is particular and relates to only one subject will prevail over one that applies to cases generally"). Accordingly, it is true that section 2-202 allows a public employee to be held liable for willful and wanton misconduct, but, in cases where a more specific provision of the Act applies, the employee will be liable for willful and wanton misconduct only where the more specific provision contains an exception allowing liability for willful and wanton misconduct. See *Ries*, 242 Ill. 2d at 221-226. That is, "exceptions for willful and wanton misconduct may not be read into [Act] provisions that do not contain them." *Ries*, 242 Ill. 2d at 225. Here, two more specific sections of the Act, sections 3-104 and 4-102, apply, and neither section contains any willful and wanton misconduct exception to the immunity conferred under the Act. Accordingly, we agree with the defendants that the Act immunizes their actions even if those actions were willful and wanton.

¶ 15 For the foregoing reasons, we affirm the judgment of the circuit court invoking the Act to dismiss the plaintiff's claims against the defendants.

¶ 16 Affirmed.