

1-09-3475

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Third Division
March 2, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|---|---|------------------|
| MARGARET SMITH, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellant, |) | Cook County. |
| |) | |
| v. |) | |
| |) | |
| VILLAGE OF OAK PARK, ILLINOIS, a |) | 06 L 6283 |
| municipality; CHICAGOLAND PAVING |) | |
| CONTRACTORS, INC., an Illinois corporation; |) | |
| and ROBIN EXCAVATING, INC., an Illinois |) | |
| corporation, |) | Honorable |
| |) | Marcia Maras, |
| Defendants-Appellees. |) | Judge Presiding. |

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Quinn and Justice Steele concurred in the judgment.

ORDER

Held: The Tort Immunity Act immunizes a municipality from liability for its negligence in the planning and supervision of construction projects, and for any negligence in its other discretionary decisions about how to keep the project safe. Contractors have no liability for injuries caused by their acts if their acts conformed to their contracts, as long as the contracts did not create such obvious hazards that no competent contractor would follow them. The appellate court has authority to affirm the trial

court's judgment on any basis supported by the record.

Margaret Smith injured her leg when she stepped into a trench dug near her home as part of a curb reconstruction project. She sued the general contractor and a subcontractor who worked on the project, along with Oak Park, who hired the general contractor. The trial court granted motions for summary judgment in favor of all three defendants.

In this appeal, this court finds Oak Park immune from suit for its discretionary decisions in the planning of the project, for its discretionary decisions about where to install temporary access to homes, and for its supervision of the work of its contractors. We affirm the judgment entered in favor of the general contractor because it followed instructions correctly, and those instructions did not create such obvious hazards that no competent contractor would have followed them. Finally, we affirm the judgment entered in favor of the subcontractor because Smith presented no evidence of a causal connection between the subcontractor's conduct and her injury.

BACKGROUND

In February 2005, Roman Babinski, a civil engineer working for Oak Park, prepared plans for replacement of the curbs along Carpenter Avenue in Oak Park. Oak Park solicited bids on the project, and awarded the contract to Chicagoland Paving Contractors, Inc. (CPC). CPC hired Robi Excavating, Inc., to install new concrete curbs.

CPC began excavation in June 2005, when it removed the curbs and some parts of the sidewalk on Carpenter between Madison and Monroe. The excavation left a trench more than one foot deep where the curb had been. Loose soil filled the bottom of the trench and the area where

CPC removed the sidewalk. Oak Park instructed the residents on Carpenter to park their cars on Monroe, the crossing street south of their homes. On June 29, 2005, in preparation for pouring the concrete for the new curbs, Robi put up yellow string lines around the trench to indicate the elevation to which Robi should pour the concrete.

At 8:30 a.m. on June 29, 2005, Smith left her home to go to her car. She decided to cross the trench in front of her home to get onto the street, as she planned to walk south on the street to get to her car on Monroe. She stepped over the yellow string with one foot, and as she brought her second foot over the line, the loose soil in the trench shifted under her planted foot, causing her to fall on the street.

Smith sued Oak Park, CPC and Robi for negligence. She alleged that Oak Park:

- “a. Carelessly and negligently planned the capital improvement project *** such that residents near the *** project were not provided with a safe means of ingress and egress to their residences and their vehicles;
- b. *** negligently failed to maintain its property in a reasonably safe condition ***;
- c. *** negligently instructed residents *** to park their vehicles on Monroe *** without then providing them a safe means to get to their vehicles;
- d. *** negligently failed to inspect the capital improvement project ***; [and]
- e. *** negligently failed to use reasonable care in discovering the dangerous and defective conditions surrounding the capital improvement project[.]”

Smith alleged that CPC and Robi negligently failed to maintain the area in a safe condition and failed

to provide her with a safe means of leaving the area.

CPC sued Robi for failing to procure contractually mandated insurance coverage, Robi sued Oak Park and CPC for contribution, and Oak Park filed a counterclaim against Robi. All three defendants moved for summary judgment on Smith's complaint. All argued that Smith could not recover because the trench created an open and obvious danger. Oak Park also argued that it had immunity from the lawsuit under the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/2-109, 2-201, 3-108(b) (West 2004)), while CPC argued that its adherence to Oak Park's instructions protected it from liability, and Robi argued that Smith could not show any causal connection between its acts and her injury. The parties appended to their motions depositions of the witnesses, including Smith's expert, and other related documents.

In her deposition, Smith testified that when she left her house on June 29, 2005, she could have taken the sidewalk north to Madison and walked south on Carpenter to get to her car on Monroe, but if she did so she would have needed to cross the trench where the curb used to be to get onto Madison. She had tried that route on June 28 and hoped to find a less dangerous alternative. She could walk south on the sidewalk to Monroe, but she would need to walk across long stretches of loose soil where CPC had removed parts of the sidewalk, and she still needed to cross the trench where the curb had been to get onto Monroe. She had used that route several times, but because she had trouble keeping her footing where the sidewalk had been removed, she hoped to find a less dangerous alternative. She chose her only other option, which was to cross the trench directly onto Carpenter, and she chose the place where the trench seemed most level, right in front of her house. She had also used this option several times before, and she thought it was the safest. She saw the

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yellow string line and stepped one foot over it without difficulty. Her knee twisted awkwardly when she tried to bring her second foot into the trench.

A neighbor agreed with Smith's testimony that Smith could not get to her car on Monroe without crossing the trench where the curb had been. While the depth of the trench varied, it had loose soil and gravel everywhere which could cause one to slip.

Smith's expert, Ronald Lobodzinski, said that in his opinion, Oak Park should have provided each resident with temporary access to the street by making a temporary walkway across the trench. The contract with CPC provided for use of aggregate at a cost of \$1 per square foot, so Oak Park could have ordered a three foot by four foot walkway of aggregate for each house, at a cost of \$12 per house. According to Lobodzinski, CPC should have made the area safe for pedestrians by placing the temporary walkways in front of each house, and Robi negligently placed the yellow string where it increased the danger the residents encountered when they crossed the trench.

The village engineer for Oak Park testified that Oak Park decided to use the aggregate for temporary access only as needed, usually when a resident notified the village of a specific difficulty. CPC's work conformed to the contract, and Oak Park paid CPC in full for its work. Robi's placement of the string also conformed to the contract and to custom within the industry. Babinski, who planned the project, also agreed that Robi placed the string correctly. The string did not stay up after June 29, 2005, because Robi poured the concrete that day, and no longer needed the string thereafter.

The trial court granted summary judgment in favor of all three defendants based on the obviousness of the hazard, without addressing the alternate bases for the defendants' motions for

summary judgment. The court added a finding of no just cause to delay appeal, and Smith now appeals.

ANALYSIS

We review orders granting motions for summary judgment *de novo*. *Hernandez v. Alexian Brothers Health System*, 384 Ill. App. 3d 510, 519 (2008). Smith points out that she presented sufficient evidence to raise a question of material fact as to whether the defendants should have anticipated that she would encounter the danger despite its obviousness, because the defendants provided no better route for her to use to leave her house. See *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 391 (1998). The defendants all claim that the torn up sidewalk heading south to Monroe, with a crossing of the trench at Monroe, provided a safer alternative for Smith. But they also all rely on the other arguments they raised in the trial court in support of their motions for summary judgment.

While we often confine our review to the basis the trial court gave for entering judgment, we have authority to affirm the trial court's judgment on any basis the record supports. *In re Application of Cook County Treasurer*, 185 Ill. 2d 428, 436 (1998). We see no need to remand the case to the trial court for further proceedings where the record provides an adequate basis for affirming the trial court's judgment, even if the trial court gave flawed reasons for entering its judgment. In her brief on appeal, Smith elected not to address the separate arguments for affirming the summary judgment. We look to the arguments Smith raised in the trial court in her responses to the defendants' motions for summary judgment to determine whether we have grounds for remanding this case to the trial court.

Oak Park

Oak Park argues that the Tort Immunity Act warrants a judgment in its favor even if Smith had a good reason to encounter the obvious danger of the trench. The Tort Immunity Act provides:

“A local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable.

* * *

Except as otherwise provided by Statute, a public employee serving in a position involving * * * the exercise of discretion is not liable for an injury resulting from his act or omission * * * when acting in the exercise of such discretion even though abused.

* * *

*** [N]either a local public entity nor a public employee is liable for an injury caused by a failure to supervise an activity on or the use of any public property.” 745 ILCS 10/2-109, 2-201, 3-108 (West 2004).

Smith alleged that Oak Park caused her injury when it negligently planned the project, when it negligently failed to provide her with safe temporary access to her car by putting in a temporary aggregate walkway to the street, and when it failed to inspect the project well enough to recognize and correct the dangerous condition of the land. Smith argued that Oak Park did not present sufficient evidence to show that the alleged negligence involved discretionary acts and supervision, rather than ministerial acts. See *Hanley v. City of Chicago*, 343 Ill. App. 3d 49, 56-57 (2003).

In *Hanley*, the plaintiff charged the City of Chicago with negligence in filling in potholes.

The trial court entered summary judgment for the city, finding that the Tort Immunity Act protected the city's discretionary decisions about when to fill the potholes. The appellate court reversed. The court held that the city acts with discretion when it adopts a plan for repairing its streets, but the execution of adopted plans may be ministerial. Because the city did not present any evidence of how it decided to fill in potholes, the court could not determine whether the decision involved the exercise of discretion after the city adopted its plan for repairs. *Hanley*, 343 Ill. App. 3d at 58.

Here, Babinski testified about the plan Oak Park adopted for repair of the curbs and sidewalks on Carpenter. The charge of negligent planning falls squarely within the ambit of the immunity provided in section 2-201. The planning for the construction project involved the exercise of discretion about the performance of the work. See *Harinek v. 161 North Clark Street, Ltd., Partnership*, 181 Ill. 2d 335, 342-43 (1998); *Wrobel v. City of Chicago*, 318 Ill. App. 3d 390, 395 (2000). Because section 2-201 made Babinski immune from liability for negligence, as he planned the project, section 2-109 immunizes Oak Park for the same alleged negligence. See *Koltes v. St. Charles Park District*, 293 Ill. App. 3d 171, 175-76 (1997).

Babinski and other witnesses explained how Oak Park decided where to install temporary aggregate access to certain properties. That evidence shows that Oak Park officials exercised discretion over the installation of aggregate. Section 2-201 immunizes the officials from this lawsuit, and therefore section 2-109 protects Oak Park. See *Koltes*, 293 Ill. App. 3d at 175-76.

Insofar as Smith charges Oak Park with failing to inspect the work and failing to discover its unsafe condition, the complaint effectively alleges negligent supervision. See *Thomas v. Chicago Board of Education*, 77 Ill. 2d 165, 171 (1979). Section 3-108 immunizes Oak Park from liability

for negligent supervision of its contractors. See *Moorehead v. Metropolitan Water Reclamation District of Greater Chicago*, 322 Ill. App. 3d 635, 638-39 (2001). Therefore, we affirm the summary judgment order entered in favor of Oak Park, although we base our decision on the Tort Immunity Act rather than the obviousness of the danger.

CPC

CPC asks us to affirm the judgment in its favor because it followed the instructions it received from Oak Park. CPC relies on the general principle that “[a]n independent contractor owes no duty to third persons to judge the plans, specifications or instructions which he has merely contracted to follow.” *Hunt v. Blasius*, 74 Ill. 2d 203, 209-10 (1978). CPC presented evidence that it fully complied with its contract.

Smith argues that CPC breached the provision in the contract that required it to keep the construction area safe, because CPC did not put in temporary aggregate walkways for every home on Carpenter, so the residents could not walk safely into the street. But Oak Park did not request temporary aggregate access for every home; instead, Oak Park requested such access only when it found special need.

CPC cites *Geever v. O’Shea & Sons Builders, Inc.*, 233 Ill. App. 3d 917 (1992), in support of its argument. In *Geever*, a condominium owner suffered injuries when his balcony railing collapsed. The condominium association had hired a contractor to inspect and repair balcony railings throughout the building, but, at the time of the injury, the contractor had not yet repaired the plaintiff’s balcony railing. The appellate court found the contractor not liable because the contractor followed the condominium association’s instructions about when to make the repairs, and the

plaintiff presented no evidence showing that every competent contractor would have disregarded those instructions. *Geever*, 233 Ill. App. 3d at 922.

Here, similarly, the evidence showed that CPC followed Oak Park's instructions, including its instructions about where to install temporary aggregate access to properties. No evidence showed that Oak Park's instructions created such obvious hazards that no competent contractor would have followed the instructions. Following *Hunt* and *Geever*, we affirm the trial court's order entering summary judgment in favor of CPC.

Robi

Robi argues that no evidence shows a causal connection between the yellow string it placed around the trench, in conformity with its contract, and the injury to Smith. The trial court should grant summary judgment in favor of the defendant if the record fails to support an inference that the defendant's conduct proximately caused the plaintiff's injury. *Kennedy v. Joseph T. Ryerson & Sons, Inc.*, 182 Ill. App. 3d 914, 918-19 (1989). Smith testified that she saw the string and she stepped over it. She did not trip on the string. Instead, she fell when the soil in the trench shifted beneath her foot, when she had one foot planted in the trench and the other foot in the air. No evidence suggests that she could have crossed the trench without lifting her feet if Robi had not put up the yellow string. Thus, at some point she would have had one foot in the trench and the other in the air as she tried to cross the trench. Although Lobodzinski opined that the yellow string made the crossing more hazardous, no evidence shows that the increased hazard had any effect on Smith's injury. Because Smith showed no causal connection between Robi's acts and her injury, we affirm the trial court's order granting summary judgment for Robi.

Moreover, we note that *Hunt* and *Geever* provide a separate basis for the entry of judgment in favor of Robi. Robi showed that it fully complied with its contract and instructions, including instructions for the conventional placement and use of the yellow string line, and no evidence shows the instructions created such an obvious hazard that no competent contractor would have followed the instructions.

CONCLUSION

The Tort Immunity Act protects Oak Park from liability for its discretionary decisions adopting plans to reconstruct curbs and for providing temporary access to some properties during the construction project. The same Act also protects Oak Park from liability for negligently supervising the work of its contractors. CPC followed Oak Park's instructions, and those instructions did not create such an obvious hazard that no competent contractor would have followed them. Smith showed no causal connection between Robi's acts and her injury. Accordingly, we affirm the judgments entered in favor of all three defendants, although we do so on grounds the trial court did not address.

Affirmed.