

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).

NO. 4-10-0547

Order filed 3/9/11

IN THE APPELLATE COURT
OF ILLINOIS

FOURTH DISTRICT

BRIAN K. LEE, as Father and Next Friend of ABRIENNE M. LEE,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	Moultrie County
THE VILLAGE OF GAYS, ILLINOIS,)	No. 06L5
Defendant-Appellee.)	Honorable
)	Dan L. Flannell,
)	Judge Presiding.

JUSTICE MYERSCOUGH delivered the judgment of the court. Justices Turner and Steigmann concurred in the judgment.

ORDER

Held: The trial court did not err by granting summary judgment in defendant's favor on the basis that plaintiff's minor daughter, who was injured while riding her bicycle on a sidewalk, was not an "intended user" of the sidewalk within the meaning of section 3-102(a) of the Local Governmental and Governmental Employees Tort Immunity Act. Because plaintiff's daughter was not an "intended user" of the sidewalk, defendant owed no duty to her to maintain the sidewalk for her use and is therefore immune under the Local Governmental and Governmental Employees Tort Immunity Act.

The father of plaintiff, Brian K. Lee, as plaintiff's next friend, filed a complaint on behalf of his daughter, Abrienne M. Lee, in the circuit court of Moultrie County, for injuries allegedly caused by the negligence of defendant, the Village of Gays (Village). Abrienne was injured while riding her bicycle on

a sidewalk in the Village. The Village denied it was liable for Abrienne's injuries and moved for summary judgment. The trial court granted the Village's motion for summary judgment after concluding the Village owed Abrienne no duty because she was not an "intended user" of the sidewalk under section 3-102(a) of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/3-102(a) (West 2006)). We affirm.

I. BACKGROUND

On June 7, 2006, a complaint was filed against the Village on behalf of Abrienne. The complaint alleged Abrienne was injured on April 29, 2005, while riding her bicycle on a sidewalk that was in front of her home but owned by the Village. Abrienne was approximately 3 1/2 years old at the time of the incident. The complaint alleged, in part, that (1) Abrienne was a permitted and intended user of the sidewalks and walkways; (2) the Village was negligent in that it (a) permitted the sidewalks to be broken, cracked, and deteriorated; (b) failed to warn people of the dangerous condition of the sidewalk; and (c) failed to implement a maintenance policy to insure the dangerous conditions did not exist to the extent they did. Further, as a direct and proximate result of the Village's negligence, Abrienne fell while riding her bicycle on a sidewalk and injured herself.

The Village's answer denied that the Village owned or

was "obliged" to maintain the sidewalks in question. Further, the Village's answer affirmatively stated that it did not own or maintain the sidewalks or walkways as alleged. The answer also denied Abrienne was an intended and permitted user of the sidewalk.

On March 22, 2010, the Village filed the motion for summary judgment at issue here. In its motion, the Village continued to deny that it had any ownership interest in or duty to maintain the sidewalk. However, the Village also argued that even if plaintiff could establish the Village had an ownership interest in and a duty to maintain and repair the sidewalk, the Tort Immunity Act would prevent recovery by plaintiff because the Village owed Abrienne no duty since she was not an intended user of the sidewalk. Attached to the motion was Village ordinance No. 41, enacted in 1908, which states that "any person or persons who shall within the corporate limits of the Village of Gays ride on bicycle on walks in said Village of Gays shall be deemed guilty of a misdemeanor[.]" The village argued because Abrienne violated a municipal ordinance, she was not an intended user of the sidewalk. Accordingly, the Village owed Abrienne no duty.

On June 15, 2010, the trial court granted the Village's motion for summary judgment. In doing so, the court stated the following:

"Determining the issue in this case is

simple in my mind. Old or not, bike[r]s on the sidewalks were not intended users due to this ordinance. [The] Tort Immunity Act is clear as a bell. Extends a duty of care only to those persons by whom the local government intended the property to be used. It says no bicycles. Motion for [s]ummary [j]udgment is allowed based on the Tort Immunity Act." This appeal followed.

II. ANALYSIS

Plaintiff makes several arguments on appeal. First, citing *Marshall v. City of Centralia*, 143 Ill. 2d 1, 570 N.E.2d 315 (1991), and *Brooks v. City of Peoria*, 305 Ill. App. 3d 806, 808, 712 N.E.2d 387, 390 (1999), plaintiff contends Illinois case law holds that bicyclists under the age of 12 are intended users of sidewalks. Second, plaintiff states the Village ordinance at issue has never been enforced and children have historically ridden their bicycles on sidewalks. Plaintiff contends that these factors combined show that Abrienne was an intended user of the sidewalk.

As indicated, the question before us is whether Abrienne, a minor bicyclist, was an "intended" user of the sidewalk within the meaning of section 3-102(a) of the Tort Immunity Act (745 ILCS 10/3-102(a) (West 2006)). We conclude she

was not.

Summary judgment is appropriate "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." 735 ILCS 5/2-1005(c) (West 2006). "[T]he court must draw all reasonable inferences from the record in favor of the nonmoving party.'" *BlueStar Energy Services, Inc. v. Illinois Commerce Comm'n*, 374 Ill. App. 3d 990, 993-94, 871 N.E.2d 880, 885 (2007) (quoting *Delaney Electric Co. v. Schiessle*, 235 Ill. App. 3d 258, 263, 601 N.E.2d 978, 982 (1992)). Because summary judgment is a drastic method of disposing of litigation, it should only be granted when the movant's right to judgment is clear and free from doubt. *Williams v. Manchester*, 228 Ill. 2d 404, 417, 888 N.E.2d 1, 9 (2008). We review the trial court's grant of summary judgment *de novo*. *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 163, 862 N.E.2d 985, 991 (2007). Moreover, whether Abrienne was an intended user of the sidewalk is a question of law which we review *de novo*. See *Gaston v. City of Danville*, 393 Ill. App. 3d 591, 601-02, 912 N.E.2d 771, 780 (2009).

As stated, the issue in this appeal is whether the Tort Immunity Act bars plaintiff's action. Section 3-102(a) of the Tort Immunity Act states as follows:

"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[.]" (Emphasis added.)
745 ILCS 10/3-102(a) (West 2006).

"It is well established that the Tort Immunity Act imposes a duty of care upon municipalities to maintain property only for uses that are both permitted *and* intended." (Emphasis in original.) *Brooks*, 305 Ill. App. 3d at 808, 712 N.E.2d at 390 (citing *Boub v. Township of Wayne*, 183 Ill. 2d 520, 702 N.E.2d 535 (1998); *Vaughn v. City of West Frankfort*, 166 Ill. 2d 155, 651 N.E.2d 1115 (1995)). Accordingly, for plaintiff to be able to maintain this action against the Village, Abrienne must qualify as both a permitted and intended user of the sidewalk. See *Brooks*, 305 Ill. App. 3d at 808-09, 712 N.E.2d at 390.

Citing *Marshall*, 143 Ill. 2d 1, 570 N.E.2d 315, and *Brooks*, 305 Ill. App. 3d 806, 712 N.E.2d 387, plaintiff states that all cases that have considered whether minor bicyclists under the age of 12 are intended users of sidewalks have concluded the minor bicyclists are intended users. Neither the

Marshall nor *Brooks* courts stand for this proposition.

In *Marshall*, the injured minor's mother sued the City of Centralia (Centralia) after the minor fell into an open sewer manhole on a parkway owned by Centralia and injured himself. *Marshall*, 143 Ill. 2d at 3-4, 570 N.E.2d at 316. The trial court granted Centralia's motion for summary judgment after finding no facts were pleaded that showed Centralia owed a duty to the minor. *Marshall*, 143 Ill. 2d at 4, 570 N.E.2d at 316. The supreme court noted that while parkways are not meant to be used by pedestrians in the same manner as sidewalks, parkways have historically been used by pedestrians in limited instances, including "to enter a car that is parked at the curb; to retrieve mail from a mailbox; to reach a neighbor's house across the street; to board a bus; to stand on so that others can pass you on the sidewalk; to cut the lawn; to trim the shrubs; and to rake the leaves." *Marshall*, 143 Ill. 2d at 10, 570 N.E.2d at 319. The court found Centralia had a duty to pedestrians "to exercise ordinary care to maintain the parkway in a reasonably safe condition for the benefit of the plaintiff." *Marshall*, 143 Ill. 2d at 9, 570 N.E.2d at 319. *Marshall* is distinguishable from the case *sub judice* in that no ordinance in *Marshall* prohibited walking on parkways, whereas, in this case, an ordinance prohibits riding bicycles on sidewalks.

In *Brooks*, a seven-year-old bicyclist was injured while

riding on a residential sidewalk in the City of Peoria (City). *Brooks*, 305 Ill. App. 3d at 807, 712 N.E.2d at 389. The child's father sued the City on the child's behalf for the child's injuries. *Brooks*, 305 Ill. App. 3d at 807, 712 N.E.2d at 389. The City brought a motion for summary judgment, alleging the child was not an intended user of the sidewalk and, therefore, the plaintiff's suit was barred by the Tort Immunity Act. *Brooks*, 305 Ill. App. 3d at 807, 712 N.E.2d at 389. The trial court granted the City's motion after finding insufficient evidence that the City intended that the sidewalks in question be used by bicyclists. *Brooks*, 305 Ill. App. 3d at 808, 712 N.E.2d at 389.

The *Brooks* court, citing *Boub*, recognized that the intent expressed by a local entity is controlling. *Brooks*, 305 Ill. App. 3d at 810, 712 N.E.2d at 391. The City relied primarily on its designation of bicycle routes as evidence of its intent that bicyclists ride on streets instead of on the sidewalks. *Brooks*, 305 Ill. App. 3d at 810, 712 N.E.2d at 390-91. The appellate court declined to give such weight to a map depicting bicycle routes and instead considered the intent expressed by the City in its ordinances. *Brooks*, 305 Ill. App. 3d at 810, 712 N.E.2d at 391. One of the ordinances exempted "junior bikes" and bikes with tires less than 20 inches from the prohibition of riding bicycles on sidewalks while another ordinance contemplated

the use of sidewalks by bicycles. *Brooks*, 305 Ill. App. 3d at 811, 712 N.E.2d at 391. The court stated that "[c]onstrued as integral parts of a statutory scheme that makes exceptions for diminutive bicycles, the provisions *** provide sufficient evidence that the City intended for [the] plaintiff, an infant bicyclist, to use the sidewalk." *Brooks*, 305 Ill. App. 3d at 812, 712 N.E.2d at 392. In the *Brooks* court's opinion, this conclusion was strengthened by the historical and customary use of the sidewalks and the nature of the property. See *Brooks*, 305 Ill. App. 3d at 809-10, 712 N.E.2d at 390-91.

Like *Marshall*, *Brooks* is distinguishable from this case. Most notably, the ordinances in *Brooks* evince an intent by Peoria that minor bicyclists were intended users of the sidewalks. Here, there can be no doubt that the plain language of the Village's ordinance means that no bicyclists were intended to ride on the sidewalks. Plaintiff essentially argues the ordinance is not enforceable because it has not been used and children have historically used the Village's sidewalks to ride their bicycles. However, contrary to the implication of plaintiff's contention that nonenforcement of the ordinance shows the Village's intent that minor bicyclists be users of the sidewalks, a municipality's intent cannot be inferred from the decision whether to enforce an ordinance in any particular instance. *First Midwest Trust Co., N.A. v. Britton*, 322 Ill. App. 3d 922,

930, 751 N.E.2d 187, 194 (2001). Even if evidence showed instances where children had been allowed to ride their bicycles on the Village's sidewalks without the ordinance being enforced, at most this would show that Abrienne was a permitted user of the sidewalk, as opposed to an intended user. See *Britton*, 322 Ill. App. 3d at 930, 751 N.E.2d at 194 ("a municipality's intent may not be determined based upon a police officer's decision whether to enforce a municipal ordinance in a particular instance"); see also *Boub*, 183 Ill. 2d at 531, 702 N.E.2d at 541 (stating that establishing historical practice alone is not sufficient to make a particular use of public property an intended use of that property). Further, the *Brooks* court, citing *Boub*, acknowledged that historical use alone is not sufficient to establish a particular use of public property as an intended use but is a valid indicator of intended use of public property when considered with other factors. *Brooks*, 305 Ill. App. 3d at 809-10, 712 N.E.2d at 390. Here, the main indicator of the Village's intent is an ordinance that unequivocally shows no bicyclists were intended to ride on sidewalks. The fact it is an old ordinance does not make it invalid.

Finally, as stated, plaintiff cites *Marshall* and *Brooks* for the proposition that all Illinois cases that have addressed the issue state that minor bicyclists under the age of 12 are intended users of sidewalks. In our view, neither case stands

for that proposition. In fact, we are not aware of any Illinois case that states that all minor bicyclists under the age of 12 are intended users of sidewalks. Moreover, the analysis the *Brooks* court conducted to conclude that the seven-year-old child was an intended user of Peoria's sidewalks supports our conclusion that plaintiff's contention--that Illinois law plainly states that 12-year-olds are intended users of sidewalks--is false. If Illinois law were that simple, the *Brooks* court would have stated so rather than analyzing Peoria's intent by looking at its ordinances and considering historical use.

Although not cited by plaintiff for this argument, we note a line of cases from the First District involving section 9-52-020(b) of the Chicago Municipal Code (Chicago Municipal Code §9-52-020(b) (eff. July 12, 1990)). Section 9-52-020(b) of the Chicago Municipal Code states "[n]o person 12 or more years of age shall ride a bicycle upon any sidewalk in any district, unless such sidewalk has been officially designated as a bicycle route." Chicago Municipal Code §9-52-020(b) (eff. July 12, 1990). This line of cases includes *Lipper v. City of Chicago*, 233 Ill. App. 3d 834, 837-38, 600 N.E.2d 18, 20-21 (1992) (finding adult bicyclist was not intended user of sidewalk where ordinance prohibited bicyclists over the age of 12 from riding on sidewalk); *Garcia v. City of Chicago*, 240 Ill. App. 3d 199, 201-04, 608 N.E.2d 239, 241-43 (1992) (noting the plaintiff, who was

over the age of 12, was not an intended or permitted user of the sidewalk, and upholding the Chicago ordinance against an equal-protection challenge to the ordinance's distinction between bicyclists who are over the age of 12 and those who are under 12); and *Prokes v. City of Chicago*, 208 Ill. App. 3d 748, 567 N.E.2d 592 (1991) (finding adult bicyclist was not intended user of sidewalk where ordinance prohibited bicyclists over the age of 12 from riding on sidewalk). This line of cases does not stand for the proposition that bicyclists who are age 12 or younger are intended users of sidewalks. Moreover, these cases do not apply here because the Chicago ordinance expressly prohibits people over the age of 12 from riding bicycles on city sidewalks. Here, the Village ordinance makes no such distinction based on age. The ordinance simply prohibits all people from riding bicycles on its sidewalks.

In sum, section 3-102(a) of the Tort Immunity Act "evinces a legislative intent to extend a duty of care only to those persons by whom the local government intended the property to be used." *Marshall*, 143 Ill. 2d at 6, 570 N.E.2d at 317 (quoting *Curtis v. County of Cook*, 98 Ill. 2d 158, 164-65, 456 N.E.2d 116, 120 (1983)). Here, Village ordinance No. 41 clearly shows that no bicyclist is an intended user of the sidewalk. While it may be a questionable public policy to exclude young minor bicyclists as intended users of sidewalks, public policy is

the province of the legislature. If the legislature wanted to prohibit local entities from enacting ordinances restricting the use of sidewalks by minor bicyclists, the legislature could have done so.

III. CONCLUSION

For the reasons stated, we affirm the trial court's judgment.

Affirmed.