

1-09-1419

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

VIRGINIA BASS and VIRGIL BASS, SR.,) Appeal from the
) Circuit Court of
Plaintiffs-Appellants,) Cook County.
)
v.) No. 05 L 8018
)
CITY OF CHICAGO, A Municipal Corporation,) Honorable
) Carol P. McCarthy,
Defendant-Appellee.) Judge Presiding.

ORDER

JUSTICE SALONE delivered the judgment of the court.
Presiding Justice Steele and Justice Murphy concurred in the judgment.

HELD: Plaintiff's allegations in first amended complaint were properly dismissed; the City's motion for summary judgment of the second amended complaint was properly granted; the trial court did not abuse its discretion in denying plaintiffs leave to file a third, fourth or fifth amended complaint; and summary judgment properly entered where the failure to maintain the crosswalk was not the proximate cause of plaintiffs' injuries.

¶ 1 Plaintiffs Virginia and Virgil Bass, Sr. filed suit against the City of Chicago (City) and

1-09-1419

Sylvester White¹ (White) for injuries Virginia incurred after she was hit by a vehicle driven by White as she crossed the street at a midblock crosswalk in Chicago.

¶ 2 During the course of litigation, the circuit court granted the City's section 2-619 (735 ILCS 5/2-619 (West 2006)) motion to dismiss four of the eight negligence claims of plaintiffs' first amended complaint with prejudice (paragraphs 12(b), 12(c), 12(f), and 12(g)), and dismissed paragraph 12(h) with leave to amend. Plaintiffs subsequently filed a second amended complaint and the City moved for summary judgment on the four claims contained therein (paragraphs 12(a), 12(d), 12(e) and 12(h)). Plaintiff's requests to file a third, fourth and fifth amended complaint were denied. Although it initially denied the City's motion for summary judgment on the second amended complaint, the circuit court subsequently granted the City's motion to reconsider and entered summary judgment in favor of the City, finding that: (1) the City owed no duty to plaintiffs to maintain a midblock crosswalk and (2) some of plaintiffs' allegations were barred by the statute of repose (735 ILCS 5/13-214(b) (West 2008)) and the Tort Immunity Act (Act) (745 ILCS 10/3-101 *et seq.* (West 2008)). Plaintiffs now appeal from the circuit court's rulings. For the reasons that follow, we reverse the trial court's finding that the City had no duty to maintain its crosswalk, but affirm in all other respects.

¶ 3 BACKGROUND

¶ 4 Factual Background

¶ 5 We will adopt the trial court's statement of facts from the May 5, 2009, memorandum

¹ All claims against White were dismissed pursuant to settlement and he is not a party to this appeal.

1-09-1419

order that plaintiffs' appeal from. On January 31, 2000, a vehicle driven by White struck and severely injured Virginia as she crossed the street near 915 South Paulina in Chicago. She was crossing the street at a midblock location marked by a pedestrian crosswalk sign, but not by roadway markings on the street's surface.

¶ 6 Both Virginia and White testified that a large cloud of steam was in the roadway at the time of the accident. According to Virginia, when she began crossing the street, she saw a large cloud of steam rising straight up from a steam vent approximately 50 feet south of her. She looked to the south and saw no cars coming, so she entered the street. However, before Virginia finished crossing the street, the steam dropped into the street, and it was so thick that it was impossible for her to see anything in the street, including the vehicle that eventually struck her.

¶ 7 White also saw a large cloud of steam near 915 South Paulina and stated that he had seen steam from the vault at that location for at least a year prior, especially on cold days. On the day of the accident, White saw steam coming from the vault when he arrived at the corner of Taylor and Paulina. He stopped at the stop sign, looked left down Paulina Street, then turned left onto Paulina. White's vision was unimpaired until he physically entered the cloud of steam, which was so thick that he could not see anything at all. White continued driving north through the steam cloud until he heard a "thud," at which time he immediately pulled over. White saw Virginia only after he pulled over and exited his vehicle. He did not know that he had hit anyone until he heard the "thud," and he never saw Virginia at any time prior to exiting his vehicle, when he saw her lying on the ground.

¶ 8 The steam vault and grate were owned, operated, and maintained by the University of

1-09-1419

Illinois at Chicago (UIC). The vault was approximately 50 feet from where White's vehicle struck Virginia. According to UIC personnel, UIC installed the vault and a sidewalk grate to provide access to an underground steam pipe serving its School of Dentistry at some time in the 1970s. Due to rising groundwater, heavy rain, or melting snow, moisture could contact the hot steam pipe. Steam escaped from the vault ever since it was constructed, at times in sufficient quantity to obscure visibility on the street and sidewalk nearby. Under certain weather conditions, including heavy rainfall, heavy snowfall or high humidity, unusually high amounts of steam could emerge from the vault.

¶ 9 Wade Pamon, an officer of the UIC Department of Police from 1988 to 2007, testified that he knew the grate near 915 South Paulina produced "quite a bit of steam" during the winter months. Pamon was near the site of the accident approximately one hour before it occurred and remembered seeing an unusually large discharge of steam. Pamon later responded to the accident and noticed that there was enough steam coming from the vault to interfere with his ability to see the street and surrounding area. Pamon testified that he and fellow UIC officers knew about the steam at 915 South Paulina, discussed it among themselves, and that he personally thought that it could obstruct traffic. However, Pamon never reported his concerns about the steam to UIC or the City.

¶ 10 Gabriel Godwin, coordinator of special projects for the City's Mayor's Office for City Services, performed a search of the City's 311 non-emergency help line for the block including 915 South Paulina for a period of two years prior to the accident. Although the City had received some complaints in the block for that period, there were no complaints about the sidewalk.

1-09-1419

Additionally, the City produced records for the block dating from 1995 to the date of the accident and there were no services requests relating to the sidewalk, crosswalks or steam.

¶ 11 City records indicated that it installed a crosswalk near the site of the accident more than a decade before the accident occurred. A “paint work order” indicates that a midblock crosswalk was painted on the surface of the roadway in 1986. Moreover, a “sign work order” indicates that crosswalk signs were installed in 1989. Plaintiffs submitted photographs of the accident location taken on February 16, 2000, which showed a yellow diamond crosswalk warning sign posted on a green pole, but no white roadway markings.

¶ 12 Procedural Background

¶ 13 Virginia and her husband Virgil filed suit on January 29, 2001, against White and the City. Counts I and II were directed against White, and Counts III and IV were directed against the City on a premises liability theory. Virginia sought recovery for personal injuries and Virgil sought recovery for his loss of consortium. On April 13, 2003, the trial court dismissed the claims against White pursuant to a good faith settlement for \$50,000. Plaintiffs then voluntarily dismissed the case without prejudice on October 8, 2004, and subsequently refiled their complaint against the City only on July 21, 2005.

¶ 14 Plaintiffs first amended complaint in the new case was filed on September 28, 2007. The first amended complaint contained two counts: count I was negligence with 15 paragraphs, and count II was loss of consortium. The first amended complaint alleged, in relevant part:

“12. Notwithstanding said duty and knowledge, at the time and place aforesaid, City was then and there guilty of one or more of

the following careless and/or negligent acts or omissions:

- a. Failed to exercise ordinary care to maintain the crosswalk and public sidewalks in a reasonably safe condition in violation of Illinois Revised Statutes, Section 745 ILCS 10/3-102(a);
- b. Failed to properly warn of the unreasonably dangerous conditions created by the permitted use of the sidewalks by the University of Illinois at Chicago;
- c. Permitted its property to be used in a manner such as to create an unreasonably dangerous condition on and about its property, including but not limited to causing an unnaturally and/or artificially created cloudy and/or steamy and/or smoky substance to emanate from a steam vault underneath public sidewalk thereby obscuring pedestrian[s] (sic.) and pedestrian warning signs from public view;
- d. Installed a crosswalk at or near 915 S. Paulina when the City knew or should have known that the view of pedestrians crossing the street at that location could be obstructed by steam escaping from a steam

vault located underneath the sidewalks on the east side of 915 S. Paulina;

- e. Installed a crosswalk at or near 915 S. Paulina in the City of Chicago in proximity to a steam vault underneath a sidewalk on the east side of Paulina when the City knew or should have known clouds of steam would escape from the steam vault that was created by the University of [Illinois] at [Chicago] (sic.) permitted use of the public sidewalk;
- f. Failed to conduct pedestrian and traffic safety studies at 915 S. Paulina prior to placing a crosswalk at or near 915 S. Paulina when defendant knew or should have known that said safety studies were necessary to insure the safety of pedestrians lawfully crossing Paulina Street because of the steam vault located in this area;
- g. Permitted the University of Illinois at Chicago to use the public sidewalk on the east side of Paulina at or near 915 S. Paulina in such a manner that caused a dangerous and hazardous condition to exist

from steam escaping from the steam vault underneath that sidewalk when the City of Chicago knew or should have known that such dangerous condition existed and that this condition could have caused presence of pedestrians using the crosswalk to be obstructed for vehicle traffic;

- h. Failed to inspect the use of the public sidewalk by the University of Illinois at Chicago. * * *

¶ 15 The City filed a section 2-619.1 (735 ILCS 5/2-619.1 (West 2006)) motion to dismiss portions of the first amended complaint. On March 19, 2008, the trial court granted the motion in part and denied it in part, dismissing paragraphs 12(b), 12(c), 12(f) and 12(g) with prejudice, and dismissing paragraph 12(h) with leave to amend.

¶ 16 Plaintiffs amended paragraph 12(h) when they filed their second amended complaint on August 19, 2008, and the case proceeded on the claims raised in paragraphs 12(a), 12(d), 12(e) and 12(h). On September 12, 2008, plaintiffs filed a motion for leave to file a third amended complaint, and on September 15, 2008, they filed an “updated rule 213(f)(1)(2) & (3) witness list as of 9/15/08.” This witness list disclosed Fred Ranck as a traffic safety expert pursuant to Supreme Court Rule 213(f)(3). Ill. S. Ct. R. 213(f)(3) (eff. September 1, 2008).

¶ 17 On October 30, 2008, plaintiffs filed a second “updated rule 213(f)(1)(2)&(3) witness list.” As of October 30, 2008, Ranck had disclosed the following opinions: "(1) the City installed a midblock crosswalk that was not properly marked and which was obscured by steam emanating

1-09-1419

from a grate in a public sidewalk; (2) the City failed to conduct an engineering study of the subject crosswalk in violation of Section 3B-18 (Crosswalks and Crosswalk Lines) of the Manual on Uniform Traffic Control Devices (1988 Edition); (3) the City failed to inspect the sidewalk; and (4) the City was negligent in its placement of the crosswalk warning sign."

¶ 18 The trial court denied plaintiffs motion for leave to file a third amended complaint on January 20, 2009, and two days later, plaintiffs filed a motion for leave to file a fourth amended complaint. The City responded with a motion for summary judgment. The trial court denied both plaintiffs' motion for leave to file a fourth amended complaint and the City's motion for summary judgment on the second amended complaint as a whole on March 20, 2009. However, the court did enter a partial summary judgment in the City's favor on paragraphs 12(d), 12(e) and 12(h) of the second amended complaint. The order specifically stated that "the case shall proceed only as to paragraph 12(a) of the Second Amended Complaint."

¶ 19 The case was then set for trial, however, the trial court reconsidered the City's motion for summary judgment, and issued a written memorandum and order on May 5, 2009. In that order, the trial court granted the City's motion for summary judgment on the second amended complaint as a whole. The court specifically found that the City did not owe Virginia duty of care because plaintiffs presented "no authority for the proposition that an Illinois municipality's duty to maintain its roadway markings free from visual obstructions includes preventing steam, smoke or any other gas from being blown onto the street," and that it "was not inclined to be the first to extend a duty that may apply to tree branches to steam that is caused and created by an entity that was never a party to this suit." Additionally, the trial court concluded that the City's

1-09-1419

alleged failure to maintain the crosswalk was not a proximate cause of the accident, and that the City was immune from liability. Plaintiffs' request for leave to file a fifth amended complaint was denied on the same day and this timely appeal followed.

¶ 20 DISCUSSION

¶ 21 Plaintiffs have raised the several issues on appeal concerning whether various paragraphs of their first and second amended complaints were properly dismissed or subjected to summary judgment. Additionally, the plaintiffs question whether the trial court's determination that the City owed no duty to maintain the crosswalk directly conflicted with the Illinois Supreme Court's decision in *Bentley v. Saunemin Township*, 83 Ill. 2d 10 (1980), and whether their motions to file a third, fourth and fifth amended complaint were properly denied. We shall examine each issue in turn.

¶ 22 I. Cause of Action for Negligence against a Municipality

¶ 23 We start our inquiry with a review of negligence as it relates to a municipality. In a cause of action alleging negligence, such as here, the plaintiff must establish the existence of a duty, a breach of that duty, and an injury proximately resulting from the breach of the duty. *Horrell v. City of Chicago*, 145 Ill. App. 3d 428, 431 (1986).

¶ 24 The tort liability of municipalities is governed by the Tort Immunity Act (Act). 745 ILCS 10/1-101 *et seq.* (West 2008); *West v. Kirkham*, 147 Ill. 2d 1, 5 (1992). The traditional common law duty of local governments concerning public property is a duty to maintain that property in a reasonably safe condition. *Horrell*, 145 Ill. App. 3d at 432. The duty is only to maintain the property and does not require the creation of public improvements. *Horrell*, 145 Ill. App. 3d at

1-09-1419

432. This is codified in section 3-102 of the Act. 745 ILCS 10/3-102 (West 2008). Thus, a duty to maintain does not commence until an improvement is actually undertaken. *Horrell*, 145 Ill. App. 3d at 432.

¶ 25 Additionally, section 3-104 of the Act governs the immunity of a municipality with regards to traffic safety devices and 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).

Thus, the Act generally precludes liability of a municipality for the initial failure to provide traffic regulatory or warning signs.

¶ 26 The purpose of the Act is to "protect local entities and public employees from liability arising from the operation of government." 745 ILCS 10/3-101.1(a) (West 2008). The Act adds no new duties to those which existed prior to its codification [*Citations*], but rather continues common law duties respecting the liability of a municipality in the maintenance of its public ways [*Citations*]. *Thompson v. Cook County Forest Preserve District*, 231 Ill. App. 3d 88, 92 (1992). Moreover, even where a municipality undertakes to act in some fashion, it is not considered to be an insurer against all accidents occurring on the public way; rather, a

1-09-1419

municipality is required to maintain its streets in a reasonably safe condition for the amount and kind of travel which may fairly be expected on them. *Ross v. City of Chicago*, 168 Ill. App. 3d 83, 87 (1988). Maintenance involves preserving the roadway, keeping it up, not permitting it to fall in a state of disrepair. *Ross*, 168 Ill. App. 3d at 87. Liability arises only when the undertaken improvement, itself, creates an unreasonably dangerous condition. *Ross*, 168 Ill. App. 3d at 87.

¶ 27 II. Dismissal of the First Amended Complaint

¶ 28 Plaintiffs first contend that the trial court committed reversible error in dismissing paragraphs 12(b) and 12(f) of their first amended complaint on the City's section 2-619.1 (735 ILCS 5/2-619.1 (West 2008)) motion to dismiss.

¶ 29 Section 2-619.1 of the Code of Civil Procedure (Code) permits a party to combine a section 2-615 (735 ILCS 5/2-615 (West 2008)) motion to dismiss based on a plaintiff's substantially insufficient pleadings with a section 2-619 (735 ILCS 5/2-619 (West 2008)) motion to dismiss based on certain defects or defenses. "It is proper for a court[,] when ruling on a motion to dismiss under either section 2-615 or section 2-619[,] to accept all well-pleaded facts in the complaint as true and to draw all reasonable inferences from those facts in favor of the nonmoving party." *Edelman, Combs and Latturner v. Hinshaw and Culbertson*, 338 Ill. App. 3d 156, 164 (2003), (citing *Lykowski v. Bergman*, 299 Ill. App. 3d 157, 162 (1998)). "Our review is *de novo* for motions to dismiss brought under both sections 2-615 and 2-619." *Edelman, Combs and Latturner*, 338 Ill. App. 3d at 164. In reviewing the dismissal of a complaint or an order granting judgment on the pleadings, the appellate court may affirm for any basis found in the record. *Lofthouse v. Suburban Trust and Savings Bank of Oak Park*, 185 Ill. App. 3d 883, 892

1-09-1419

(1989).

¶ 30 A. Paragraph 12(b)

¶ 31 Plaintiffs alleged in paragraph 12(b) of their first amended complaint that the City failed to properly warn of the unreasonably dangerous conditions created by the permitted use of the sidewalks by UIC. Plaintiffs contend on appeal that paragraph 12(b) specifically alleged that the City was negligent in placing the crosswalk sign at the crosswalk instead of in advance of the crosswalk, thereby not giving motorists adequate warning that a crosswalk was located beyond the valve vault. In its motion to dismiss, the City alleged that paragraph 12(b) is barred by section 3-104 of the Act. 745 ILCS 10/3-104 (West 2008).

¶ 32 Paragraph 12(b) was dismissed pursuant to section 2-619(a)(9). Section 2-619(a)(9) allows for dismissal where the claim asserted is barred by affirmative matter avoiding the legal affect of or defeating the claim. *Daniels v. Union Pacific Railroad Co.*, 388 Ill. App. 3d 850, 855 (2009). This type of motion admits the legal sufficiency of the plaintiff's claim but sets forth an affirmative matter that prevents the lawsuit from going forward. *Daniels*, 388 Ill. App. 3d at 855 (citing *Travis v. American Manufacturers Mutual Insurance Co.*, 335 Ill. App. 3d 1171, 1174 (2002)). "Affirmative matter" encompasses any defense other than a negation of the essential elements of a cause of action. *Daniels*, 388 Ill. App. 3d at 855 (citing *Travis*, 335 Ill. App. 3d at 1174). In a section 2-619 motion to dismiss, the defendant bears the burden of proving the affirmative defense. *Daniels*, 388 Ill. App. 3d at 855. The standard of review is *de novo*. *Gonnella Baking Co. v. Clara's Pasta di Casa, Ltd.*, 337 Ill. App. 3d 385, 387 (2003).

¶ 33 Plaintiffs' argument is essentially an attempt to demonstrate that the City owed a duty of

1-09-1419

care based on an exception to the grant of immunity to municipalities found in section 3-103(a) of the Act, which holds a local public entity to be liable "if after the execution of [a] plan or design it appears from its use that it has created a condition that is not reasonably safe." 745 ILCS 10/3-103(a) (West 2008). We note however that the allegation at issue in the first amended complaint does not make that specific allegation, but states only that the City failed to "properly warn of the unreasonably dangerous conditions created by the permitted use of the sidewalks by [UIC]." A complaint must minimally allege facts sufficient to set forth the essential elements of the cause of action. *Allstate Insurance Co. v. Winnebago County Fair Association, Inc.*, 131 Ill. App. 3d 225, 232 (1985).

¶ 34 Moreover, we find that paragraph 12(b) is barred by sections 2-109, 2-204, and 3-104 of the Act. 745 ILCS 10/2-109, 2-204, 3-104 (West 2008).

¶ 35 Section 2-204 of the Act provides immunity as follows:

"Except as otherwise provided by statute, a public employee, as such and acting within the scope of his employment, is not liable for an injury caused by the act or omission of a third party." 745 ILCS 10/2-204 (West 2008).

¶ 36 Additionally, section 2-109 provides immunity to the City as follows:

"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."
745 ILCS 10/2-109 (West 2008).

¶ 37 And finally, section 3-104 provides:

1-09-1419

"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).

¶ 38 Here, paragraph 12(b) of plaintiff's first amended complaint specifically points to conduct of a third party, namely UIC, in creating an unreasonably dangerous condition. Section 2-204 specifically grants immunity for injury caused by the acts or omissions of third parties, and section 2-109 specifically grants immunity in situations where it isn't liable. Thus, paragraph 12(b) was properly dismissed on those bases.

¶ 39 Moreover, we agree with the City that paragraph 12(b) of the first amended complaint was barred by section 3-104 of the Act. Plaintiffs cannot demonstrate, nor do they argue, that the placement of the midblock crosswalk itself created an unreasonably dangerous condition. Instead, plaintiffs argue that the crosswalk sign should have been placed in a different location. Plaintiffs argue that the immunity of section 3-104 does not apply in this case because the City had already installed a crosswalk sign near the crosswalk, thus their claim is not based on an initial failure to provide a warning device. Plaintiffs contend instead that the City should have installed the crosswalk sign in a different location, or installed another crosswalk sign prior to the crosswalk itself, in order to provide adequate warning to motorists of the existence of the

1-09-1419

midblock crosswalk beyond the steam vault. This is not required under the Act. This type of argument was expressly rejected by our supreme court in *West*, 147 Ill. 2d at 10. The court noted:

"The creative plaintiff, seeking to premise an action on the failure to provide a particular traffic device, could always circumvent section 3-104 by finding and pointing out some *other* traffic device that was provided. We do not believe that the legislature intended such a narrow construction of 3-104, particularly considering the changes wrought by the 1986 amendment." *West*, 147 Ill. 2d at 10.

(Emphasis in original).

Therefore, the Act does not provide a basis for the City's liability to plaintiffs. See *West*, 147 Ill. 2d at 14-15. We therefore conclude that paragraph 12(b) of plaintiffs' first amended complaint was properly dismissed under section 2-619(a)(9) on the basis of the City's immunity from suit.

¶ 40 B. Paragraph 12(f)

¶ 41 Turning to paragraph 12(f), plaintiffs alleged that the City failed to conduct pedestrian and traffic safety studies prior to installing the midblock crosswalk. On appeal, as to paragraph 12(f), plaintiffs contend that the trial court erred in dismissing it because the City failed to ensure the midblock crosswalk was safe in the first place by not conducting traffic safety studies, not maintaining the visibility of the crosswalk and not placing the warning sign in the correct location, all in violation of its duties to maintain its property in a reasonably safe condition and maintain its crosswalks for pedestrians.

1-09-1419

¶ 42 Paragraph 12(f) was dismissed pursuant to section 2-615 (735 ILCS 5/2-615 (West 2008)) based on the City's argument that it alleged breach of a duty that the common law does not impose. A motion to dismiss under section 2-615 presents the question of whether the facts alleged in the complaint, when viewed in the light most favorable to the claimant, are sufficient to entitle the claimant to relief as a matter of law. *Chandler v. Illinois Central R.R. Co.*, 207 Ill. 2d 331, 348 (2003). As a result, a motion to dismiss pursuant to section 2-615 should not be granted unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery. *Alpha School Bus Co., Inc. v. Wagner*, 391 Ill. App. 3d 722, 735 (2009). Illinois is a fact-pleading state, and conclusions of law and conclusory factual allegations unsupported by specific facts are not deemed admitted. *Alpha School Bus*, 391 Ill. App. 3d at 735. In addition, a pleading that merely paraphrases the elements of a cause of action in conclusory terms is insufficient. *Alpha School Bus*, 391 Ill. App. 3d at 735. We review *de novo* the trial court's dismissal of a complaint pursuant to section 2-615. *Alpha School Bus*, 391 Ill. App. 3d at 735.

¶ 43 On its face, plaintiffs' paragraph 12(f) pleaded no facts to show how a failure to conduct traffic safety studies prior to installing the crosswalk would ensure the safety of pedestrians crossing the street because of the steam vault. Specifically, plaintiffs failed to show that the traffic safety studies would have shown that the crosswalk location was unsafe. Moreover, as indicated previously, section 3-102 of the Act provides that a local public entity has the duty to exercise ordinary care in the maintenance of its property and shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a

1-09-1419

condition that is not reasonably safe in reasonably adequate time prior to injury. 745 ILCS 10/3-102(a) (West 2008). Plaintiffs' paragraph 12(f) does not establish that there was actual or constructive notice by the City of any unreasonably safe condition of the crosswalk, thus there can be no liability. Because Illinois is a fact-pleading jurisdiction, a complaint must allege ultimate facts sufficient to set forth the essential elements of the cause of action being asserted. *Nolan v. Hillard*, 309 Ill. App. 3d 129, 142 (1999). We therefore conclude that the trial court properly dismissed paragraph 12(f) pursuant to section 2-615.

¶ 44 III. Summary Judgment on Second Amended Complaint

(Paragraphs 12(d), 12(e) and 12(h))

¶ 45 Plaintiffs next contend that the trial court erred in granting summary judgments as to paragraphs 12(d), 12(e) and 12(h) of their second amended complaint. Plaintiffs contend that the statute of repose does not apply to the allegations of paragraphs 12(d) and 12(e) that the City failed to maintain the midblock crosswalk, nor does discretionary immunity insulate the City from liability for the improper location of the crosswalk. With respect to paragraph 12(h), plaintiffs argue that summary judgment was improper because the City is not entitled to liability for failing to inspect its property.

¶ 46 Summary judgment is proper where the pleadings, depositions, and admissions on file, together with affidavits, reveal no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Daniel v. Aon Corp.*, 2011 IL App (1st) 101508, ¶13. The standard for reviewing a trial court's order granting summary judgment is *de novo*. *Daniel*, 2011 IL App (1st) 101508, ¶13.

¶ 47 A. Paragraphs 12(d) and 12(e)

¶ 48 Paragraphs 12(d) and 12 (e) of plaintiffs' second amended complaint alleged that the City carelessly or negligently:

"d. Installed a crosswalk at or near 915 S. Paulina when the City knew or should have known that the view of pedestrians crossing the street at that location could be obstructed by steam escaping from a steam vault located underneath the sidewalks on the east side of 915 S. Paulina;

e. Installed a crosswalk at or near 915 S. Paulina in the City of Chicago in proximity to a steam vault underneath a sidewalk on the eastside of Paulina when the City knew or should have known clouds of steam would escape from the steam vault that was created by the University of Chicago at Illinois [*sic.*] permitted use of the public sidewalk; * * *."

¶ 49 The trial court granted summary judgment with respect to paragraphs 12(d) and 12(e) based on application of the Statute of Repose (735 ILCS 5/13-214(b) (West 2008)) and section 2-201 of Act.

¶ 50 The record indicates that the City installed the crosswalk by painting lines on the surface of the roadway in 1986. The record further indicates that the City installed a crosswalk warning sign near the crosswalk in 1989. The trial court noted, and we agree, that plaintiffs submitted no records indicating any date of installment after 1989, thus, there is no genuine issue of material

1-09-1419

fact as to the date of completion of the crosswalk.

¶ 51 Further, there is no genuine issue of material fact that the crosswalk constitutes an improvement to public property. As to improvement of public property, the Code sets forth the Illinois Statute of Repose as follows:

"No action based upon tort, contract or otherwise may be brought against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property after 10 years have elapsed from the time of such act or omission. *

* *" 735 ILCS 5/13-214(b) (West 2008).

¶ 52 The accident in the case at bar occurred on January 31, 2000, more than 10 years after installation of the crosswalk was completed in 1989. Plaintiff's second amended complaint was filed on August 18, 2008, almost 20 years after installation of the crosswalk was completed. Thus plaintiffs' allegations in its complaint based on the design or planning of construction related to real property, in this case the crosswalk, are barred by the plain language of the Statute of Repose. We find there are no genuine issues of material fact relating to those allegations, and the trial court properly granted summary judgment on that basis.

¶ 53 As an additional ground for summary judgment on paragraphs 12(d) and 12(e), the City argued that its decision on when and where to install crosswalks is discretionary in nature, which is protected by section 2-201 of the Act.

¶ 54 Section 2-201 of the Act states as follows:

1-09-1419

"Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." 745 ILCS 10/2-201 (West 2008).

¶ 55 As the allegations of paragraphs 12(d) and 12(e) seek to place liability on the City for its placement of the crosswalk, plaintiffs' argument that the City is liable for maintenance of the crosswalk is misplaced. This court in *Horrell* noted that the location of crosswalks is separately determined and involves a discretionary decision on the part of the Commission of Public Works each time a crosswalk was established. *Horrell*, 145 Ill. App. 3d at 434. Such discretion falls squarely within the immunity provision of section 2-201 of the Act. Accordingly, no material issue of genuine fact exists with respect to whether the allegations of paragraphs 12(d) and 12(e) are barred by the Act, and the trial court properly granted summary judgment.

¶ 56 B. Paragraph 12(h)

¶ 57 The trial court also granted summary judgment with respect to paragraph 12(h) of the plaintiffs' second amended complaint. Paragraph 12(h) alleged that the City carelessly or negligently:

"h. Failed to inspect the public sidewalk at or near 915 S. Paulina, Chicago, Illinois or failed to have reasonable inspection plan in place."

1-09-1419

¶ 58 In its motion for summary judgment, the City argued that it was immune from liability based on section 2-105 of the Act. Section 2-105 provides as follows:

"A local public entity is not liable for injury caused by its failure to make an inspection or by reason of making an inadequate or negligent inspection, of any property, other than its own, to determine whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety."

¶ 59 We find that under the plain language of the Act, the City was immune from the allegations of paragraph 12(h). Additionally, the record reveals that there was no defect in the sidewalk at or near the accident location, and that the accident occurred while Virginia was walking in the street, thus the condition of the sidewalk had no bearing on the accident. We therefore find that there is no genuine issue of material fact related to the sidewalk and the City's immunity from any claims regarding inspection of property. As such, summary judgment was properly entered on paragraph 12(h).

¶ 60 IV. Denial of leave to file a Third, Fourth or Fifth Amended Complaint

¶ 61 Next, plaintiffs contend that the trial court abused its discretion in denying their motions for leave to file a third, fourth or fifth amended complaint.

¶ 62 Whether to allow an amendment of a complaint is a matter within the sound discretion of the trial court, and, absent an abuse of that discretion, the court's determination will not be overturned on review. *Compton v. Country Mutual Insurance Co.*, 382 Ill. App. 3d 323, 331 (2008). In considering whether a circuit court abused its discretion in ruling on a motion for

1-09-1419

leave to file an amended complaint, the reviewing court considers the following factors: "(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleadings could be identified." *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992). Given the broad discretion a trial court exercises in ruling on motions to amend pleadings prior to final judgment, a court should not find the denial of a motion to amend is prejudicial unless there has been a manifest abuse of discretion. *Compton*, 382 Ill. App. 3d at 331.

¶ 63 Plaintiffs filed a motion for leave to file a third amended complaint on September 19, 2008, seeking to add allegations 12(i), 12(j) and 12(k), which were premised on plaintiffs' timely disclosed expert opinions. Specifically, plaintiffs sought to allege that in violation of the MUTCD the City failed to adequately mark the crosswalk, failed to conduct an engineering study prior to installing the midblock crosswalk and provided inadequate warning to motorists of the pedestrian crosswalk.

¶ 64 The trial court's order denying the motion does not specify its reasoning for the denial. The denial order, drafted by counsel for the City, merely states that plaintiffs' "motion for leave to file her third amended complaint and for leave to file her proposed third amended complaint is hereby denied." While plaintiffs have included a copy of the transcript of the hearing on the motion, they did not include the transcript of the court's ruling on the motion, which would presumably have specified the court's reasoning for the denial. In absence of such transcript, we

1-09-1419

must assume that the circuit court had sufficient evidence to support its decision, unless the record indicates otherwise. *Compton*, 382 Ill. App. 3d at 333. Our review of the transcript of the hearing on plaintiffs' motion does not establish the reasoning for the trial court's ruling. We are bound by the rules that any doubts arising from an incomplete record must be construed against the appellant and that the order entered by the trial court was in conformity with the law and had a sufficient factual basis. *Alpha School Bus*, 391 Ill. App. 3d at 749. See also *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984). As such, we must conclude that the trial court did not abuse its discretion in denying plaintiffs' leave to file their third amended complaint.

¶ 65 Plaintiffs' motion for leave to file a fourth amended complaint was heard simultaneously with the City's motion for summary judgment. Plaintiffs' fourth amended complaint sought to amend the allegations of paragraphs 12(a), 12(d), 12(e) and 12(h) of their second amended complaint to add more specificity. After the trial court granted the City's motion for summary judgment as to 12(d), 12(e) and 12(h), plaintiffs' counsel asked for leave to amend the fourth complaint to add more specific allegations to paragraph 12(a). The proposed fourth amended complaint added the following to paragraph 12: the address of the crosswalk; an allegation that the City inadequately warned of the presence of the crosswalk; failed to maintain the visibility of the crosswalk markings; failed to maintain the visibility of the crosswalk to oncoming motorists; that the City knew or should have known that the view could be obstructed from the steam vault; created an unreasonably dangerous condition in installing a mid-block crosswalk with the warning sign at the crosswalk instead of in advance of the crosswalk; and failed to inspect the public sidewalk and crosswalk.

1-09-1419

¶ 66 The following exchange occurred:

"THE COURT: What's the point of that? I mean, what would that serve?

MR. STATHAM [Plaintiffs' Counsel]: Okay.

THE COURT: I know Judge Maris [sic.] already denied further amendments. I don't think you need further amendments, and this is really the most unusual case. I appreciate your arguments, both of you, very much.

MR. STATHAM: Thank you, Judge.

MR. LEOVY [Counsel for the City]: So the fourth amended complaint motion is denied?

THE COURT: Right."

¶ 67 As previously stated, permission to file an amended complaint rests within the sound discretion of the trial court, and its decision will not be disturbed on review absent an abuse of that discretion. *Cross v. Ainsworth Seed Co.*, 199 Ill. App. 3d 910, 936 (1990). The record reveals that plaintiffs' counsel had previously been barred from raising any issues concerning the steam emitting from the sidewalk, the complaint was essentially limited to issues regarding the maintenance of the crosswalk. Based on our discussion with regards to the summary judgment on paragraph 12(a), we find that the trial court did not abuse its discretion in denying plaintiffs' motion to file a fourth amended complaint.

¶ 68 Subsequently, at the time the trial court granted the City's motion for summary judgment

1-09-1419

as to the remaining paragraph of the second amended complaint, 12(a), plaintiffs' sought leave to file a fifth amended complaint, which was denied. Plaintiffs' contend that the denial of their motion for leave to file a fifth amended complaint without review of the *Loyola* factors was an abuse of discretion. We disagree.

¶ 69 The oral motion for leave to file a fifth amended complaint was made by plaintiffs' counsel after the trial court had already granted the City's summary judgment motion. The proposed fifth amended complaint sought to add allegations that the City failed to maintain the crosswalk, failed to maintain the visibility of the crosswalk, placed the advance warning sign in the incorrect location, failed to remove the crosswalk after knowing that it created an unreasonably dangerous condition, failed to prevent UIC from creating high volumes of steam from its permitted use of the City sidewalk, and failed to maintain the public sidewalk in that it allowed a large cloud of steam to be present above the sidewalk when the City knew or should have know that the steam obstructed the view of the individuals using crosswalk.

¶ 70 Section 2-1005(g) of the Code (735 ILCS 5/2-1005(g) (West 2008)) provides that a plaintiff may amend her complaint after the entry of summary judgment "upon just and reasonable terms." The "just and reasonable terms" language used in section 2-1005(g) mirrors the language used in section 2-616 (735 ILCS 5/2-616 (West 2008)). Under these sections, the right to amend is very broad; it has been interpreted to permit amendment if it would further the ends of justice. *In re Estate of Hoover*, 155 Ill. 2d 402, 416 (1993).

¶ 71 Here, the trial court, after review of the entire record, reconsidered the City's motion for summary judgment and granted it in its entirety, concluding that the City was immune from suit

1-09-1419

and also that the City's failure to maintain the crosswalk was not the proximate cause of the accident. A review of the plaintiffs' proposed fifth amended complaint does not address the lack of proximate cause. Thus it fails to cure defects related to the cause of action and it was properly denied.

¶ 72 V. Summary Judgment as to Paragraph 12(a)

¶ 73 Plaintiffs' next contend that the trial court erred in granting summary judgment as to paragraph 12(a) of its second amended complaint because the City had a duty to maintain the crosswalk. The question of whether a duty exists is a question of law. *Horrell*, 145 Ill. App. 3d at 431. Our review is *de novo* for questions of law. *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 226 (2010). In the case at bar, the trial court concluded that the accident was not a reasonably foreseeable consequence of the City's failure to maintain the crosswalk and thus the failure to maintain was not a proximate cause of the accident as a matter of law, so summary judgment was appropriate. Additionally, the trial court found that the City was immune based on sections 3-101, 3-102(a) and 3-105(a) of the Act. 745 ILCS 10/3-101, 3-102(a), 3-105(a) (West 2008).

¶ 74 Summary judgment is proper where the pleadings, depositions, and admissions on file, together with affidavits, reveal no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Daniel*, 2011 IL App (1st) 101508, ¶13. The standard for reviewing a trial court's order granting summary judgment is *de novo*. *Daniel*, 2011 IL App (1st) 101508, ¶13.

¶ 75 As noted previously, it is well-settled that the City is not required to construct crosswalks.

1-09-1419

See *Horrell*, 145 Ill. App. 3d at 432. However, the City did construct a midblock crosswalk in the case at bar. Therefore, there was a duty to maintain it. See *Horrell*, 145 Ill. App. 3d at 432.

¶ 76 However, this does not end our inquiry. As indicated previously, the other elements of a cause of action for negligence are breach of duty and proximate cause resulting from that breach. *Horrell*, 145 Ill. App. 3d at 431. Thus, we must now turn our discussion as to whether the City breached its duty to maintain the crosswalk. We find that it did. Photographic evidence of the accident site showed no street markings indicating a crosswalk, although there was a crosswalk sign on a green post nearby. Other evidence indicated that the crosswalk lines were originally painted in 1986. As noted earlier, maintenance involves preserving the roadway, keeping it up, not permitting it to fall in a state of disrepair. *Ross*, 168 Ill. App. 3d at 87. We conclude therefore that City breached its duty to maintain the crosswalk by not keeping the crosswalk lines clearly marked. We now turn to the issue of proximate cause.

¶ 77 While proximate cause is ordinarily a question of fact for the jury, the court can decide it as a question of law where reasonable minds could not differ as to interferences drawn from undisputed facts. *Parsons v. Carbondale Township*, 217 Ill. App. 3d 637, 646 (1991). Plaintiffs do not argue any disputable facts, therefore if the trial court correctly ruled as a matter of law that the City's failure to maintain the crosswalk could not have been the proximate cause of plaintiffs' injuries, summary judgment in the City's favor was proper. *Parsons*, 217 Ill. App. 3d at 646.

¶ 78 In its written order, the trial court stated : "[I]t is difficult for the Court to understand how missing or absent traffic markings could even have been a condition that permitted the accident to occur, much less a reasonably foreseeable consequence of the City's failure to

1-09-1419

maintain its crosswalk. Even if the City failed to maintain any traffic markings it had once installed, the conduct of Bass, White, and UIC, operating together on the day of the accident, interrupted any causal connection between the City's alleged negligence and the accident."

¶ 79 We agree. Proximate cause describes two distinct elements: cause in fact and legal cause. *Jefferson v. City of Chicago*, 269 Ill. App. 3d 672, 676 (1995). See also *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 455 (1992). The defendant's conduct is a factual cause of the plaintiff's injury if the conduct was a material element and a substantial factor in bringing about the injury. *Jefferson*, 269 Ill. App. 3d at 676.

¶ 80 It is clear from the evidence presented in the trial court that the City's failure to maintain crosswalk markings was not the factual cause of the accident. It is clear that the intervening acts of UIC's steam vault emitting steam into the street, Virginia's act of crossing the street while the steam was blowing, and White's act of driving through an opaque cloud of steam were the proximate causes of Virginia's injuries and that the crosswalk markings had absolutely no bearing on the injury. We therefore conclude that the failure to maintain the crosswalk markings was not the factual cause of Virginia's injuries. We turn to whether it was the legal cause of her injuries.

¶ 81 A negligent act is a proximate cause of an injury if the injury is of a type which a reasonable man would see as a likely result of his conduct. *Lee*, 152 Ill. 2d at 456. If the negligence charged only furnishes a condition by which the injury is made possible, and that condition causes an injury by the subsequent, independent act of a third party, the creation of the condition is not the proximate cause of the injury. *Abrams v. City of Chicago*, 211 Ill. 2d 251,

1-09-1419

259 (2004).

¶ 82 Here, we have already concluded that the City's failure to maintain the crosswalk markings was not the factual cause of the accident. The same conclusion is warranted in terms of legal cause. There is no reasonable argument to be made that the intervening acts of the steam, White's decision to drive into the cloud of steam and Virginia's decision to cross the street while a cloud of steam obscured her vision of the street were a foreseeable result of the missing crosswalk markings. We conclude as a matter of law that the City could not have reasonably anticipated that its failure to mark a crosswalk would result in steam blowing from an underground steam vault maintained by UIC at the same time Virginia was crossing the street at the same time that White decided to drive his car through an opaque cloud of steam. The legal causes of the injury here were at the very least, White's and Virginia's use of poor judgment, and not anything the City did or did not do. See *Abrams*, 211 Ill. 2d at 259-63. Therefore, the trial court did not err in granting summary judgment as to paragraph 12(a) of the second amended complaint.

¶ 83 CONCLUSION

¶ 84 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 85 Affirmed.