

No. 1-12-3650

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IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

HEATHER BAY,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee/Cross-Appellant,)	Cook County.
)	
v.)	No. 08 L 2516
)	
CITY OF CHICAGO, a Municipal Corporation, and)	
RAUL ALVAREZ,)	The Honorable
)	Elizabeth M. Budzinski,
Defendants-Appellants/Cross-Appellees.)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Howse and Justice Lavin concurred in the judgment.

ORDER

HELD: Trial court properly denied defendants' motion for judgment notwithstanding the verdict where its defense of section 4-102 tort immunity clearly did not apply to collision police officer had with plaintiff, resulting in her injury, at a time when the officer was not performing crowd control duties.

¶ 1 Plaintiff-appellee/cross-appellant Heather Bay (plaintiff) brought suit against defendants-

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appellants/cross-appellees the City of Chicago, a municipal corporation, and Raul Alvarez (defendants or as named) with respect to injuries she received during a parade. Following trial, a jury awarded plaintiff \$4,000,000. Defendants moved for judgment notwithstanding the verdict, which the trial court denied. Defendants appeal, contending that the trial court's denial of their posttrial motion was erroneous. They ask that we reverse that decision and order judgment notwithstanding the verdict in their favor. For the following reasons, we affirm.¹

¶ 2

BACKGROUND

¶ 3 On June 26, 2005, plaintiff, along with a group of about 10 other volunteers, participated in the Gay Pride Parade taking place on Halsted Street in Chicago. Defendant Alvarez, an on-duty Chicago police officer at that time, was assigned to crowd control duties at the parade and was driving an all-terrain vehicle (ATV). At one point during the event, as plaintiff was passing out literature to spectators who were lining the street, officer Alvarez attempted to pass her while driving the ATV. Instead, however, officer Alvarez struck plaintiff on the left side of her body, injuring her left knee, ankle and foot.

¶ 4 Plaintiff filed a complaint at law against defendants. In it, she asserted that officer Alvarez "had the duty to operate the ATV in the exercise of ordinary care and caution," but that he breached this duty when he "[c]arelessly and negligently" failed to keep a proper lookout, exercise proper precautions, warn of his approach, maintain proper control, stop or change

¹We note for the record that plaintiff originally filed a notice of cross-appeal in this cause, appealing an order from the trial court denying her motion for costs. However, plaintiff later filed a motion in our Court requesting to withdraw that notice. On November 22, 2013, we allowed plaintiff's motion and dismissed her cross-appeal.

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course, and that he otherwise drove the ATV improperly and at an unreasonable rate of speed while not enforcing any laws at the time of the collision. Defendants filed a motion to dismiss, asserting that they were immune from plaintiff's suit pursuant to section 4-102 of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act or Act) (745 ILCS 10/4-102) (West 2004)), because at the time of the incident, officer Alvarez was "engaged in crowd control at the parade" and, thus, was providing a police service. The trial court denied defendants' motion. In a memorandum opinion and order, the court examined the pleadings and noted that, contrary to defendants' insistence that plaintiff's claim was one of inadequate police services, plaintiff was actually asserting that officer Alvarez had negligently operated the ATV at a time when he was not providing police services, thereby rendering section 4-102's immunity inapplicable. Because this raised a question of fact, namely, whether officer Alvarez was providing police services at the time he struck plaintiff, the court concluded that it could not determine as a matter of law that section 4-102 applied.

¶ 5 As the cause proceeded through discovery, defendants moved for summary judgment, again asserting that officer Alvarez was engaged in crowd control and invoking tort immunity under section 4-102 based on his performance of police services. The trial court denied defendants' motion, again noting that whether officer Alvarez was so engaged when he struck plaintiff was in dispute. Accordingly, the cause proceeded to trial.

¶ 6 Plaintiff testified that, on the day of the parade, she was volunteering along with a group of about 10 other people for Hep Team Chicago passing out literature and bracelets to spectators. She described that Halsted Street was blocked off from traffic so that floats and parade

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participants could travel the parade route, and that fencing had been erected on the sides of the street to keep the spectators off the route. Accordingly, as they walked the route, she and her group, who were all wearing matching orange shirts, would gather their materials from a vehicle following them and then would walk over to the sides of the street and hand them out to the spectators. Plaintiff averred that it was a very festive atmosphere; the spectators were "well-behaved" and "getting along," and no one was attempting to break through the fence. Plaintiff testified that, about two hours into the parade, while she was where she was assigned to be with her group and while she was walking the route and passing out materials, she was suddenly struck from behind and thrown down to the pavement, chest and face first. When she was able to pick herself up in a push-up position, she noticed that her left foot and ankle were stuck and she could not move them. When she turned around, plaintiff saw an ATV resting on her leg. Officer Alvarez then stood up on the ATV, looked over the windshield and asked plaintiff if she was hurt, telling her he did not see her at the time of the collision. Eventually, plaintiff was able to free her leg from the ATV, and officer Alvarez and another person escorted her to the side of the parade route, whereupon medics arrived and brought her to the hospital.

¶ 7 With respect to her injuries, plaintiff testified that, when she arrived at the emergency room, she was given vicodin and crutches and was told to follow up with an orthopedic doctor for possible soft tissue damage. However, on the ride home from the hospital, she began to feel a burning, stabbing pain in her left buttock, hip and lower back, pain she has had every day since. She followed up with an orthopedic doctor and received physical therapy and medication. The immediate injury to her left leg and ankle eventually healed, but the pain in her back and left

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buttock did not. This led plaintiff to an extensive regimen of care, to which she testified at length. She sought treatment from spinal surgeons who gave her a series of spine and sacroiliac joint injections in an attempt to ease her pain. She met with a pain psychologist and entered into pain programs at hospitals to achieve pain management. She also went to the Mayo Clinic and entered a patient program at the Rehabilitation Institute of Chicago. She received a spinal cord stimulator and is in need of a more permanent, indwelling morphine pump, which will require further surgery. She is on daily doses of fentanyl morphine and has been since the day of the collision. She has been diagnosed with sacroiliac joint related pain compounded by complex regional pain syndrome (CRPS), a condition where her pain will never be remedied and can only be managed. Plaintiff further testified that, before this incident, she was a very fit and active person, participating in outdoor activities like running and hiking; she was also a sailor. She was employed as a vaccine sales consultant for GalxoSmithKline at a salary of approximately \$80,000 a year. Following the incident, plaintiff has suffered weight loss, sickness from the medications she must take, and sleeplessness due to her constant and chronic pain. She is severely limited physically and can no longer do any of the activities she did before. She lost her job and is unable to work.

¶ 8 Officer Alvarez testified that he was assigned to crowd control at the parade. He was riding his ATV up and down the side of the street. He stated that, at the time of the incident, no one was breaking through the fence and everyone was where they were supposed to be; there were no problems with the crowd. He admitted that he saw plaintiff prior to striking her approximately 20 to 30 feet in front of him while he was on the ATV; she was with a group of

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people on the parade route all wearing orange shirts, passing out literature to spectators, and heading north. He also admitted that he knew plaintiff was not looking at him and did not see him. Instead, she was standing stationary, talking to someone on her right and facing away from the street. At this point, and believing he could clear her, officer Alvarez, looking straight ahead, attempted to pass plaintiff with the ATV on her left side. Officer Alvarez conceded that he passed her within a distance of one foot from her body, close enough that she would not have been able to take a step to her left without running into him. He thought she would remain stationary as she had been, even though, admittedly, everyone in her group was walking around. He did not know he hit plaintiff until he actually made contact with her. When she turned and looked at him suddenly, he, for the first time, applied his brakes. He disputed that he actually ran plaintiff over and that she fell to the ground. Officer Alvarez further testified that the left side of the street was totally clear of obstructions at the time and that he could have swerved and avoided plaintiff entirely. And, he admitted that he never turned on the ATV's light or siren nor did he honk the horn as he tried to pass plaintiff, stating that he believed she would not have heard or seen him anyway due to the noise of the parade.

¶ 9 The medical evidence at trial was extensive. Briefly, plaintiff presented the testimony of several physicians who were currently treating her or had treated her since the collision. Their corroborative testimony demonstrated that plaintiff's pain was real and genuine, that it was specifically due to the collision, that her final diagnosis was CRPS or chronic pain, and that she will experience this pain for the rest of her life, rendering her totally and permanently disabled. Defendants, meanwhile, presented the testimony of one physician, a medical defense expert who

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had never met or treated plaintiff but had reviewed her medical records. She opined that plaintiff only received bumps and bruises to her left knee and ankle from the collision which healed days later, and that her other symptoms were unrelated. She also concluded that the medical diagnoses of plaintiffs' several treating physicians were incorrect and that plaintiff was a malingerer.

¶ 10 Following the close of testimony, defendants asked the trial court to instruct the jury on the issue of their affirmative defense of tort immunity. Similar to their prior motion to dismiss and motion for summary judgment, the court denied defendants' request, finding that, as a matter of law, this cause did not involve a claim based on adequate police services. The jury returned a verdict in favor of plaintiff and against defendants in the amount of \$4,000,000. Defendants filed a posttrial motion for judgment notwithstanding the verdict, once again asserting tort immunity pursuant to their claim that officer Alvarez was providing a police service at the time of the collision and, thus, they were immune from liability. However, noting its prior determinations on this same and repeated assertion, the court explained that section 4-102 would only immunize defendants from claims that they had either failed to establish police services or provided inadequate police services. The court recognized that this "was not the issue in this case" since officer Alvarez "wasn't doing anything inadequate about [*sic*] his police services or failed to establish police services" at the time he struck plaintiff. Rather, the court stated that "the issue" was "whether or not the officer was negligent" and "failed to exercise ordinary caution for [plaintiff's] safety." Accordingly, and finding that section 4-102 was inapplicable here, the trial

court denied defendants' motion.²

¶ 11

ANALYSIS

¶ 12 Once again reasserting their position from the trial court, defendants' sole contention on appeal is that the trial court erroneously denied their motion for judgment notwithstanding the verdict in this cause because they are immune from any liability to plaintiff under the auspices of section 4-102 of the Tort Immunity Act since officer Alvarez was engaged in the police service of crowd control at the time of the collision. Based upon our review of the record, we disagree.

¶ 13 Just like a directed verdict, judgment notwithstanding the verdict is to be entered only when all the evidence, viewed in the light most favorable to the nonmovant, so overwhelmingly favors the movant that no contrary verdict could stand based on the evidence. See *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 132 (1999); accord *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 178 (2006); *Maple v. Gustafson*, 151 Ill. 2d 445, 452 (1992); see also *Pedrick v. Peoria & Eastern Railroad Co.*, 37 Ill. 2d 494, 502 (1967). As defendants correctly note, and specific to cases involving claims of tort immunity, judgment notwithstanding the verdict would be proper if a local governmental entity or its employee is able to establish, based on the evidence presented, immunity under the Act as a matter of law. See *Ries v. City of Chicago*, 242 Ill. 2d 205, 215 (2011). However, in deciding whether to grant such a judgment, the trial court may not reweigh the evidence and set aside the verdict simply because

²Defendants presented a second ground in support of their posttrial motion for judgment notwithstanding the verdict, namely, that the trial court erred in not instructing the jury as to their affirmative defenses. The trial court denied the motion on this ground, as well. However, defendants did not raise this as a basis for appeal before our Court and, thus, we need not consider it.

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a jury could have drawn different conclusions or inferences from the evidence or because it feels other possible results may have been more reasonable. See *McClure*, 188 Ill. 2d at 132; *Pedrick*, 37 Ill. App. 3d at 504 (the right of the parties to have a substantial factual dispute resolved by the jury should be "carefully preserve[d]"); accord *Maple*, 151 Ill. 2d at 452. Likewise, a reviewing court may not usurp the role of the jury and substitute its own judgment on factual questions fairly submitted, tried, and determined from the evidence. See *McClure*, 188 Ill. 2d at 132 (reviewing court cannot substitute own judgment on questions of fact and witness credibility, which remain solely within the province of the jury); *Maple*, 151 Ill. 2d at 452-53. Rather, the standard is a high one, and we review a trial court's denial of a motion for judgment notwithstanding the verdict *de novo*. See *McClure*, 188 Ill. 2d at 132; accord *Ries*, 242 Ill. 2d at 215.

¶ 14 The Tort Immunity Act recognizes that local governmental units are liable in tort, but limits this liability with a list of immunities based on specific government functions. See *Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill. 2d 335, 344 (1998). In other words, the Act attempts to create situations of immunity that are exceptions to the general rule of municipal liability. See *Aikens v. Morris*, 145 Ill. 2d 273, 277-78 (1991). As such, the Act "is in derogation of the common law action against local public entities, and must be strictly construed against the public entity involved." *Aikens*, 145 Ill. 2d at 278.

¶ 15 In the instant cause, the parties agree, and the record is clear, that provision of the Act at issue is section 4-102. That section states, in relevant part:

"Neither a local public entity nor a public employee is liable for failure to *** provide

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police protection service or, if police protection service is provided, for failure to provide adequate police protection or service ***.” 745 ILCS 10/4-102 (West 2004).

The language and meaning of this section are plain and unambiguous. Section 4-102 immunizes a local government when its police officers are providing, or failing to provide, police services. See *Anthony v. City of Chicago*, 382 Ill. App. 3d 983, 991 (2008). It addresses those situations where no police protection is provided to the public as well as those where the police protection provided is inadequate. See *DeSmet v. County of Rock Island*, 219 Ill. 2d 497, 515 (2006). And, there is no exception for willful and wanton misconduct. See *DeSmet*, 219 Ill. 2d at 515 (local governmental defendants are immune from liability in these situations against both negligence and willful and wanton misconduct); accord *Ries*, 242 Ill. 2d at 224-25. In addition, and specific to the instant cause, our courts have held that crowd control is a typical police function that falls within the meaning of police protection or service immunized under section 4-102. See *Anthony*, 382 Ill. App. 3d at 994; *Cadena v. Chicago Fireworks Manufacturing Co.*, 297 Ill. App. 3d 945, 954-55 (1998), *rev'd on other grounds*, *Ries*, 242 Ill. 2d at 227; *Dockery v. Village of Steeleville*, 200 Ill. App. 3d 926, 929 (1996).

¶ 16 However, the key to the instant cause lies not in these general provisions of law, which both sides here agree represent the law on tort immunity and police services. Rather, it lies in plaintiff's complaint. As we noted earlier, in her complaint, plaintiff asserted that officer Alvarez had a duty to operate the ATV with ordinary care and caution to avoid injury to others who were lawfully on the street. Plaintiff then claimed that he breached this duty when he “carelessly and negligently” operated the ATV at a great rate of speed, without keeping proper

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lookout, without exercising proper precautions upon observing her, without giving proper warning, failing to maintain proper control, failing to stop or change course so as to avoid striking her, and otherwise improperly driving and operating the ATV, thereby resulting in her injuries. Contrary to defendants' argument, one they have mistakenly maintained throughout this litigation, absolutely none of the allegations in plaintiff's complaint relate to defendants' purported failure to provide the police service of crowd control, nor to their failure to provide adequate crowd control service, at the parade at the time officer Alvarez collided with and permanently injured her. Indeed, crowd control is a police service that is recognized to be subject to section 4-102, which confers immunity for the failure to provide it or for its inadequate provision. However, this does not include the allegations involved in plaintiff's complaint, which assert *not* that officer Alvarez was negligent in failing to provide or inadequately providing crowd control at the parade but, rather, that he was negligent in driving the ATV at the time he hit plaintiff.

¶ 17 In other words, the basis for plaintiff's complaint was an assertion of negligence wholly unrelated to officer Alvarez's crowd control duties which would have otherwise qualified for section 4-102's immunity. The evidence presented at trial, and most significantly, officer Alvarez's own testimony, bears this out. The atmosphere at the parade was a festive one; everyone in the crowd was well-behaved and getting along. Officer Alvarez admitted that, at the time of the collision, everyone was where they were supposed to be and no one was breaking through the fencing. He stated that there were no problems with the crowd. Clearly, then, by his own admission, he was not performing any crowd control duties when he hit plaintiff. In

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addition, he further admitted that he specifically saw plaintiff long before he struck her, that he knew she did not see him because she was facing away from the street, and that, even though the entire left side of the street was clear and available to him, he chose instead to pass her by driving his ATV within one foot of her body, close enough that she could not take a step without making contact with him. During this time, officer Alvarez was not looking at the crowd but was, rather, looking straight ahead so he could pass ahead of plaintiff. And, he did this without turning on the ATV's light or siren or even honking its horn to warn plaintiff that he was approaching, braking for the first time when he had already made contact with her. His only explanation was that he thought plaintiff would remain stationary, even though he admittedly saw everyone else in her group walking around at the time. Clearly, none of the actions plaintiff complained of, nor any of the actions which officer Alvarez took, implicated the existence or adequacy of police protection services as provided by officer Alvarez at the time of the collision. Thus, plaintiff's claim was not barred by the immunity otherwise provided to defendants under section 4-102.

¶ 18 Defendants rely heavily on *Dockery* and *Cadena*, two cases that found governmental units immune pursuant to section 4-102 amid allegations of improper crowd control. See, e.g., *Dockery*, 200 Ill. App. 3d 926; *Cadena*, 297 Ill. App. 3d 945, *rev'd on other grounds*, *Ries*, 242 Ill. 2d at 227. First, in *Dockery*, the plaintiff brought suit against the municipal defendants after he was struck by a firework while attending a fireworks display at which the defendants' police department was performing crowd control. See *Dockery*, 200 Ill. App. 3d at 927. The plaintiff's complaint alleged that the defendants had been negligent in that they "a) [a]llowed the spectators *** to watch the fireworks display in a position which was in the direct flight path of said

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fireworks display; b) [f]ailed to keep the spectators *** at a safe and proper distance from the site ***; c) [f]ailed to maintain proper crowd control ***.” *Dockery*, 200 Ill. App. 3d at 927-28. The defendants filed a motion for summary judgment asserting governmental immunity, and the trial court granted this motion. See *Dockery*, 200 Ill. App. 3d at 928. Upon review, the *Dockery* court affirmed, holding that the allegations in the plaintiff’s complaint clearly asserted a claim for the inadequate provision of police protection service at the time he was injured at the event, for which the defendants were immune under section 4-102. See *Dockery*, 200 Ill. App. 3d at 929 (summary judgment was proper where complaint at issue alleged that municipal defendants provided inadequate police protection in that they allowed spectators to watch, or failed to prevent them from watching, the display from an unsafe area, for which they were immune pursuant to the Act).

¶ 19 A similar situation occurred in *Cadena*. There, following a city fireworks display that resulted in their injury, the plaintiffs brought suit against the municipal defendants, alleging, in part, that they were negligent in failing to protect spectators, failing to warn them of danger, placing spectator barricades too close to the ignition area and failing to designate a proper spectator viewing area. See *Cadena*, 297 Ill. App. 3d at 949. The defendants moved for summary judgment asserting section 4-102 immunity. During the pendency of that cause, another case arising from the same incident, *McLellan v. City of Chicago Heights*, was filed and decided in federal court. See *Cadena*, 297 Ill. App. 3d at 950; *McLellan*, 61 F.3d 577 (1995). The plaintiffs in that cause, just as those in *Cadena*, claimed the defendants were negligent in the same manner. Citing *Dockery*, the *McLellan* court upheld the grant of summary judgment in

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favor of the defendants, finding that all the counts in its plaintiffs' complaint directly related to allegations of inadequate police services, for which the defendants were immune. See *Cadena*, 297 Ill. App. 3d at 951, citing *McLellan*, 61 F.3d at 578-79. Acknowledging *McLellan*, the *Cadena* court, too, upheld the grant of summary judgment in favor of the defendants, similarly noting that the allegations in its plaintiffs' complaint regarding the failure to warn and protect spectators were directly based upon the contention that the defendants failed to provide adequate police service, which section 4-102 immunizes. See *Cadena*, 297 Ill. App. 3d at 955 ("[t]hus, we find that the City's conduct falls within those 'police services' protected under section 4-102 of the Tort Immunity Act and, as in *Dockery*, we hold that the City was immune from [the] plaintiffs' claims of negligence under section 4-102").

¶ 20 We find nothing inappropriate with the holdings of *Dockery* and *Cadena*. Those cases were properly decided, since the plaintiffs therein made specific allegations against municipal defendants related to crowd control that directly asserted negligence based on the failure to provide, or the inadequate provision of, police protection services. Clearly, based on those allegations, the defendants were immune under section 4-102. The instant cause, however, is wholly distinguishable from those cases. Here, unlike in *Dockery* and *Cadena*, plaintiff did not allege that defendants were negligent because officer Alvarez failed to or inadequately performed crowd control duties. Rather, plaintiff alleged that officer Alvarez was negligent in operating his vehicle and, even more specifically, that he was doing so at a time when he was not performing police services. This is what sets plaintiff's cause completely apart from *Dockery* and *Cadena* and, thus, from the applicability of section 4-102's immunity. Compare also *Aikens*, 145 Ill. 2d

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273 (no immunity where police officer was involved in car accident with the plaintiff; even though police officer was on duty and in the course of his employment, he was not enforcing or executing any laws at the time of the accident).

¶ 21 Finally, we note that defendants cite one more line of cases in support of their proposition that they are immune from liability because plaintiff's claim boils down to one of a municipal employee's negligence at the time he was providing a police service. Those cases are *Hernandez v. Kirksey*, 306 Ill. App. 3d 912 (1999), *Trepachko v. Village of Westhaven*, 184 Ill. App. 3d 241 (1989), and *Kavanaugh v. Midwest Club, Inc.*, 164 Ill. App. 3d 213 (1987). While defendants are correct that the reviewing courts in those cases all found the municipal defendants immune under section 4-102, this is where any potential similarity to the instant cause ends. First, unlike even *Dockery* and *Cadena*, which we already found to be distinguishable, none of them involve a situation of crowd control. See *Hernandez*, 306 Ill. App. 3d at 913 (involving municipal crossing guard); *Trepachko*, 184 Ill. App. 3d at 243 (involving direction of traffic); *Kavanaugh*, 164 Ill. App. 3d at 215-16 (involving rescue attempt). In addition, and more importantly, in each of those cases, it was undeniably clear that the plaintiffs' injuries were sustained while police protection services were being provided. See *Hernandez*, 306 Ill. App. 3d at 913 (municipal crossing guard wearing headphones instructed child to cross at intersection against light and in front of oncoming traffic, leading to injury); *Trepachko*, 184 Ill. App. 3d at 243 (police officer directed vehicle across highway while shining spotlight on driver so he could not see oncoming traffic, leading to collision); *Kavanaugh*, 164 Ill. App. 3d at 215-16 (police failed in attempt to perform rescue of driver from retention pond when they did not have necessary equipment,

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leading to death). That is not the case here, where, from the very beginning, plaintiff has maintained, and the evidence and admissions on record wholly support her claims, that her injuries directly resulted from officer Alvarez's negligent operation of the ATV during a time when he was not providing any police service.

¶ 22 In the instant cause, we find that section 4-102 does not immunize defendants from liability for the conduct described in the complaint and which the evidence at trial bore out. Again, none of plaintiff's allegations related to defendants' purported failure to provide the services of crowd control or the failure to provide adequate crowd control services. Instead, plaintiff specifically alleged the contrary, namely, that officer Alvarez's negligence occurred when he was not performing the police protection service of crowd control, and officer Alvarez's own admissions at trial confirmed that this was true. Therefore, we find no basis whatsoever to reverse the trial court's decision below denying defendants' motion for judgment notwithstanding the verdict.

¶ 23 CONCLUSION

¶ 24 Accordingly, for all the foregoing reasons, we affirm the judgment of the trial court.

¶ 25 Affirmed.