THIRD DIVISION
March 31, 2015

No. 1-14-0736

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

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ADAM WEIL and REBECCA WEIL,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Cook County
	)	
v.	)	No. 09 L 4445
	)	
CITY OF CHICAGO, a municipal corporation,	)	Honorable
	)	Kathy M. Flanagan,
Defendant-Appellee.	)	Judge Presiding.
	)	
(City of Chicago, a municipal corporation,	)	
Defendant/Third-Party Plaintiff, and	)	
The Cloz Companies, Inc., Third-Party Defendant).	)	

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Pucinski and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: A municipality owed no duty of care to the plaintiff who slipped and fell on unimproved property used as a parking lot because parking was not the municipality's permitted and intended use of the property. Summary judgment in favor of the municipality properly granted.

¶ 2 In this slip and fall case, plaintiffs Adam Weil and Rebecca Weil, husband and wife, appeal an order granting summary judgment in favor of the City of Chicago. Adam fell on unimproved property owned by the City, but appropriated for use as a parking lot by Adam's employer. On appeal, the Weils claim that parking on the City's property was permitted and intended because vehicles historically parked on the gravel area and it was reasonably foreseeable that vehicles would perpendicularly park on the gravel. Because we find that parking on the gravel area was not the intended and permitted use of the property, we affirm summary judgment in favor of the City.

¶ 3 BACKGROUND

¶ 4 At issue in this appeal is the Weils' amended complaint filed on February 23, 2010. The amended complaint pled a negligence count against the City relating to injuries Adam sustained when he fell on property owned by the City and used as a parking lot by the Cloz Company, Adam's employer.[1] Rebecca also pled a claim against the City for the loss of consortium.

¶ 5 On June 19, 2013, the City filed a motion for summary judgment asserting it owed no duty to Adam because he was not an intended and permitted user of the property. Citing section 3-102(a) of the Illinois Tort Immunity Act (Act) (745 ILCS 10/3-102 (West 2008)), which imposes a duty on a municipality to maintain its property in a reasonably safe condition for intended and permitted uses of the property, the City argued that it did not intend or permit the property on which Adam fell to be used as a parking lot. The City attached to its motion the affidavit of George Black, field services director for the City's department of transportation, who

[1] The Weils also pled negligence counts against: (1) Bruce R. Mendez, Robert W. Mendez and Robert Bruce Industries, Inc., who managed or controlled the parking area and designated use of the area as a parking space for The Cloz Company employees and (2) The Cloz Company, who designated the parking space for his use. These individuals and entities are not part of this appeal and the related procedural history is omitted from this order.

averred that the City did not intend the gravel area where Adam fell to be used for parking and that the vehicles parked on that area violated section 9-64-020 of the Chicago Municipal Code (added July 12, 1990), which requires parallel parking in the direction of traffic in order to avoid obstruction of traffic. The perpendicular parking of vehicles on Richmond left less than the required clearance to allow traffic to pass unobstructed in both directions. The following pertinent facts were obtained from Adam's and Black's discovery depositions.

¶ 6 Adam worked for the Cloz Company located at 2910 West 36th Street in Chicago, housed in a building east of Richmond Street and north of 36th Street. Richmond Street is a public street with a paved center and gravel on each side of it. The street is not improved with curbs, parkways, lighting or sidewalks. The Cloz Company's main building faces 36th Street and there are four designated parking spaces on the west side of the building on the unpaved, gravel area adjacent to Richmond Street. Adam's employer designated one of the parking spaces for his use and placed the following sign on the building's wall: "RESERVED PARKING PERMIT #34312 A. Weil." Above that sign, Adam's employer also placed the following sign: "PRIVATE PARKING UNAUTHORIZED CARS WILL BE TOWED AWAY AT OWNER'S EXPENSE."

¶ 7 On December 4, 2008 at approximately 10 a.m., Adam arrived at work and parked in his designated space. Adam exited his vehicle through the driver's side door, walked around to the passenger's side door, opened the door to retrieve his bag, turned and started walking. There were approximately four inches of snow on the ground. After taking two or three steps, Adam's left foot slipped on ice that was covered with snow and he fell landing in the adjacent parking space. Adam fell in the gravel area and had not yet walked to any pavement. Adam described the surface where he fell as "very, very slippery."

¶ 8 Adam understood the parking lot to be a private parking area because company employees parked there and his employer posted the signs reserving his parking space and

designating the area as private parking. Adam never saw City employees walking near his employer's building, but had seen trucks belonging either to the City or the Chicago Park District fill potholes on Richmond Street.

¶ 9 The City classified Richmond Street adjacent to where Adam fell as a works progress administration (WPA) street. WPA streets were built during the Depression as part of a public works program and lack infrastructure improvements. More specifically, a WPA street lacks drainage, curbs, sidewalks and lighting. Basically, a WPA street is a residential corridor street that has not been improved. Because of the street's unimproved state, vehicle parking and pedestrian movement on either side of the street is not warranted for safety reasons. The City does not erect warning signs informing pedestrians not to walk on WPA streets, but such areas would not attract pedestrians in any event because there are no curbs or walkways. A business near a WPA street may contact the ward's alderman to negotiate improving the area to provide for parking and a safe right-of-way.

¶ 10 According to Black, Adam parked his vehicle in a non-constructed curb area on Richmond where parking was not permitted. Richmond Street had gravel on each side to facilitate drainage and that area was a public way owned by the City. If parking on the gravel was intended, the City would have placed signs, recessed bays would have been built out with grass, streetlights would have been installed and parking spaces would have been marked on the property. Black stated that where the Cloz Company employees parked their vehicles was not authorized or permitted by the City and "was something that they created on their own," which was apparent due to the posting of signs that were not City signs and the lack of pavement markings designating parking spaces. Black also stated that the vehicles depicted in the photographs violated section 9-64-020 of the Chicago Municipal Code (added July 12, 1990) because the vehicles were not parked parallel with the direction of traffic. The ordinance requires

nine-foot wide traffic lanes and nine-foot wide parking lanes for vehicles to park on a constructed street. Black further stated that if someone had called 311 regarding the parked vehicles on the gravel area, a police officer or meter worker would have written a ticket because the vehicles were required to park parallel with traffic. But Black also explained that due to the width of Richmond Street, if vehicles parked parallel on both sides of the street, there would not be enough room for larger vehicles to pass unobstructed and a vehicle would still receive a ticket even though it was parallel parked.

¶ 11 The trial court agreed with the City and granted summary judgment in its favor finding there was no duty of care to maintain the gravel area under section 3-102(a) of the Act because: (1) parking was not the intended use of the property; (2) Adam was not an intended and permitted user of the property; and (3) Adam illegally parked his vehicle on the property. The Weils' motion to reconsider was denied and they timely appealed.

¶ 12 ANALYSIS

¶ 13 The Weils claim the trial court erred in granting summary judgment in favor of the City because the City had a duty to maintain its property, which had historically been used as a parking lot. The City responds that section 3-102(a) of the Act shields it from liability for Adam's injuries because Adam was neither the permitted nor intended user of the property where he fell. We agree with the City.

¶ 14 To establish a cause of action for negligence, a plaintiff must plead and prove the existence of a duty owed to plaintiff by defendant, a breach of that duty and injury proximately resulting from the breach. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12 (2014). The element of negligence in dispute here is whether the City owed a duty to Adam. Because the City is a

municipality, section 3-102(a) of the Act controls our analysis of this issue. Section 3-102(a) of the Act states:

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

Our supreme court has clearly articulated that "[s]ection 3-102(a) of the Act only imposes a duty of ordinary care on municipalities to maintain property for uses that are *both* permitted *and intended*." (Emphasis in original.) *Vaughn v. City of West Frankfort*, 166 Ill. 2d 155, 160 (1995). The municipality's intent determines the property's intended use. *Harden v. City of Chicago*, 2013 IL App (1st) 120846, ¶ 37.

¶ 15 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 judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2008). Summary judgment should not be granted where the material facts are disputed or where reasonable persons might draw different inferences from the undisputed facts. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). "Whether a duty exists is a question of law for the court to decide." *Bruns*, 2014 IL 116998, ¶ 13. If a court cannot infer the existence of a duty, " 'no recovery by the plaintiff is possible as a matter of law and summary judgment in favor of the

defendant is proper.' " *Id.* (quoting *Vesey v. Chicago Housing Authority*, 145 Ill. 2d 404, 411 (1991)). This court reviews a ruling on a motion for summary judgment *de novo*. *Id.*

¶ 16 The Weils offer no genuine issue as to any material fact that would preclude summary judgment. Instead, they erroneously claim that the presence or absence of pavement markings and signs on the property are issues of fact, but these facts are not in dispute and are clearly established in the record. Moreover, the nature of this case does not require departure from the seminal rule that whether a duty exists is a question of law for the court to decide, and summary judgment in favor of the defendant is proper where no recovery by the plaintiff is possible as a matter of law. *Id.* We are mindful of the equally well-established rule that "summary judgment is a drastic means of disposing of litigation and should only be awarded when the moving party's right to judgment as a matter of law is clear and free from doubt," and conclude that the issue of whether the City owed a duty to Adam may properly be decided in accordance with this standard. See *Curatola v. Village of Niles*, 154 Ill. 2d 201, 207 (1993) (stating that whether a duty of care exists is a question of law that may be decided on a motion for summary judgment).

¶ 17 On the issue of the existence of a duty, according to the amended complaint, the City had the duty "to keep and maintain [the] parking area in a good and reasonably safe condition." As stated, a duty is imposed on a municipality "to maintain property for uses that are *both* permitted *and intended*." (Emphasis in original.) *Vaughn*, 166 Ill. 2d at 160. Here, the undisputed facts show that parking on the gravel area was not a permitted and intended use.

¶ 18 Our decision in *Doria v. Village of Downers Grove*, 397 Ill. App. 3d 752 (2009), is dispositive. The plaintiff in *Doria* fell after exiting his vehicle and while walking on a gravel lot that displayed no signs either permitting or prohibiting parking, and there were no parking meters or painted yellow parking lines. *Id.* at 753, 759. A single concrete parking bumper existed between one area of the lot and the adjacent building, but the parking bumper was not

placed there by the municipality. *Id*. at 753, 759. The municipality raised a claim of immunity under section 3-102(a) of the Act in its summary judgment motion asserting the plaintiff, who used the area as a parking lot at the time of his injury, was not the intended user of the gravel area. *Id*. at 754. An affidavit supporting the motion averred that the municipality never intended the property to be used as a parking lot. *Id*. at 754. The municipality also offered evidence that it was an ordinance violation for a vehicle to park on the gravel area in a manner that encroached the sidewalk running along the building. *Id*. The municipality, though, agreed that use of the area as a parking lot was permitted. *Id*. at 757. This court granted the municipality's motion for summary judgment because the nature of the property itself revealed that the municipality did not intend for the gravel area to be used as a parking lot; thus, section 3-102(a) of the Act provided it with immunity from liability. *Id*. at 766.

¶ 19 The gravel area where Adam fell is nearly identical to the place of injury in *Doria* because both areas were unpaved and unmarked with painted lines, there were no parking meters and the municipalities did not place signs permitting parking. The lack of signs affirmatively prohibiting parking is not dispositive because, as we recognized in *Doria*, it is not feasible or practical for a municipality to place "No Parking" signs on every piece of public property not intended to be used for parking. *Id*. at 759. Importantly, both municipalities considered it an ordinance violation for the vehicles to park on the gravel area. *Id*. at 754. The facts in this case are even more indicative that the City did not owe Adam a duty because, here, the City did not concede that use of the gravel area as a parking lot was a permitted use and the manner in which the vehicles parked violated a provision of the Municipal Code. Consequently, *Doria* supports a finding that the City did not owe a duty to Adam because the property lacked any physical manifestations reflecting the City's intent that it be used as a parking lot.

¶ 20 The Weils also claim that parking was the permitted and intended use because vehicles historically parked on the gravel area without prohibition by or ramifications from the City. *Doria* is again dispositive because this court rejected this same contention regarding the historical use of the property finding the plaintiff failed to establish that "gravel lots of the type at issue here were or are customarily or historically used for parking, as would be required to establish a historical use that might indicate that plaintiff was an intended user of the gravel lot." *Id*. at 766. This court reasoned that adopting the plaintiff's position that immunity should depend on the use made of property and not the uses generally associated with the type of property "would erase the statutory distinction between permitted and intended uses." *Id*. The Weils advance no persuasive reason to depart from *Doria*'s holding. Moreover, the record directly rebuts the Weils' claim because Black testified that the property, which was a WPA street, was not the *type* of property the City intended to be used as a parking lot under any circumstances due to the lack of an infrastructure.

¶ 21 Relying on *Gutstein v. City of Evanston*, 402 Ill. App. 3d 610 (2010), the Weils further claim that Adam was an intended and permitted user of the property for the narrow purpose of entering and exiting his parked vehicle. *Gutstein* is inapposite. *Gutstein* recognized the narrow purpose cited by the Weils, but specified that the purpose applies where a municipality has designated areas for street parking, *i.e.*, where a vehicle was legally parked. *Id*. at 617; see also *Curatola*, 154 Ill. 2d at 213; *Sisk v. Williamson County*, 167 Ill. 2d 343, 351 (1995); *Di Domenico v. Village of Romeoville*, 171 Ill. App. 3d 293, 295 (1998); *Torres v. City of Chicago*, 218 Ill. App. 3d 89, 94-95 (1991) (recognizing a municipality has a duty to maintain the street immediately surrounding a legally parked vehicle). Here, the evidence establishes that not only did the City not designate the gravel area for street parking use, but parking on the gravel area

was also illegal. Accordingly, the City owed no duty to maintain the gravel area for the narrow purpose of permitting individuals to enter and exit their illegally parked vehicles.

¶ 22 The Weils' claim that a municipality's intended use of property may be determined by looking at the nature of the property itself is a correct recitation of the law, but application of that principle rebuts their position. Our supreme court has repeatedly instructed that the nature of the property itself must be examined to determine the intent of the municipality. *Swain v. City of Chicago*, 2014 IL App (1st) 122769, ¶ 24 (citing *Vaughn*, 166 Ill. 2d at 160, 162-63); *Berz v. City of Evanston*, 2013 IL App (1st) 123763, ¶ 11. Factors to consider regarding the nature of the property include: pavement markings, signs and other physical manifestations of the intended use of the property. *Id.*

¶ 23 The Weils contend photographs of the injury site reveal that the nature of the gravel area supports its intended use as a parking lot because: (1) there was a reserved private parking sign; (2) there were no signs prohibiting parking; and (3) there were vehicles perpendicularly parked on the lot. The Weils claim that the lack of a concrete curb and sidewalk created the reasonable expectation that the gravel area would be used for perpendicular parking. These purported indicia of permitted and intended use, however, are not attributable to any conduct by the City so that its intent that the gravel area should be used as a parking lot could be inferred. Instead, the record clearly reflects that Adam's employer, not the City, designated the area as a private parking lot and permitted perpendicular parking in the area where it was illegal to do so. During his deposition, Adam acknowledged that his employer placed the signs permitting parking, and made no allegations that the City placed those signs on the building's wall. More importantly, Adam acknowledged that his employer designated the area as “Private Parking,” which directly contradicts a conclusion that the City intended the area to be used for public parking. All of the facts in the record establish that Adam's employer intended the gravel area to be used as a

parking lot, but the employer's intended use of the gravel area is irrelevant for duty purposes under section 3-102(a) of the Act. See *Boub v. Township of Wayne*, 183 Ill. 2d 520, 525 (1998) (stating the municipality's intent is controlling).

¶ 24 Moreover, we reject the Weils' claim that it was reasonably foreseeable that the gravel area would be used to perpendicularly park vehicles due to the lack of a concrete curb and no sidewalk. The Weils' position is directly contradicted by Black who testified that the absence of a sidewalk and other infrastructure rendered the area unsuitable for pedestrian traffic. Consequently, it was not reasonably foreseeable that pedestrians would walk on the gravel area.

¶ 25 Even assuming that individuals were *permitted* to park on the gravel area because the City never issued a ticket to vehicles parked there or otherwise prohibited parking, there is nothing in the record to support a conclusion that the City *intended* individuals to park on the gravel area. See *Berz*, 2013 IL App (1st) 123763, ¶ 19 (citing *Boub*, 183 Ill. 2d at 530) (no specific markings, signage, or further manifestations of defendant's intent expressly allowing or prohibiting bicycle riding in an alley creates the inference that bicyclists were *permitted* to use the alley, but not *intended* users of the alley). Again, to recover for injuries under a negligence theory against a municipality, a plaintiff must demonstrate that he was *both* an intended and permitted user of the area. *Boub*, 183 Ill. 2d at 524; *Vaughn*, 166 Ill. 2d at 160. Not only were there no physical manifestations—no paved surface, no painted lines, no parking meters, no parking bumper, no signs—that the City intended the area to be used as a parking lot, but the opposite is quite clear because the City's ordinance rendered it illegal to perpendicularly park in the gravel area where Adam parked his vehicle. Moreover, Richmond Street was not even wide enough to permit parallel parking on both sides of the street, which is further support for the conclusion that parking on the gravel area was not an intended use of the property. There is no basis in the record to find that Adam was an intended and permitted user of the gravel area.

Consequently, the City owed no duty to Adam under section 3-102(a) of the Act to maintain the gravel area, and the trial court properly entered summary judgment in favor of the City.

¶ 26 As a final matter, the Weils make cursory references to the City's claimed duty to inspect its property, and argue that had it done so, it would have discovered that the gravel area was used as a parking lot. Section 3-102(a) of the Act does not impose a duty on a municipality to actively inspect its property to discover uses that are not intended and permitted and the Weils have cited no authority for such a proposition. It defies logic to suggest that the City's awareness that its property was being used for a purpose it did not intend and permit could give rise to a duty to maintain the property in a safe condition for unintended and unpermitted users of the property.

¶ 27 CONCLUSION

¶ 28 We affirm the trial court's order granting summary judgment in favor of the City because, under section 3-102(a) of the Act, it owed no duty to Adam who was not an intended and permitted user of the gravel area where he fell.

¶ 29 Affirmed.