FIRST DIVISION
June 22, 2015

No. 1-14-1302

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GLENN BROCK and MARI BROCK, Plaintiffs-Appellants, v. THE CITY OF CHICAGO, and THE CHICAGO TRANSIT AUTHORITY, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 09 L 949 Honorable Kathy M. Flanagan, Judge Presiding.

ORDER

PRESIDING JUSTICE DELORT delivered the judgment of the court, with opinion. Justices Cunningham and Connors concurred in the judgment.

¶ 1 ***Held:*** The trial court erroneously granted summary judgment in favor of defendant transit authority on the basis that it owed no duty to plaintiff. The trial court, however, properly granted defendant city's motion for summary judgment because the plaintiff was not a permitted and intended user of the city's roadway. We affirm in part, reverse in part, and remand for further proceedings.

¶ 2 This appeal arises from a negligence action brought by Glenn and Mari Brock against defendants the City of Chicago (the City) and the Chicago Transit Authority (the CTA). Plaintiffs now appeal the trial court's granting of defendants' motions for summary judgment, contending that the trial court erred in finding that: (1) the CTA did not owe a duty to Glenn to protect him from a hazard as he was alighting from a CTA bus, and (2) the City did not owe a duty to him because he was not an intended and permitted user of the street. For the following

reasons, we affirm the trial court's granting of the City's motion for summary judgment, reverse the trial court's granting of the CTA's summary judgment motion, and remand this cause for further proceedings.

¶ 3 BACKGROUND

¶ 4 On January 27, 2009, plaintiff Glenn Brock (Brock) and his wife, Mari, filed a four-count complaint against defendants the CTA and the City. Brock alleged the CTA and the City were negligent when he stepped off of a CTA bus into a pothole and suffered personal injuries. In addition, Brock's wife alleged that the CTA's and the City's negligence proximately caused her loss of consortium and society with Brock. The case proceeded through discovery, including depositions and interrogatories, and the facts adduced are as follows.

¶ 5 On February 3, 2008, Brock was in a CTA bus traveling northbound on Ashland Avenue in Chicago. Brock was seated in the back of the bus, which had a front door and a rear door. The weather that day was cold and there were several inches of snow on the ground.

¶ 6 At around 3:30 p.m., the bus approached a stop at the intersection of South 63rd Street, near the "El" station. The bus driver, Marshall Wade, however, testified that he did not stop the bus parallel to the curb because there was a car parked at the bus stop and there was a pothole in the street behind that car. Wade stated that, although the CTA's standard operating procedure requires a driver to stop a bus approximately parallel to, and within 18 inches of, the curb, drivers are nonetheless allowed to "deviate" from this procedure when circumstances warrant it and based upon the driver's "common sense." Wade added that the "massive" pothole was "right at" the bus stop, and he believed it had been there for "[a]t least three weeks."

¶ 7 Wade therefore stopped the bus at an angle with the front half of the bus in the parking lane (*i.e.*, the lane immediately adjacent to the curb and sidewalk) and the rear half of the

bus-from the rear door to the back end-in the travel lane. Wade announced to the passengers, "Hey y'all something's at the back door, come on up front." Brock, however, said he never heard that announcement, so he exited through the rear doors. He was the first in a line of passengers to do so.

¶ 8 As Brock stepped from the rear door of the bus, he was looking straight ahead and did not look down to examine the condition of the street. He did not recall whether there were any piles of snow on the street, but he said that there was snow and ice on the ground because it had snowed the previous day. Brock then stepped into the pothole with his right foot, which "twisted," causing him to fall backwards into another passenger who was also getting off of the bus. He suffered a severe fracture of his right distal tibia and fibula with dislocation, requiring the insertion of a plate.

¶ 9 Sharon Calhoun stated in her deposition that she previously had been a passenger on this bus route and had gotten off at the 63rd Street stop. On February 3, 2008, the bus was "packed," and there was snow and ice on the streets. In addition, there were piles of snow along the curb and "[d]efinitely in the street." Calhoun agreed that the pothole was "massive" and added that it was about one foot wide and ankle-deep. In addition, Calhoun said that the pothole was somewhat "camouflaged," with part of a snow pile covering it. Calhoun stated that the pothole was not solid; rather, it was "kind of mushy, slushy, but looked like it was a place you could stand." Calhoun added that she could not see the pothole "visibly" due to the snow and slush.

¶ 10 Calhoun agreed that the bus stopped at an angle, and recalled that the back end of the bus, where the rear doors were, was about 1½ feet from the curb. She acknowledged, however, that on March 25, 2008, she provided a written statement estimating the bus to be 2½ or 3 feet from the curb. Calhoun said her written statement was likely more accurate because her memory was

clearer at that time than at the time of her deposition, which was more than three years after the incident.

¶ 11 When asked when she last saw the pothole before the accident, Calhoun initially stated that she could not recall, explaining as follows:

> "I'll tell you why, because that is like a reoccurring [*sic*] spot, and I know we've complained about can you just get the buses to pull all the way to the curb so people don't have to jump the hole. And if you—if you're not a person that normally rides that way, you don't really know about the hole."

Nonetheless, Calhoun later estimated that the pothole had been there for "at least" a couple of weeks and "probably" a month or more.

¶ 12 Calhoun was standing right behind Brock as he got off the bus. She saw Brock try to take a "big step" from the bus to the sidewalk, but his foot slid and fell into the pothole, which was directly between the door and the sidewalk. Calhoun screamed for the bus driver not to move because Brock had fallen, and she saw Brock try to get up, but Brock fell again. Calhoun said she could hear Brock yelling that his foot was in pain, and she told others to help Brock to the sidewalk. She remained on the scene until help arrived. Calhoun further stated that she avoided the pothole because she was able to "swing [her]self off."

¶ 13 The CTA and the City each filed motions for summary judgment. The CTA sought summary judgment on two grounds. First, relying upon *Kiesel v. Chicago Transit Authority*, 6 Ill. App. 2d 13 (1955), it stated that it owed no duty to protect Brock, its passenger, from obvious street dangers. Second, it argued that it owed Brock no duty to warn because the pothole was an open and obvious condition. The City argued that it was entitled to summary judgment because

(1) the pothole was an open and obvious condition, to which neither the distraction exception nor the deliberate encounter exception applied; (2) Brock was not a intended and permitted user of the street; (3) Brock failed to establish that the street condition was a proximate cause of his injuries; and (4) the Tort Immunity Act (745 ILCS 10/1-101 *et seq.* (West 2010)) barred the claim.

¶ 14 On March 31, 2014, the trial court issued a written decision granting the CTA's and the City's motions for summary judgment. The trial court agreed with the CTA's claim that the CTA did not have a duty to protect Brock from a pothole on the street under *Kiesel*. With respect to the City's motion, the trial court agreed with the City's argument that Brock was not a permitted and intended user of the street. The trial court, however, rejected the CTA's and the City's arguments that the pothole was an open and obvious condition, as well as the City's arguments regarding proximate causation and immunity under the Tort Immunity Act.

¶ 15 This appeal followed.[1]

¶ 16 ANALYSIS

¶ 17 On appeal, plaintiffs contend that the trial court erred in granting summary judgment in favor of the defendants. Regarding the CTA's motion, plaintiffs argue that (1) the CTA was operating as a common carrier and therefore owed Brock "the highest duty of care"; (2) the trial court erred in failing to consider that the CTA had preexisting knowledge of the pothole but neglected to take "all reasonable steps to protect [Brock] from the known hazard"; and (3) the trial court's reliance upon *Kiesel* was improper because it is factually distinct from this case. As

[1] This court allowed the Illinois Trial Lawyers Association to file an *amicus curiae* brief in support of plaintiffs.

to the City's summary judgment motion, plaintiffs argue that the trial court erred in finding that Brock was not an intended and permitted user of the street.

¶ 18 Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2010). Summary judgment is a drastic measure and should only be granted when the moving party's right to judgment is "clear and free from doubt." *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). "In determining whether a genuine issue as to any material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent." *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). "Where a reasonable person could draw divergent inferences from undisputed facts, summary judgment should be denied." *Id.* Motions for summary judgment are not "intended to be used as a means of weighing conflicting issues of fact." *Allstate Insurance Co. v. Tucker*, 178 Ill. App. 3d 809, 812 (1989).

¶ 19 To state a cause of action for negligence, a complaint must allege facts that establish the existence of a duty of care owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by that breach. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 430 (2006). The issue in this case is whether either defendant owed a duty to plaintiff. Whether a duty exists in a particular case is a question of law for the court to decide. *Id.* The touchstone of a duty analysis is to determine whether a plaintiff and a defendant "stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff." *Id.* at 436. The policy considerations that inform this inquiry are viewed in terms of four factors: (1) the reasonable foreseeability of the injury, (2) the likelihood

of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing that burden on the defendant. *Id.* at 436-37.

¶ 20 We review a trial court's entry of summary judgment *de novo*. *Virginia Surety Co. v. Northern Insurance Company of New York*, 224 Ill. 2d 550, 556 (2007). In addition, questions of law, such as the existence of a duty, are also subject to *de novo* review. *Vancura v. Katris*, 238 Ill. 2d 352, 383 (2010).

¶ 21 The CTA's Motion for Summary Judgment

¶ 22 Plaintiffs argue that the CTA owed Brock "the highest duty of care" because it was a common carrier and the trial court erred in failing to consider that the CTA had preexisting knowledge of the pothole but neglected to take all reasonable steps to protect Brock from that known hazard. Plaintiff further argues that *Kiesel* is factually distinct from this case, and the trial court also erred in relying upon it. The CTA responds that *Kiesel* controls the outcome here, and that the CTA is not responsible for the street conditions. The CTA further argues that the testimony was "uncontroverted" that the pothole was open and obvious, precluding any duty on its part. Finally, the CTA claims that its drivers should not be required to be aware of the condition of "each and every pothole" on the city's streets and that plaintiff's failure to exercise reasonable care in failing to look at the ground negates any duty it would have had to him.

¶ 23 Under Illinois law, there are four special relationships that may give rise to an affirmative duty to aid or protect another against unreasonable risk of physical harm, which includes the relationship of common carrier (here, the CTA) and passenger (plaintiff Glenn Brock). *Marshall*, 222 Ill. 2d at 438. It is well established that common carriers owe their passengers the "highest" duty of care, and this relationship does not end when the carrier reaches the passenger's ultimate destination; instead, the carrier must still provide its passenger "an

opportunity to safely alight." *Katamay v. Chicago Transit Authority*, 53 Ill. 2d 27, 30 (1972) (citing *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 173 (1898)). Although the CTA is not an absolute insurer of its passengers' safety (*Gaines v. Chicago Transit Authority*, 346 Ill. App. 3d 346, 349 (2004)), as a common carrier, the CTA must exercise a high degree of care toward its passengers, which includes "the responsibility to prevent injuries which could have been reasonably foreseen and avoided by the carrier" (*Letsos v. Chicago Transit Authority*, 47 Ill. 2d 437, 441 (1970)).

¶ 24 In this case, the trial court relied upon a 60-year-old case, *Kiesel v. Chicago Transit Authority*, 6 Ill. App. 2d 13 (1955). There, the defendant transit authority appealed from the denial of its motions for judgment notwithstanding the verdict and for a new trial following a $2,000 jury verdict in the plaintiff's favor. *Id.* at 14. The plaintiff injured herself when she stepped off of a bus at a time when the roads and sidewalks were described as "slippery" and "icy," and snow had been falling that day. *Id.* at 14-15. The defendant contended that the trial court erroneously allowed plaintiff's proffered instruction, which read as follows: " 'Common carriers of persons are required to do all that human care, vigilance and foresight can reasonably do, consistent with the character and mode of conveyance adopted and the practical prosecution of the business, to prevent accidents to the passengers riding upon their streetcar buses, getting them upon or alighting therefrom.' " *Id.* at 16-17.

¶ 25 The *Kiesel* court agreed with the defendant that the instruction was "wholly unrelated and inapplicable" to the plaintiff's theory of the case, observing that the record indicated that "the icy and slippery condition of the street and sidewalk where the plaintiff fell prevailed generally in the vicinity of the occurrence." *Id.* at 17. It further noted, " 'The duty to select a safe place for passengers to board or alight from street cars does not require the carrier to protect such

passengers from obvious street dangers ***.' " *Id.* (citing 13 C.J.S. *Carriers* § 733, at 1378-79 (1939)). The court then reversed the trial court's judgment and remanded for a new trial. *Id.*

¶ 26 *Kiesel* is distinguishable from this case. To begin, the dangerous conditions in *Kiesel* were generally prevalent and "obvious" (*Id.*), whereas here, there is a dispute as to that fact: Calhoun testified both that the pothole was only "somewhat" camouflaged and also that she could not see the pothole "visibly." In addition, we note that *Kiesel* had a full trial on the merits, and therefore the factual discrepancies were resolved by the jury, but here, the case is on appeal from a grant of summary judgment, where it is inappropriate to weigh conflicting factual issues. *Tucker*, 178 Ill. App. 3d at 812.

¶ 27 The CTA further argues that *Haynes v. Chicago Transit Authority*, 59 Ill. App. 3d 997 (1978), is inapplicable because "this case did not involve an assault." We disagree and do not read *Haynes* to be so limited in its holding. As the *Haynes* court stated, "Knowledge of conditions which are likely to result in an assault upon a passenger, *or which constitute a source of potential danger*, imposes the duty of active vigilance on the part of the carrier's agents and the adoption of such steps as are warranted in the light of existing hazards." (Emphasis added.) *Id.* at 1000. In essence, *Haynes* found that the CTA is liable where a passenger's injury is foreseeable. As such, we cannot hold that, as a matter of law, the CTA has absolutely no duty to its passenger even when it has knowledge of a road condition that would deny its passenger the opportunity to safely alight.

¶ 28 Nonetheless, the CTA counters that, although Wade testified that he believed the pothole had been present for at least three weeks prior to plaintiff's injury, plaintiff failed to show that Wade (the bus driver) knew of the pothole's condition on the day of the injury. The CTA posits that the pothole "could have been repaired in the intervening weeks, or it could have been altered

by pedestrian or vehicle usage." On review from the granting of a summary judgment motion, however, we must construe the pleadings, depositions, admissions, and affidavits strictly against the movant (here, the CTA) and liberally in favor of the opponent (here, plaintiff). *Williams*, 228 Ill. 2d at 417. Construing the pleadings in the manner that the CTA asks would run afoul of that requirement. In addition, as we have previously observed, where a reasonable person could draw divergent inferences from undisputed facts, summary judgment should be denied. *Id.* The CTA's argument must therefore fail.

¶ 29 Moreover, our decision is unaffected by the CTA's reliance upon *Gaines*. There, the plaintiff injured herself when she tripped over a book bag as she walked down the aisle towards the rear of the bus. *Gaines*, 346 Ill. App. 3d at 349-50. The plaintiff stated that she was not looking at the floor when the bus "lurched" forward; instead, she was trying to avoid being hit in the face by a student's book bag and was not looking at the floor. *Id.* at 350. We affirmed summary judgment in favor of the CTA, however, noting that the plaintiff failed to allege that the bus driver either "knew or should have known" of the presence of the hazard (*i.e.*, the book bag being on the floor). *Id.* Here, by contrast, there *was* at least some evidence that Wade (the driver) knew of the pothole but nonetheless stopped the bus with the rear doors directly in front of it, requiring one witness to "swing" herself out over the pothole to avoid it. Therefore, since *Gaines* is factually distinguishable, the CTA's reliance upon it is unavailing.

¶ 30 Finally, the CTA asks that we not require bus operators "to be aware of the condition of each and every pothole" on the City's streets and the "frequently changing bus routes that they drive." Our holding will do no such thing: it will only require bus operators who *already* know of a dangerous condition to avoid placing their passengers in its midst. See *Katamay*, 53 Ill. 2d

at 30 (requiring common carriers to provide their passengers the opportunity to safely alight). The CTA's concern is thus unwarranted.

¶ 31 The City's Motion for Summary Judgment

¶ 32 Plaintiffs next claim that summary judgment in favor of the City was inappropriate because Glenn was a passenger on a bus that was parked in the parking lane, and he stepped into a pothole that was in an area that "has been defined by our courts as an area where such a pedestrian is viewed as an intended and permitted user of the street."

¶ 33 It is well established that a municipality, such as the City, owes a duty to maintain its streets only for uses that are *both* permitted *and* intended. 745 ILCS 10/3-102(a) (West 2012). "The general rule that has evolved in Illinois with regard to the duty of a municipality to maintain its streets in a reasonably safe condition is that, since pedestrians are not intended users of streets, a municipality does not owe a duty of reasonable care to pedestrians who attempt to cross a street outside the crosswalks." *Vaughn v. City of West Frankfort*, 166 Ill. 2d 155, 158-59 (1995) (collecting cases). Our supreme court, however, carved out a "narrow exception" and held that operators and occupants exiting or entering a legally parked vehicle by use of the street "immediately around the vehicle" was an additional permitted and intended use. *Curatola v. Village of Niles*, 154 Ill. 2d 201, 213 (1993). The *Curatola* court cautioned, however, that not every pedestrian use of the street that is necessary to a permitted use is itself both permitted and intended, nor is necessity alone the measure of whether such use is intended. *Id.*

¶ 34 The City relies upon this court's opinion in *Vance v. City of Chicago*, 199 Ill. App. 3d 652 (1990). There, the plaintiff was riding in a bus that let her off outside of the crosswalk at a bus stop, where there was a pothole at the curb and about one foot from the sidewalk. *Id.* at 653. She then stepped off the bus into the pothole and twisted her ankle. *Id.* We noted a long line of

cases holding that the City has no duty to reasonably maintain its streets for pedestrians who were injured while walking in the street outside the crosswalk. *Id.* at 654 (citing *Mason v. City of Chicago*, 173 Ill. App. 3d 330 (1988); *Risner v. City of Chicago*, 150 Ill. App. 3d 827 (1986); and *Deren v. City of Carbondale*, 13 Ill. App. 3d 473 (1973)).

¶ 35 This court further rejected the plaintiff's reliance upon on *Di Domenico v. Village of Romeoville*, 171 Ill. App. 3d 293 (1988), because in that case, the village expressly allowed parking in the street and therefore the village "must have recognized a driver would have to walk in the street from his legally parked car to the sidewalk," so the village consequently had a duty "to drivers and their passengers to maintain the area of the street where cars were allowed to park." *Vance*, 199 Ill. App. 3d at 654. This court then affirmed the trial court's granting of summary judgment in favor of the City, holding that "bus passengers were not intended and permitted users of the street" and the City therefore did not owe a duty to the plaintiff to "keep the street in a reasonably safe condition for pedestrian traffic." *Id.* at 655.

¶ 36 The facts of this case are virtually indistinguishable from those of *Vance*. Here, too, plaintiff stepped from a bus into a pothole and injured himself. The location of his injury was outside of a pedestrian crosswalk and up to four feet from the curb. Under well-established precedent, the City owes no duty to plaintiff, who exited the bus outside of a crosswalk.

¶ 37 We further reject plaintiff and the *amicus curiae*'s claim that plaintiff was a permitted and intended user of the street because passengers typically and customarily exit buses onto the street before reaching the sidewalk. As noted above, simply because a pedestrian's use of the street is necessary to a permitted use does not transform that use into both a permitted and intended use, nor will the necessity of using the street in that manner determine, with nothing more, whether that use is intended. *Curatola*, 154 Ill. 2d at 213.

¶ 38 They further argue that the issue in *Curatola* is "materially identical" to the issue here because the *Curatola* court determined that a pedestrian's use of the street to access a legally parked vehicle was permitted and intended because it was foreseeable and expected that pedestrians would the area immediately around the vehicle to access it. They conclude that, here, the passenger's use of the street to access the sidewalk is similarly foreseeable and expected. We disagree. *Curatola* concerned a pedestrian's ability to access a vehicle that was legally parked in the street. *Id.* By contrast, section 9-48-050(b) of the Chicago Municipal Code (the Ordinance) requires buses (without lifts) to pull its right front wheel no more than 18 inches from the curb of a bus stop and to stop "approximately parallel" to the curb to avoid impeding the flow of traffic. Chicago Municipal Code § 9-48-050(b) (amended Apr. 12, 1991). The Ordinance does not permit buses to deposit their passengers in the middle of the street, nor would it defy common sense to conclude that the City did not contemplate and intend that the bus driver or the CTA's passengers would use the street area around the stopped bus to enter or exit it. *Cf. Di Domenico*, 171 Ill. App. 3d at 295-96.

¶ 39 Finally, plaintiffs contend that, in *Evans v. City of Chicago*, 268 Ill. App. 3d 924 (1994), this court held that a plaintiff who stepped off of a curb (to see if her bus was coming) and fell into an open manhole was an intended and permitted user of the street.[2] Plaintiffs' reliance upon *Evans* is unavailing, however, because our supreme court subsequently vacated the judgment in *Evans* and directed the court to reconsider the decision in light of *Vaughn v. City of West Frankfort*, 166 Ill. 2d 155 (1995). *Evans v. City of Chicago*, 163 Ill. 2d 553, 553 (1995). The *Evans* court did so, and reversed its original holding. *Evans v. City of Chicago*, 276 Ill. App. 3d

[2] Plaintiffs claim that this case cites to *Vance*, but we find no reference to that case whatsoever.

631, 634 (1995) (holding that the plaintiff was *not* an intended and permitted user of the street and the City had no duty to maintain the street in a reasonably safe condition for her). Plaintiffs' contention is therefore without merit.[3]

¶ 40 CONCLUSION

¶ 41 The trial court properly granted the City's motion for summary judgment because plaintiff was not a permitted and intended user of the street at the point where he exited the bus and injured himself. The trial court, however, erred in granting the CTA's motions for summary judgment because unresolved factual issues preclude summary judgment. Accordingly, we affirm in part and reverse in part the judgment of the trial court, and remand this cause for further proceedings.

¶ 42 Affirmed in part; reversed in part; and remanded.

[3] The City has filed a motion for leave to file a sur-reply to plaintiffs' reply brief. The City's sur-reply brief primarily addresses the impaired precedential value of *Evans*. Based upon our discussion in paragraph 39, *supra*, we deny the City's motion.