2016 IL App (1st) 150058-U

SIXTH DIVISION
Order filed: February 26, 2016

No. 1-15-0058

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

DESIREE BROWN, Plaintiff, v. SHANEL D. McGRUDER, Defendant and Counter-Plaintiff-Appellant, SABRINA M. DANIELS and CITY OF CHICAGO, a Municipal Corporation, Defendants and Counter-Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County No. 11 M1 300375 Honorable Sidney A. Jones, III, Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: Summary judgment for the City of Chicago and its ambulance driver, based upon their immunity under the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/1-101 *et seq.* (West 2010)), is affirmed where no genuine issue of material fact exists as to whether the ambulance driver was responding to an emergency call or whether her conduct was willful and wanton.

¶ 2 The defendant and counter-plaintiff, Shanel D. McGruder, appeals from an order of the circuit court granting summary judgment in favor of Sabrina M. Daniels and the City of Chicago

(City) on McGruder's counter-claim asserting causes of action sounding in negligence and willful and wanton misconduct arising from a motor vehicle collision which occurred on February 16, 2010. For the reasons which follow, we affirm the judgment of the circuit court.

¶ 3 The facts underlying this litigation are, for the most part, undisputed. On February 16, 2010, at approximately 9:30 a.m., a City ambulance being driven by Daniels southbound on Larmie Avenue collided with a 1998 Honda being driven eastbound on Augusta Boulevard by McGruder. Both vehicles then struck a Jeep Cherokee being driven by Desiree Brown and a Lexus driven by Alshawntus Beck in which Natasha Martinez was riding as a passenger.

¶ 4 On February 10, 2011, Brown filed the instant action (case No. 11-M1-300375) against Daniels and McGruder, asserting causes of action for negligence and seeking recovery against the City based on a theory of *respondeat superior*, for Daniels' negligent conduct. Martinez and Beck also filed negligence actions (case Nos. 11-M1-300278 and 11-M1-300341, respectively), against Daniels, the City, and McGruder. On August 24, 2011, the circuit court consolidated the instant action with the cases filed by Beck and Martinez for "purposes of discovery and trial."

¶ 5 On June 24, 2013, McGruder filed a counter-claim in the instant case against Daniels, asserting causes of action sounding in negligence and willful and wanton misconduct and seeking recovery against the City on a theory of *respondeat superior*, for Daniels' conduct.

¶ 6 On July 10, 2014, Beck's case (No. 11-M1-300341) was dismissed for want of prosecution.

¶ 7 On August 15, 2014, the City and Daniels moved for summary judgment in the instant case against Brown and McGruder, arguing that no genuine issue of material fact existed on the question of whether Daniels was responding to an emergency call at the time of the accident, and therefore, they were immune from liability pursuant to sections 5-106 and 2-109 of the Local

Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/5-106, 2-109 (West 2010)). In addition, they argued that there was no genuine issue of material fact on the question of whether Daniels' actions were willful and wanton. In support of their motion, the City and Daniels relied upon the deposition testimony of Martinez, McGruder, and Daniels, as well as the sworn testimony of Brown and Beck given at a mandatory arbitration hearing.

¶ 8 The following facts are taken from the pleadings, depositions, testimony at arbitration, and affidavits on file.

¶ 9 Sabrina Daniels, a firefighter and emergency medical technician, testified that shortly before 9:30 a.m. on February 16, 2010, she was driving a City ambulance to a fire station when she received a call from the dispatcher regarding a medical emergency. Immediately following the dispatch, she activated the emergency lights and siren and proceeded south on Laramie Avenue, traveling 25 to 30 miles per hour. She testified that no vehicles were in front of her and nothing obstructed her view as she approached Augusta Boulevard. Although Daniels did not recall whether she had a green light or red light, she observed that the cars in and around the intersection were stopped. She stated that she slowed to a complete stop for "a second or so," scanned the intersection for traffic, and accelerated into the intersection at 5 or 10 miles per hour. Upon entering the intersection, the front of Daniels' ambulance collided with the front driver's side of McGruder's vehicle; both vehicles then collided with two other vehicles stopped in the northbound lanes on Laramie. Daniels described the impact as "heavy" and estimated that McGruder was traveling between 10 and 20 miles per hour.

¶ 10 Daniels testified that the horn on the ambulance was on as she approached the intersection. She stated she looked both ways before entering the intersection, but she never saw

McGruder's vehicle. According to Daniels, she first saw McGruder's vehicle immediately before the collision, and she tried to avoid the accident by turning left. Daniels denied that her partner warned her about McGruder's vehicle and explained that he was "writing the run sheet" at the time of the collision. Daniels acknowledged that she received eight hours of unpaid time off as a result of the accident, but she explained that the discipline was standard procedure and did not reflect any wrongdoing on her part.

¶ 11 During her deposition, McGruder testified that, at approximately 9:30 a.m. on the date of the accident, she was driving her Honda eastbound on Augusta toward the intersection at Laramie. Her son was also in the vehicle. McGruder stated that traffic was light, there were no cars in front of her, and nothing obstructed her view prior to entering the intersection. According to McGruder, the traffic signal for Augusta was green and she was traveling 25 to 30 miles per hour. She heard no sirens and observed no emergency lights. McGruder confirmed that cars were stopped in the northbound and southbound lanes of Laramie, waiting at the red light.

¶ 12 McGruder testified that as she entered the intersection, an ambulance "t-boned" her, striking the front driver's side corner of her vehicle. After the initial impact, the ambulance pivoted and hit the driver's side of her vehicle as well. The collision pushed McGruder's car into two other vehicles, which were stopped in the northbound lanes of Laramie, waiting at the red light. McGruder testified that she never saw the ambulance before the collision, but she admitted that its "Mars" lights were flashing. McGruder opined that, based upon the force of the collision, the ambulance was traveling 55 miles per hour. After the accident, McGruder and her son were transported to the hospital for treatment.

¶ 13 At a mandatory arbitration hearing, Brown testified that prior to the collision she was stopped at a red light in the northbound lane of Laramie with a Lexus (Beck's vehicle) stopped

on her right. Brown observed an ambulance driving southbound on Laramie with its emergency lights on. She did not, however, hear any sirens. Brown testified that she also observed a Honda traveling eastbound on Augusta. According to Brown, as the light turned yellow for the Honda (McGruder's vehicle), both the Honda and the ambulance entered the intersection, collided, and then struck her vehicle.

¶ 14 Beck also testified at the arbitration hearing. He stated that he was driving his Lexus northbound on Laramie and was stopped at a red light at Augusta with a Jeep Cherokee (Brown's vehicle) in the lane to his left. He testified that he heard sirens from an ambulance, which was traveling southbound on Laramie. Beck initially testified that he did not recall seeing the ambulance's emergency lights, but later admitted that he noticed the lights flashing after the accident occurred. Although Beck did not see the initial collision, he recalled seeing one of the vehicles hit the Jeep Cherokee, which in turn hit the driver's side of his Lexus.

¶ 15 Martinez, who was sitting in the front passenger seat of Beck's vehicle, testified at her deposition that the accident happened so fast she could not say who hit her vehicle first, or how, or in what order. When asked if she heard sirens or saw the ambulance's emergency lights, Martinez said, "Maybe, maybe not" and "I just don't know."

¶ 16 In response to the City's and Daniels' motion for summary judgment, McGruder argued that the City's failure to produce documents "lead to the inference that Daniels was not on an emergency run at the time of the accident." She further asserted that Daniels' "self serving and biased testimony brings her credibility into issue." Finally, McGruder maintained that there were genuine issues of material fact regarding whether Daniels' operation of her ambulance rose to the level of willful and wanton conduct.

¶ 17 On October 31, 2014, the circuit court entered a memorandum opinion and order granting summary judgment in favor of the City and Daniels, and against McGruder and Brown. The court found that Daniels was responding to a medical emergency at the time of the accident and that the evidence, as a matter of law, failed to show willful and wanton conduct on the part of Daniels. McGruder subsequently filed a motion for reconsideration which the court denied on December 9, 2014.

¶ 18 Thereafter, on December 17, 2014, the circuit court dismissed Brown's remaining claim against McGruder with prejudice for want of prosecution, and severed Brown's case from Martinez's case. On January 7, 2015, McGruder filed a notice of appeal from the circuit court's grant of summary judgment in favor of the City and Daniels.

¶ 19 Summary judgment is an appropriate means to dispose of an action where the pleadings, depositions, admissions, together with affidavits on file, viewed in a light most favorable to the nonmoving party, demonstrate the absence of a genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014); *Coleman v. East Joliet Fire Protection District*, 2016 IL 117952, ¶ 20. While a plaintiff need not prove its case at the summary judgment stage, she must present enough evidence to create a genuine issue of fact. *Keating v. 68th & Paxton, L.L.C.*, 401 Ill. App. 3d 456, 472 (2010). The purpose of a motion for summary judgment is to determine the existence or absence of a genuine issue as to any material fact; it cannot be used to resolve a disputed fact. *Illinois State Bar Association Mutual Insurance Co. v. Law Office of Tuzzolini & Terpinas*, 2015 IL 117096, ¶ 14. We review a circuit court's decision on a motion for summary judgment *de novo*. *Coleman*, 2016 IL 117952, ¶ 20.

¶ 20 McGruder contends that the circuit court erroneously granted the City's and Daniels' motion for summary judgment. She argues that genuine issues of material fact exist on whether Daniels was (1) responding to an emergency call at the time of the accident, and (2) engaged in willful and wanton conduct, rendering civil immunity under section 5-106 of the Tort Immunity Act, inapplicable to this case. We address each argument in turn.

¶ 21 Section 5-106 of the Tort Immunity Act provides immunity for government employees responding to emergency calls:

> "Except for willful or wanton conduct, neither a local public entity, nor a public employee acting within the scope of his employment, is liable for an injury caused by the negligent operation of a motor vehicle or firefighting or rescue equipment, when responding to an emergency call, including transportation of a person to a medical facility." 745 ILCS 10/5-106 (West 2010).

"A reason for this limited immunity is that if an emergency vehicle operator were haunted by the possibility of facing devastating personal liability for actions taken in the course of responding to an emergency, driver performance would be hampered." *Harris v. Thompson*, 2012 IL 112525, ¶ 17.

¶ 22 McGruder first argues that the City and Daniels do not qualify for immunity on the ground that Daniels was not "responding to an emergency call" at the time of the collision. We disagree. According to Daniels' testimony, which was unrebutted, she was driving her ambulance to the fire station when she received a call from dispatch regarding a medical emergency. At that point, she immediately activated her emergency lights and siren and proceeded south on Laramie. Daniels' testimony was corroborated by McGruder, Brown, and

Beck, who all confirmed that they observed flashing lights on Daniels' ambulance either immediately preceding or at the time of the accident.

¶ 23 We recognize that McGruder and Brown also testified that they did not hear the ambulance's siren at the time of the accident. However, the lack of siren, by itself, does not create a genuine issue of material fact as to whether Daniels was responding to an emergency call. See *Harris*, 2012 IL 112525, ¶ 44. The plain language of section 5-106 of the Tort Immunity Act refers to the "operation of a motor vehicle" and includes no requirement that the vehicle have emergency lights and sirens activated when responding to an emergency. McGruder's attempt to create liability for the City and Daniels based upon Daniels' alleged failure to activate her siren while in the midst of an emergency run must fail. See *id.* (holding ambulance driver immune from civil liability where the emergency lights, but not the siren, were activated).

¶ 24 McGruder also argues that "missing documents" lead to the inference that Daniels was not responding to an emergency call. In particular, she asserts the City failed to produce dispatch records, run sheets, and handwritten notes from Daniels' partner. Our review of the record establishes that, in fact, these documents were produced. For example, the record includes the "run sheets," which are two pages of handwritten notes that Daniels' partner prepared contemporaneously to the events leading up to, and following, the accident. The record also contains printouts from the Chicago police department showing dispatch records beginning at 9:26 a.m. on February 16, 2010. As to McGruder's claim that the City failed to produce affidavits from "anyone" within the Chicago fire department to corroborate Daniels' testimony, we note that this court has consistently held that a party may not create a genuine issue of material fact to defeat a summary judgment motion by pointing to the absence of evidence.

Gyllin v. College Craft Enterprises, Ltd., 260 Ill. App. 3d 707, 710-11 (1994) (a plaintiff must present some affirmative evidence to defeat a motion for summary judgment). In this case, McGruder failed to offer any evidence to rebut Daniels' testimony that she was responding to a medical emergency at the time of the accident. Accordingly, we fail to find a genuine issue of material fact as to whether Daniels was responding to an emergency call.

¶ 25 We next address McGruder's assertion that a genuine issue of material fact exists as to whether Daniels operated the ambulance in a willful and wanton manner. The Tort Immunity Act defines "willful and wanton conduct" as "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property." 745 ILCS 10/1-210 (West 2010). The question of whether a public employee's actions amount to willful and wanton conduct is usually reserved for the trier of fact. *Harris*, 2012 IL 112525, ¶ 42. However, the question may be resolved on a motion for summary judgment, when all the evidence viewed in the light most favorable to the nonmovant so overwhelmingly favors the movant that no contrary determination based on that evidence could ever stand. *Id.*; see also *Hatteberg v. Cundiff*, 2012 IL App (4th) 110417, ¶ 30.

¶ 26 Here, McGruder contends that Daniels showed an utter indifference to, or conscious disregard for, the safety of others when she: (1) failed to activate the ambulance's lights and siren, (2) used excessive speed, and (3) failed to stop or slow down before entering the intersection. We find McGruder's arguments unpersuasive.

¶ 27 In *Harris*, 2012 IL 112525, the plaintiff brought an action alleging negligence and willful and wanton conduct against the defendant ambulance driver when the ambulance collided with his vehicle in an intersection. The evidence at trial established that the ambulance was traveling

on an emergency call with its emergency lights activated. *Id.* ¶ 37. The plaintiff testified that he never saw the ambulance. *Id.* ¶ 4. While the ambulance driver estimated his speed at 10 miles per hour, the plaintiff's passenger testified that the ambulance appeared to be traveling at 40-plus miles per hour. *Id.* ¶ 39. At the close of the plaintiff's case, the circuit court granted the defendant's motion for a directed verdict on the willful and wanton count. In affirming the directed verdict, the supreme court noted that "[a]lthough the siren was not continuously activated, the failure to activate emergency equipment does not by itself constitute willful and wanton conduct." *Id.* ¶ 44. The supreme court also rejected the plaintiff's argument that there was a dispute as to the speed at which the ambulance was traveling:

> "driving at an excessive rate of speed alone is not decisive as to the issue of willful and wanton conduct. Rather, speed is only a single circumstance in the totality of the evidence presented to establish willful and wanton conduct. [Citation]. Courts have held that although emergency vehicle drivers entered intersections at excessive speeds, the totality of the circumstances nonetheless failed to show that the drivers consciously disregarded or where utterly indifferent to the safety of others. [Citations]." *Id.* ¶ 45.

¶ 28 In this case, as discussed above, the undisputed evidence shows that, at all relevant times, Daniels had her emergency lights activated. With regard to Daniels' alleged failure to activate the siren, our supreme court has made clear that the failure to activate emergency equipment does not rise to the level of willful and wanton conduct. See *id.* ¶ 44; see also *Williams v. City of Evanston*, 378 Ill. App. 3d 590, 600 (2007); *Shuttlesworth v. City of Chicago*, 377 Ill. App. 3d 360, 368 (2007) (failure to activate police vehicle's Mars lights and siren does not constitute

willful and wanton conduct). Thus, Daniels' failure to activate her siren falls far short of establishing that she consciously disregarded, or was utterly indifferent to, the safety of others.

¶ 29 Next, to the extent McGruder argues that Daniels' speed suggests a conscious disregard for the safety of others, our supreme court held that driving at an excessive rate of speed is not decisive and is only a single circumstance in the totality of the evidence presented to establish willful and wanton conduct. *Harris*, 2012 IL 112525, ¶ 45. In this case, McGruder points to her own testimony that the ambulance was traveling 55 miles per hour. We note, however, that while lay witnesses may express an opinion as to a vehicle's speed, McGruder testified that she never saw the ambulance prior to the collision. Instead, she simply opined that the ambulance was traveling 55 miles per hour based upon the impact she felt. Because McGruder did not see the ambulance traveling, she cannot opine as to its speed. See *Williams*, 378 Ill. App. 3d at 600 (disregarding the plaintiffs' testimony that the ambulance was traveling 50 to 60 miles per hour where they based their opinion on the impact they felt and distance their vehicle traveled upon colliding with the ambulance). As such, we are left with Daniels' undisputed testimony that she came to a complete stop, scanned the intersection for traffic, and accelerated into the intersection at 5 or 10 miles per hour. Under these circumstances, Daniels' speed does not establish willful or wanton conduct.

¶ 30 Finally, McGruder argues that Daniels' failure to stop or slow down before entering the intersection is evidence of willful and wanton conduct. In support of her argument, McGruder relies upon a transcript of a telephone call between a State Farm Insurance representative and Priscilla Joseph, an eyewitness to the accident. We note, however, the telephone transcript does not meet the standards for affidavits in summary judgment proceedings. Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013) requires that affidavits be made on the personal knowledge of the

affiant and consist only of facts admissible in evidence. Furthermore, affidavits must affirmatively show that the affiant, if sworn as a witness, can testify competently to those facts. Here, the telephone transcript was created by a State Farm Insurance representative who had no personal knowledge of the car collisions at issue in this case. Moreover, the telephone transcript contains the hearsay statements of Joseph which are not admissible in support of, or in opposition to, a motion for summary judgment motion. *People ex rel. Madigan v. Kole*, 2012 IL App (2d) 110245, ¶ 47. Accordingly, we do not consider the contents of the telephone transcript.

¶ 31 Turning to the merits, the undisputed evidence is that Daniels slowed to a complete stop, looked both ways, and made sure the intersection was clear before she committed to entering it. Contrary to McGruder's contention, the record contains no evidence that Daniels failed to stop or slow down. Nor is there any evidence that Daniels was aware of McGruder's vehicle's location as it approached Laramie. Accordingly, we find no evidence that Daniels failed to stop or slow down or otherwise entered the intersection with an utter indifference to, or in conscious disregard of, McGruder's safety.

¶ 32 In sum, after carefully reviewing the record in the light most favorable to McGruder, we conclude that no genuine issue of material fact exists as to whether Daniels acted with an actual or deliberate intention to harm or an utter indifference to, or conscious disregard of, the safety of others. Accordingly, we conclude that no genuine issue of material fact exists regarding whether Daniels' actions constituted willful and wanton conduct.

¶ 33 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County, which granted summary judgment in favor of the City and Daniels.

¶ 34 Affirmed.