SECOND DIVISION
AUGUST 9, 2011

2011 IL App (1st) 101594-U
1-10-1594

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LISA CARMER and STEVEN CARMER,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Cook County.
	)	
v.	)	No. 09 L 377
	)	
THE CITY OF CHICAGO, a Municipal Corporation,	)	Honorable
	)	Jeffrey Lawrence,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Karnezis and Harris concurred in the judgment.

ORDER

Held: The trial court correctly granted summary judgment to the defendant pursuant to the defendant's statutory immunity. The plaintiffs' cause of action based upon the theory that the defendant had undertaken a duty to warn the plaintiff about the hazard is without merit because the plaintiff was not an *intended* or *permitted* user of the street, within the statutory meaning, at the time she sustained her injury.

¶ 1 In January 2009 the plaintiff, Lisa Carmer (Lisa), initiated this lawsuit in the circuit court of Cook County against the City of Chicago (the City) for negligently maintaining the public street where a sink hole was located and into which she fell into as she exited an illegally parked vehicle. Lisa sought compensation for the personal and pecuniary injuries she sustained as a result of her

injuries from the fall. In September 2009, Lisa filed a first amended complaint adding her husband, Steven Carmer (Steven), as a party plaintiff and adding a claim for his loss of consortium. The City filed a motion for summary judgment and contended that the City was immune from liability pursuant to the Local Governmental and Governmental Employees Tort Immunity Act (the Act) because Lisa was not an intended and permitted user of the street under the Act. 745 ILCS 10/3-102(a) (West 2008). On May 19, 2010, the plaintiffs filed a motion for additional discovery on the issue of whether the City had placed a traffic cone near the hazard in order to warn the public.

¶ 2 On May 21, 2010, the trial court denied the plaintiffs' request for additional discovery; granted the plaintiffs leave to file an amended complaint; and continued the City's request for summary judgment. On May 25, 2010, the plaintiffs filed a second amended complaint. They added a claim for negligence based upon the theory that the City had voluntarily undertaken the duty to warn the public of the hazard and had done so negligently. On June 4, 2010, the trial court granted the City's motion for summary judgment and entered judgment in favor of the City.

¶ 3 On appeal, the plaintiffs raise the following issues: (1) whether the trial court erred by granting the City's motion for summary judgment because the City voluntarily undertook to warn those who would foreseeably encounter the sink hole, including Lisa, of the danger but did so negligently; (2) whether the trial court abused its discretion by denying the plaintiffs' request for additional discovery regarding the City's actions in warning the public about the sink hole; and (3) whether the City's affirmative defense pursuant to section 10/3-104 of the Act was applicable.

¶ 4 For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 5 BACKGROUND

¶ 6 The following facts were alleged in the plaintiffs' pleadings and deposition testimony. On the evening of October 18, 2008, Lisa was a passenger in a car that was double-parked in front of her apartment at 3246 North Hamlin Avenue in Chicago. Lisa exited the car and walked between two parked cars toward the curb. Lisa claimed that because of the darkness, she never saw a sink hole adjacent to the curb, nor had she previously observed the hole. The hole was created by a sewer cave-in that the City had notice of as early as August 25, 2008. The day after her fall, Lisa sought medical assistance and discovered that she suffered a broken knee cap during the fall. She has suffered pain in her knee and back and has incurred medical expenses. Additionally, Steven has suffered a loss of consortium as a result of Lisa's injuries.

¶ 7 On January 13, 2009, Lisa initiated a lawsuit against the City alleging that the City's negligence in maintaining the street where the hole was located was the proximate cause of her injuries. In September 2009, Lisa added her husband Steven as a plaintiff in her first amended complaint and included a claim for Steven's loss of consortium. In February 2010, the City filed a motion for summary judgment arguing that it was immune from liability under section 3-102(a) of the Act because Lisa was exiting a double-parked car at the time of her injury and thus she was not an intended and permitted user of the street within the meaning of the Act. 745 ILCS 10/3-102(a) (West 2008). The City also answered the plaintiff's interrogatories by stating that no City employee had placed an orange traffic cone in or close to the sink hole in question.

¶ 8 On May 19, 2010, the plaintiffs filed an affidavit pursuant to Supreme Court Rule 191(b) and attached the deposition of a supervisor in the City's water management department. Ill. S. Ct. R.

191(b) (eff. Jul. 1, 2002). The plaintiffs claimed in their affidavit that the supervisor whom the City had offered for deposition had not spoken with anyone with personal knowledge concerning the City's notice, inspection or repair of the hole. The plaintiffs therefore requested that the City identify persons for deposition who had actually been involved with the defect and with four other sewer cave-in scenarios in the city where orange cones had been placed. The plaintiffs argued that they should be given the opportunity to conduct pertinent discovery regarding the issue of whether the City had placed the traffic cone in or near the hole.

¶ 9 On May 21, 2010, the trial court denied the plaintiffs' request for additional discovery; granted the plaintiffs leave to file an amended complaint; and continued the City's request for a summary judgment. On May 25, 2010, the plaintiffs filed a second amended complaint that added an additional negligence claim. The plaintiffs alleged that the City voluntarily assumed a duty to warn the public about the hazard through its act of placing a safety cone in or near the hole. On June 4, 2010, the trial court granted the City's motion for summary judgment and entered judgment in favor of the City.

¶ 10 The plaintiffs filed a timely appeal from the trial court's June 4, 2010, judgment. Ill. S. Ct. R. 303(a) (eff. May 30, 2008). We note that the plaintiffs did not specify in their notice of appeal that they were also appealing the trial court's May 21, 2010, order denying their request for additional discovery. However, because that order is a step in the procedural progression leading to summary judgment, the order is reviewable. *Longo v. Globe Auto Recycling, Inc.*, 318 Ill. App. 3d 1028, 1034, 743 N.E.2d 667, 672 (2001). Notices of appeal are to be liberally construed and unless the appellee claims prejudice, which is not the case here, strict compliance with technical

rules is not fatal to jurisdiction. *Knapp v. Bulun*, 392 Ill. App. 3d 1018, 1023, 911 N.E.2d 541, 546 (2009). We therefore have jurisdiction to consider the issues that plaintiffs raise in this appeal.

¶ 11 ANALYSIS

¶ 12 We review the grant of summary judgment under a *de novo* standard. *Morris v. Margulis*, 197 Ill. 2d 28, 35, 754 N.E.2d 314, 318 (2001). Summary judgment is proper where the pleadings, depositions and admissions on file reveal 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). This court can affirm the trial court's ruling on any basis in the record. *Legion Insurance Co. v. Empire Fire & Marine Insurance Co.*, 354 Ill. App. 3d 699, 703, 822 N.E.2d 1, 4 (2004).

¶ 13 The City argued before the trial court that Lisa was not an intended and permissible user of the street where she fell because she was exiting an illegally parked vehicle; thus the statutory immunity for the City was applicable. Section 3-102(a) of the Act provides that "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 *** ." 745 ILCS 10/3-102(a) (West 2008). The plaintiffs concede in their opening brief that "the City did not owe [Lisa] a duty to exercise ordinary care in *maintaining* the subject public street in a reasonably safe condition on October 18, 2008 by virtue of the immunity conferred by Section 3-102 of [the Act] *** ."

¶ 14 The plaintiffs argue instead that the City undertook a duty to warn anyone who would foreseeably encounter the hazard because its employee placed a traffic cone in or near the hole. The plaintiffs submitted a photograph during Lisa's deposition that Steven allegedly took the day after

the accident. Lisa was not able to positively identify the photograph as depicting the condition of the hole at the time she fell and did not know when the photograph was taken. There is an orange object visible in the hole in the photograph. The plaintiffs allege the object is a crushed traffic cone.

¶ 15 The plaintiffs note that our supreme court has held that " 'one who undertakes, gratuitously or for consideration, to render services to another is subject to liability for bodily harm caused to the other by one's failure to exercise due care in the performance of the undertaking.' " *Wakulich v. Mraz*, 203 Ill. 2d 233, 241, 785 N.E.2d 843, 854 (2003) (quoting *Rhodes v. Illinois Central Gulf R.R.*, 172 Ill. 2d 213, 239, 665 N.E.2d 1260 (1996)). The record does not contain a transcript of the hearing on the summary judgment. The plaintiffs contend that the trial court based its decision solely on the City's statutory immunity pursuant to section 3-102 and did not address the theory of liability based on voluntary undertaking of a duty.

¶ 16 The City argues that it does not matter whether its employees had placed a traffic cone at or near the hole because even if it had done so, it did not assume a duty to warn all pedestrians, permitted and not permitted, about the hazard. The City reasons that because Lisa was not an intended or permitted user of the street, she would not have been a person whom the City would voluntarily undertake to warn of a hazardous condition. The City points to the case of *Wojdyla v. City of Park Ridge*, 148 Ill. 2d 417, 592 N.E.2d 1098 (1992) for support of its argument. In that case, a pedestrian was illegally walking across a six-lane highway when he was struck and killed by a car. The decedent's spouse made the argument that the city had failed to adequately illuminate the highway, preventing the driver of the car from seeing the victim. The decedent's spouse argued that the act of supplying streetlights on the highway subjected the city to "a duty of care regardless of

whether the decedent was an intended and permitted user of the highway under [section 3-102(a) of] the Tort Immunity Act." *Id*. at 421, 592 N.E.2d at 1100. The appellate court affirmed a rejection of that theory of liability because "[s]ection 3-102 of the Tort Immunity Act does not base duty solely on foreseeable users, but upon intended and permitted foreseeable users. Since we have determined the decedent was not an intended user, this argument must fail." *Id*. at 428, 592 N.E.2d at 1104.

¶ 17 We apply the analysis of the *Wojdyla* case to the facts here. Even if the City had placed a warning cone in or near the hole, the alleged voluntary undertaking of a duty to warn would not extend to Lisa. Lisa was not an *intended* or *permitted* user of the street because she was alighting from an illegally parked car. Under the Act, the legislature imposed upon governmental entities, a duty to exercise ordinary care in the maintenance of public property and defined the persons to whom the duty is owed. We hold that the trial court did not err in rejecting the plaintiffs' cause of action since the plaintiffs based their theory upon the City's voluntary assumption of a duty to an unintended user of the street.

¶ 18 The next issue raised by the plaintiffs is whether the trial court abused its discretion by denying their request for additional discovery. The plaintiffs acknowledge that if this court were to find that section 3-102(a) of the Act is applicable and the City did not voluntarily undertake a duty to warn that would extend to Lisa, "the requested additional discovery would not be relevant or necessary." Based on our determination that the statutory immunity under section 3-102(a) of the Act was applicable and the City did not voluntarily undertake a duty to warn Lisa, the plaintiffs' second issue is, as they admit, moot.

¶ 19 The third issue that the plaintiffs raise is whether the City's affirmative defense pursuant to section 10/3-104 of the Act is applicable. That section of the Act grants immunity to public entities and their employees for injuries caused by their failure to initially provide regulatory traffic control devices, including warning signs. 745 ILCS 10/3-104 (West 2008). The plaintiffs argue that this defense is not applicable because their cause of action is not that the City failed initially to provide any warning about the hazard, but that the City failed to exercise reasonable care in the warnings that it voluntarily undertook to provide. Because of our determination that Lisa was not in the class of persons to whom the City owed a duty under the plaintiffs' theory of voluntary undertaking of a duty, we need not address this issue.

¶ 20 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 21 Affirmed.