SIXTH DIVISION
December 23, 2011

No. 1-10-3555

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MIVIAN SANCHEZ,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 08 L 014323
	)	
CITY OF BERWYN,	)	The Honorable
	)	Jennifer Duncan-Brice,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE GARCIA delivered the judgment of the court.
Presiding Justice R. E. Gordon and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in granting the employer defendant's motion to dismiss the plaintiff's suit where the plaintiff had previously recovered under the Workers' Compensation Act for injuries caused in an accident with a coemployee.

¶ 2 The trial court granted the defendant's motion to dismiss the plaintiff's complaint, arising

from a two-car accident in which both the plaintiff and the driver of the other car were employees of the defendant, the City of Berwyn. The plaintiff filed a workers' compensation claim against the defendant for the injuries she suffered in the accident. The plaintiff and the City of Berwyn settled the claim, with the plaintiff receiving $59,426.23. The plaintiff also filed a lawsuit against the driver of the other car and obtained a default judgment. The instant complaint was the plaintiff's effort to collect the damages awarded in the default judgment from the City of Berwyn, as the other driver's employer. The trial court dismissed the complaint as barred by the Workers' Compensation Act. We affirm.

¶ 3 BACKGROUND

¶ 4 On July 13, 2006, the plaintiff, Mivian Sanchez, was driving in Cook County when her car collided with a car driven by Barbara Glinka. Both the plaintiff and Glinka were, at the time, employees of the defendant, the City of Berwyn. The two women did not know each other; as the plaintiff states in her brief, they were "complete strangers," who got into a collision that was "completely serendipitous." The plaintiff filed a lawsuit against Glinka alleging her negligent driving proximately caused her injuries. On April 8, 2008, the circuit court entered a default judgment against Glinka and awarded the plaintiff damages in the amount of $1,500,000. Meanwhile, the plaintiff pursued a workers' compensation claim against the defendant for the injuries she sustained in the traffic accident. On April 25, 2008, the Workers' Compensation Commission approved a settlement contract between the plaintiff and the defendant, which awarded $59,426.23 in compensation.

¶ 5 On December 30, 2008, the plaintiff filed the instant complaint against the defendant,

which alleged the automobile accident occurred while Glinka was acting within the scope of her employment with the defendant City of Berwyn. Through this action, the plaintiff sought to collect from the defendant the damages she was awarded in the default judgment against Glinka. The plaintiff based her claim on § 9-102 of the Illinois Governmental Tort Immunity Act (745 ILCS 10/9-102 (West 2008)), which requires public entities to pay tort judgments entered against an employee when, in the course of employment, the employee injures another.

¶ 6 The defendant moved to dismiss the plaintiff's complaint, arguing the settled claim under the Workers' Compensation Act (the Act) (820 ILCS 305/5(a) (West 2008)), was the plaintiff's exclusive remedy. Before the circuit court, the plaintiff contended the "dual capacity doctrine," which permits a choice of remedy in certain circumstances, permitted the instant action. The plaintiff argued that because Glinka owed her a duty of care both as a coemployee and as a fellow driver on the road, the civil complaint was not barred by the Act. The trial court initially denied the defendant's motion, but the court reconsidered on the defendant's motion and dismissed the complaint. The plaintiff appeals.

¶ 7 ANALYSIS

¶ 8 Before the trial court, the defendant argued it was not liable to pay the plaintiff's damages for three reasons: (1) the Act barred the plaintiff from what would be a second recovery from the defendant; (2) Glinka was not operating "in the scope of [her] employment" at the time of the accident as § 9-102 requires before liability can be imposed on a municipality for the negligence of an employee; and (3) the defendant was an indispensable party to the original suit against Glinka and cannot now be made to answer for Glinka when the plaintiff failed to join the

defendant in her suit against Glinka.

¶ 9 Before this court, the plaintiff argues dismissal was improper because her lawsuit did not fall within the Act as she seeks only payment from the defendant based on a judgment against Glinka and is not suing the defendant for its direct negligence. The plaintiff draws a distinction between an action under the Tort Immunity Act, which imposes liability on a municipality for the negligence of its employee acting within the scope of employment, and a tort action by an employee grounded on the employer's negligence.

¶ 10 We review the grant of a dismissal motion *de novo*. *O'Casek v. Children's Home & Aid Society*, 229 Ill. 2d 421, 436 (2008)

¶ 11 This case presents an unusual scenario as both drivers involved in the traffic collision were employees of the same municipality. In a typical case brought under § 9-102, the plaintiff is not an employee of the public entity being sued and thus cannot pursue a workers' compensation claim involving the defendant municipality. The facts of this case require us to examine how the Act interplays with a tort action when the tortfeasor is also employed by the plaintiff's employer. We begin with precedent from our supreme court: *Collier v. Wagner Hastings Co.*, 81 Ill. 2d 229 (1980).

¶ 12 The plaintiff in *Collier* suffered cardiac arrest at work; he was then injured by a fellow employee's negligence in attempting to assist the plaintiff. *Id*. at 232-34. The plaintiff filed a workers' compensation claim for the injuries he sustained and received a settlement. *Id.* at 234. Later, the plaintiff filed a derivative claim against his employer, arguing the coemployee's actions were intentional and therefore were not covered by the Act because the Act covers only

"accidental" injuries. *Id.* at 237. The court rejected the distinction. The supreme court expressly held that whether the injuries were covered by the Act was immaterial because the plaintiff's recovery under the Act precluded the plaintiff from pursuing a subsequent lawsuit against his employer. *Id.* at 241. "[W]here an employee injured by a coemployee has collected compensation on the basis that his injuries were compensable under the Act, the injured employee cannot then allege that those injuries fall outside the Act's provisions." *Id.* The court "base[d] this conclusion not only upon a fear of double recovery [citation] but also upon [the] desire to prevent the proliferation of litigation." *Id.*

¶ 13 Thus, under *Collier*, the "sole remedy provision" of the Act has preclusive effect on a subsequent lawsuit against the employer whenever the plaintiff has previously received compensation under the Act. *Id.*; 820 ILCS 305/5(a) (West 2008). We are aware of no exceptions to this rule. "Our supreme court has clearly ruled that an injured employee who applies for and accepts workers' compensation benefits, whether through a settlement or an award, cannot thereafter also recover civil damages from the employer for the same injury." *Wells v. Enloe*, 282 Ill. App. 3d 586, 596-97 (1996).

¶ 14 We agree with the circuit court; the dismissal of the plaintiff's complaint was dictated by the *Collier* decision. As in *Collier*, the instant plaintiff collected a settlement under the Act. As in *Collier*, the instant plaintiff sought to ward off the employer's motion to dismiss the subsequent civil lawsuit based on the plaintiff's settlement of her workers' compensation claim. Each of the plaintiffs sought to establish an exception to the exclusive remedy provision of the Act. In *Collier*, the supreme court established an absolute rule that once a plaintiff accepts the

workers' compensation settlement, no subsequent or further claim is permitted against the employer. *Collier*, 81 Ill. 2d at 241; *Wells*, 282 Ill. App. 3d at 596-97. We note that in *Collier* our supreme court held that an *intentional act* permits no exception to the "sole remedy provision" of the Act once a workers' compensation claim has been settled; it necessarily follows that no exception can arise from a *negligent act* by an coemployee in a traffic accident to avoid the application of that same provision. We reject the plaintiff's claim that an exception exists under the circumstances of her case.

¶ 15 Like the court in *Collier*, we need not decide whether the somewhat unusual facts that gave rise to the instant plaintiff's injuries fell outside the coverage of the Act. Her earlier recovery under the Act precludes the plaintiff's second action against her employer. *Collier*, 81 Ill. 2d at 241; *Wells*, 282 Ill. App. 3d at 596-97.

¶ 16 The plaintiff insists she is not seeking to impose liability on the defendant for her injuries, but is merely seeking to collect the damages she was awarded in her lawsuit against Glinka. The plaintiff contends the Act applies only to actions seeking to recover "for injury or death" and her claim seeks to recover only monetary damages for injuries caused by a third party. This is a distinction without a difference. Obviously, the plaintiff would not have been awarded $1.5 million had she not suffered any injuries in the accident with Glinka. The plaintiff fails to direct us to anything in the Act or in the *Collier* rule that recognizes a distinction, once a workers' compensation claim has been settled, between a suit to collect from an employer damages assessed against a coemployee for the coemployee's negligence and a suit against the employer for its direct negligence. Negligence is an essential element of either action. The Act,

as interpreted by our supreme court in *Collier*, provides an absolute bar to a second recovery against an employer regardless of the manner in which the plaintiff characterizes her lawsuit.

¶ 17 Nor is the plaintiff's reliance on *Wilson v. City of Chicago*, 120 F.3d 681 (7th Cir. 1997), as supporting authority well taken. In that case, an accused in a criminal matter sued the City of Chicago and one of its officers based on allegations that the officer tortured the plaintiff to obtain a confession. *Id.* at 683. A jury returned verdicts in favor of both defendants. *Id.* The federal court of appeals affirmed the jury's verdict in favor of the City, but reversed as to the individual officer. *Id.* After the plaintiff obtained a judgment against the officer, the plaintiff sought to invoke § 9-102 to collect the judgment against the officer from the City. *Id.* The City argued that *res judicata* barred the plaintiff from proceeding with a collection claim based on the jury's verdict in favor of the City in the original action. *Id.* at 687. The federal court of appeals held *res judicata* presented no bar to the plaintiff's collection action against the City pursuant to § 9-102 because the issue of derivative liability was not precluded by the verdict based on no direct liability. *Id.*

¶ 18 The plaintiff contends her suit is analogous to the collection action in *Wilson*. Essentially, her argument is that the "sole remedy provision" of the Act has the same limited application as the *res judicata* bar. We are not persuaded that the two preclusive barriers serve a similar purpose. Nor does the plaintiff offer authority for her contrary contention. As *Wilson* made clear, r*es judicata* does not preclude a new action if the subsequent claim was never decided in the original suit. The Act, however, as made clear by our supreme court in *Collier*, prohibits a second recovery from an employer whenever the plaintiff received compensation

under the Act for injuries arising from the same event. *Collier*, 81 Ill. 2d at 241; *Wells*, 282 Ill. App. 3d at 596-97. *Wilson* did not address the preclusive bar of the Act, making *Wilson* inapposite to the issue before us.

¶ 19 The plaintiff correctly compares the City of Berwyn to an insurer to make good on injuries caused by the negligence of its employees under § 9-102. However, she fails to explain how the defendant's status as one similar to an insurer entitles her to receive what effectively would be a double recovery. We find no basis to graft an exception to the *Collier* rule based on a claim that a municipality acts as an insurer. The *Collier* rule is clear: once an employee recovers under the Act, the employee may not sue the employer to collect additional damages for injuries arising from the same event.

¶ 20 Nor does the dual capacity doctrine, as the plaintiff argued before the trial court, lead to a different outcome. While we could rule the plaintiff abandoned her dual capacity argument on appeal as she addressed it for the first time in her reply brief (Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008)), the doctrine, as we explained in *Ocasek v. Krass*, 153 Ill. App. 3d 215 (1987), has no application under the facts of this case. The dual capacity doctrine gives the plaintiff a choice of remedy; it does not give a plaintiff the right to double recovery. In *Ocasek*, the decedent was killed in a plane crash piloted by her employer, while the two returned from a business trip. *Id.* at 216. The decedent's estate filed a negligence complaint against the employer's estate, which the defendant sought to dismiss based on a contention that the sole remedy to recover for the death of the decedent was to proceed with a claim under the Act. *Id.* The *Ocasek* court held that the "sole remedy provision" of the Act was not triggered when the negligent party was acting in

a dual capacity as employer and a pilot of a plane that owed a separate duty of care to the decedent. *Id*. at 217. Under the dual capacity doctrine, the plaintiff had a choice of remedy to either file a claim under the Act or file a negligence suit against the pilot of the plane. *Id.* In the instant action, the plaintiff elected to proceed with a workers' compensation claim, which she settled on April 25, 2008. The dual capacity doctrine has no application once the plaintiff recovered on her workers' compensation claim. In any event, the circumstances here are not analogous to those in *Ocasek*. The instant plaintiff did not claim the City of Berwyn acted in a dual capacity. Rather, her claim was that Glinka acted in a dual capacity as a fellow employee and a fellow driver, which perhaps explains the plaintiff's decision to forgo this argument in her main brief. The dual capacity doctrine has no application to the City of Berwyn.

¶ 21 Once the plaintiff accepted the settlement for her workers' compensation claim from the City of Berwyn, the Act barred the plaintiff's subsequent suit against the defendant municipality to obtain a separate recovery on her collection suit arising from the default judgment against Glinka, a fellow employee. In light of the absolute bar to the plaintiff's collection suit under the Act, we need not consider the viability of an initial suit against the municipality under § 9-102 for the negligence of Glinka. Nor does our resolution of this appeal require us to answer whether the defendant was an indispensable party in the original lawsuit against Glinka. We affirm based on the preclusive effect of the "sole remedy provision" of the Act, which is an absolute bar once the plaintiff receives a workers' compensation award.

¶ 22 CONCLUSION

¶ 23 Because the plaintiff collected damages from the defendant through a workers' compensation claim, the Act barred the plaintiff's subsequent action for a separate recovery against the municipality based on the plaintiff's lawsuit to collect on a default judgment arising from the negligence of a fellow employee. The trial judge did not err in dismissing the plaintiff's complaint against the City of Berwyn, the plaintiff's employer.

¶ 24 Affirmed.