2012 IL App (1st) 110393-U

FOURTH DIVISION
OCTOBER 25, 2012

No. 1-11-0393

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CHRISTOPHER WILSON, Plaintiff-Appellant, v. CITY OF HARVEY, Defendant-Appellee and KEITH PRICE, Defendant.	)))))))))))))))	Appeal from the Circuit Court of Cook County. No. 09 L 12849 The Honorable Jeffrey Lawrence, Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Epstein concurred in the judgment.

O R D E R

HELD: Circuit court order granting city's motion for summary judgment upheld where there was no genuine issue of material fact that the city was immune from liability under

the Illinois Local Governmental and Governmental Employees Tort Immunity Act .

¶ 1 Plaintiff Christopher Wilson suffered injuries after being physically attacked by Keith Price, who at the time of the altercation, was an elected official of the City of Harvey (the City). Wilson subsequently filed a complaint naming Price and the City as defendants. The City responded with a motion for summary judgment, which was granted by the circuit court. On appeal, Wilson argues that the circuit court erred in granting the City's motion because genuine issues of material fact exist as to whether the City can be held liable for Price's tortious actions under the Illinois Local Governmental and Governmental Employees Tort Immunity Act (Act or Tort Immunity Act) (745 ILCS 10/1-101 *et seq*. (West 2008)). For the reasons set forth herein, we affirm the judgment of the circuit court.

¶ 2 BACKGROUND

¶ 3 The underlying facts regarding the physical altercation are undisputed.

¶ 4 In 2007, Price was elected to serve a four-year term as an alderman of the Sixth Ward of the City of Harvey. As an elected official of the City, Price received a yearly salary, health benefits and an expense account. Price was not provided with an office or phone line; rather, Price set his own hours and responded directly to calls made by his constituents to his personal cell phone. Price did not take any directions from the mayor, members of the City Council, or any other elected official.

¶ 5 Pursuant to chapter 2-48-050 of the City of Harvey's municipal code, Price as an elected alderman, was considered an "officer" rather than an "employee" of the City. City of Harvey, Ill., Ch. 2-48-050 (2007). The definitions for these designations are set forth in chapter 2-93-010 of

the City's municipal code, which in pertinent part, provides:

> " 'Employee' means a person employed by the City of Harvey whether on a full-time or part-time basis or pursuant to a contract, whose duties are subject to the direction and control of an employer with regard to the material details of how the work is performed, but does not include an independent contractor.
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> 'Officer' means a person who holds, by election or appointment, an office created by statute or ordinance, regardless of whether the officer is compensated for service in his or her own official capacity." City of Harvey, IL, Ch. 2-93-010 (2007).

¶ 6 During Price's tenure as an alderman of the Sixth Ward and an officer of the City, he responded to calls from his constituents regarding various public concerns, such as the presence of potholes, abandoned homes, and noise disturbances. On May 2, 2008, Price received several calls on his cell phone from senior citizens who resided in the Sixth Ward regarding the presence of illegally parked cars in front of Midnight Auto Express (Midnight Auto), a car repair shop located at 14407 South Halsted, near the intersection of Halsted Street and Calumet Avenue. The callers complained that the cars posed a safety hazard because they impeded their view of oncoming traffic when they attempted to turn onto Halsted Street from Calumet Avenue. In response to the phone calls, Price drove to Midnight Auto sometime around 6 p.m. that evening. When he arrived, Price saw that a number of cars were parked illegally in front of the repair shop. He then spoke to Wilson, an employee of the repair shop, who was working that evening. Price asked Wilson to move the cars, but Wilson refused to do so. During the heated conversation that ensued, Price punched Wilson in the face and head. Wilson was knocked

unconscious and fell to the ground. Wilson received various injuries as a result of the attack including a broken jaw.

¶ 7 The physical altercation ultimately resulted in both criminal[1] and civil proceedings. In the civil proceeding filed by Wilson in the circuit court, he named both Price and the City as defendants. The City's liability was premised on Wilson's assertion that "[a]t all times relevant hereto Defendant KEITH PRICE was an ALDERMAN employed by the CITY OF HARVEY and at all times herein was acting in the capacity of agent, servant and employee of the CITY OF HARVEY, a municipal corporation." Because Price was in the City's employ at the time of the attack, Wilson asserted that the City was subject to liability under the Illinois Tort Immunity Act.[2]

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[1] In the criminal matter, Price was tried and convicted of battery by way of a bench trial before Judge Luciano Panici under case number 08 MC6 011002-01. He was sentenced to 24 months conditional discharge and was ordered to perform 30 days of community service.

[2] Wilson also filed a complaint in federal court, seeking damages against Alderman Price and the City. In the federal complaint, Wilson alleged that Price had been acting "under color of state law" at the time of the assault and sought to impose liability on the City pursuant to 42 U.S.C. § 1983. The City filed a motion to dismiss the complaint, arguing that Wilson failed to state a valid § 1983 claim. The City's motion was granted and the ruling was upheld on appeal. In affirming the dismissal, the Seventh Circuit, explained: "[E]ven assuming that [Price] was at Midnight Auto in a capacity legitimately related to his role as legislator, it is indisputable that Price crossed that line and entered the realm of law enforcement–which is wholly unrelated to the

¶ 8 The City subsequently filed a motion for summary judgment, arguing that there was no genuine issue of material fact that the City was immune from liability under the Act. In its motion, the City observed that liability under the Tort Immunity Act exists only if one of its employees commits a tortious act during the scope of his employment with the City. It then argued that Price, an elected alderman, was not an "employee" of the City; rather, he was merely an "officer" of the City. In making its argument, the City noted that one of the distinguishing features of an employer-employee relationship is the employer's ability to exercise control over an employee and argued that the City had no such authority over Price. Rather, Price was solely accountable to his electorate. In addition, the City cited to two local ordinances that specifically delineate aldermen as "officers" rather than "employees." The City further argued that even if Price could be considered its employee, he was acting well outside the scope of his employment when he punched Wilson and broke his jaw.

¶ 9 The trial court conducted a hearing on the City's motion. After hearing arguments from the parties, the court granted the City's motion. In its oral ruling, the court specifically found that Price was not an employee of the City of Harvey because aldermen are excluded from the

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duties of a legislator–the moment he demanded that Wilson move the cars. *** Price's demand that Wilson remove the cars illegally parked in front of Midnight Auto (and, obviously, his use of force against Wilson when Wilson refused) does not constitute part of an alderman's regular duties whether those duties are legislative or otherwise necessary for legislation. As such, it is not a basis on which we can find Price to be acting under color of state law." *Wilson v. Price*, 624 F. 3d 389, 393 (7th Cir. 2010).

definition of "employee" that is contained in the City's municipal code. The court further found that even if Price could be considered an employee of the City, there was no genuine issue of material fact that he was acting outside the scope of his authority when he physically assaulted Price. The court explained: "[A]n alderman acts within the scope of his authority by discussing public issues in city counsel and–and proposing ordinances and so on. It is not within a scope of an alderman's authority to punch out anybody that displeases his constituents."

¶ 10 This appeal followed.

¶ 11 ANALYSIS

¶ 12 On appeal, Wilson contends that the circuit court erred in granting the City's motion for summary judgment because Price was an employee of the City of Harvey and was acting within the scope of his employment when he initiated the physical attack. As indicia of Price's employment status with the City, Wilson observes that at the time of the incident, Price was the recipient of a salary and benefits, which were paid for by the City. Moreover, Wilson notes that Price made the trip to Midnight Auto in response to calls from citizens in the Sixth Ward and was thus acting within the scope of his employment when he initiated the physical attack.

¶ 13 The City responds that the circuit court correctly granted its motion for summary judgment because there was no genuine issue of material fact that Price, at the time of the attack, was not a City employee; rather, pursuant to its municipal code, Price was an officer whose duties were not dictated by the City. The City further argues that even if Price could be considered an employee, summary judgment was nonetheless properly granted because Price was acting well outside the scope of his aldermanic duties when he physically attacked Wilson.

¶ 14 Summary judgment is appropriate when "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 2006). In reviewing a motion for summary judgment, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the moving party to determine whether a genuine issue of material fact exists. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). A genuine issue of fact exists where the material relevant facts in the case are disputed, or where reasonable persons could draw different inferences and conclusions from undisputed facts. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). Although summary judgment has been deemed a "drastic means of disposing of litigation" (*Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986)), it is nonetheless an appropriate mechanism to employ to expeditiously dispose of a lawsuit when the moving party's right to a judgment in its favor is clear and free from doubt (*Morris v. Margulis*, 197 Ill. 2d 28, 35 (2001)). A trial court's ruling on a motion for summary judgment is subject to *de novo* review. *Weather-Tite, Inc. v. University of St. Francis*, 233 Ill. 2d 385, 389 (2009).

¶ 15 Pursuant to the Tort Immunity Act, a public entity is statutorily obligated to assume financial and legal liability for tortious acts committed by its employees. See *In re Consolidated Objections to Tax Levies of School Dist. No. 205*, 193 Ill. 2d 490, 502 (2000) ("[T]he purpose behind the Tort Immunity Act is to subject local government units to liability in tort on the same basis as private tortfeasors with the exception for those immunities provided by the Act"). Specifically, section 9-102 of the Act states: "A local public entity is empowered and directed to

pay any tort judgment or settlement for compensatory damages for which it or any *employee* while acting within the scope of his employment is liable." 745 ILCS 10/9-102 (West 2008) (Emphasis added.) Accordingly, based on the express terms of the Act, a local public entity can only be subject to liability for tortious acts committed by persons who are considered employees.

¶ 16 Here, the City emphasizes that pursuant to the terms of its municipal code, aldermen are considered "officers" rather than "employees" of the City. City of Harvey, Ill., Ch. 2-48-050, 2-93-010 (2007). We observe, however, that the definition of "employee" contained in the Tort Immunity Act is considerably broader, and specifically includes "officers." Specifically, section 1-202 of the Act defines the term "employee" as follows: " 'Employee' includes a present or former *officer*, member of a board, commission or committee, agent, volunteer, servant or employee, whether or not compensated, but does not include an independent contractor." (Emphasis added.) 745 ILCS 10/1-202 (West 2008). Accordingly, the designations contained in the City's municipal code are not dispositive as to Price's employment status or the City's liability under the Act. Indeed, under the Act a municipality can be subject to liability for the tortious acts committed by an official unless the official is an independent contractor.

¶ 17 Whether an individual is properly considered an employee or an independent contractor depends not upon specific designations contained in a local municipal code; rather, it is dependant upon the degree of control that is exerted over the details of the person's work. Specifically, an employee is "a person who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance." Black's Law Dictionary (9th ed. 2009). An independent

contractor, in contrast, is "[o]ne who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it." Black's Law Dictionary (9th ed. 2009).

¶ 18 Here, Price was elected to serve as an alderman of the City. Although the City provided Price with a salary, an expense account and health benefits, there is no dispute that the City did not exercise any control over the duties that Price performed as alderman of the Sixth Ward. The relevant discovery materials included in the record indicate that Price responded directly to calls made to him by his constituents. In performing his aldermanic duties, Price did not receive direction from the mayor, members of the City Council, or any other official affiliated with the City. The City lacked the authority to train, supervise or discipline Price and he answered directly to the electorate. Because the record indicates that the City did not possess the ability to exercise supervision or control over Price during his tenure as alderman of the Sixth Ward, we conclude that Price cannot be considered an "employee" of the City as that term is defined by the Tort Immunity Act. See, e.g., *Carver v. Sheriff of LaSalle County*, 203 Ill. App. 3d 497, 513 (2003) (recognizing that an independently elected sheriff who answered solely to the electorate of the county from which he was elected was not an employee under the Act).

¶ 19 Even if Price could be considered an employee of the City, we nonetheless find that summary judgment was properly granted as there is no genuine issue of material fact that Price was acting outside the scope of his aldermanic duties when he punched Wilson and broke his jaw. Although "[n]o precise definition has been accorded the term 'scope of employment,'" (*Pyne v. Witmer*, 129 Ill. 2d 351, 359-60 (1987), quoting *Sunseri v. Puccia*, 97 Ill. App. 3d 488,

493 (1981)), it is well-established that Illinois courts look to the Second Restatement of Agency (Restatement) for guidance to determine whether an employee's negligent or tortious acts were committed within the scope of his employment (*Bagent v. Blessing Care Co.*, 224 Ill. 2d 154, 164 (2007); *Rodman v. CSX Intermodal, Inc.*, 405 Ill. App. 3d 332, 336 (2010)). The Restatement identifies three criteria to be used in making this determination, and provides as follows:

> "(1) Conduct of a servant is within the scope of employment, if but only if:
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> (a) it is of the kind he is employed to perform;
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> (b) it occurs substantially within the authorized time and space limits;
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> (c) it is actuated, at least in part, by a purpose to serve the master,
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> * * *
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> (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." Restatement (Second) of Agency § (1958).

Each of the three criterion identified in the Restatement must be satisfied to support a finding that the employee was acting within the scope of his employment when he committed a negligent act. *Bagent*, 224 Ill. 2d at 165. Ultimately, "[w]hether an employee was acting within the course of the employment depends on the employment contract and the nature of the relationship, which must exist at the time of and in respect to the particular facts out of which the injury arose. Plaintiff has the burden of showing the contemporaneous relationship between the tortious act and the scope of employment." *Id.*, citing *Pyne*, 129 Ill. 2d at 360. Although "[a]n

unbroken line of precedent holds that summary judgment is generally inappropriate when scope of employment is at issue" (*Rodman*, 405 Ill. App. 3d at 335), when the facts of the case are such that no reasonable person could conclude that the employee was acting within the scope of his employment when he committed a tortious act, summary judgment in favor of the employer is proper (*Bagent*, 224 Ill. 2d at 171).

¶ 20 Here, pursuant to the Illinois Municipal Code, alderman are elected officials and members of a municipality's city council, and as such, serve a "purely legislative" function. 65 ILCS 5/6-4-6 (West 2008). While responding to citizen complaints about the hazards posed by cars illegally parked in front of Midnight Auto would have been within the scope of Price's duties as an alderman of the City, there is no question of fact that punching a constituent serves no legislative function. The physical altercation that Price initiated did not fall within his statutorily granted aldermanic authority; rather, it was a personal matter that served no legislative purpose. See, *e.g.*, *City of Elmhurst ex. rel. Mastrino v. City of Elmhurst*, 272 Ill. App. 3d 168, 174, 176 (1995) (finding that the City of Elmhurst could not be held liable under the Act for the libelous statements made by two aldermen because the statements constituted "private activity" and "conduct outside the scope of the official duties of an alderman"). Therefore, summary judgment was proper.

¶ 21 CONCLUSION

¶ 22 Accordingly, the judgment of the circuit court is affirmed.

¶ 23 Affirmed.