2011 IL App (1st) 110533-U

THIRD DIVISION
August 24, 2011

No. 1-11-0533

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IGNACIO GONZALEZ and CECILIA GONZALEZ, Plaintiffs-Appellants, v. CITY OF PROSPECT HEIGHTS, an Illinois Municipal Corporation, and WILLIAM CAPONIGRO, as agent, servant and employee of the City of Prospect Heights, an Illinois Municipal Corporation, Defendants-Appellees.	))))))))))	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY No. 09 L 3034 HONORABLE HOWARD L. FINK, JUDGE PRESIDING.

JUSTICE STEELE delivered the judgment of the court.
Presiding Justice Quinn and Justice Murphy concurred in the judgment.

O R D E R

HELD: The circuit court of Cook County did not err in dismissing plaintiffs' personal injury complaint against defendants, a municipal corporation and one of its police officers. Defendants did not owe a legal duty to plaintiffs where the police officer responded to two prior automobile accidents at the site where one of the plaintiffs lost control of his vehicle. The judgment of the circuit court is affirmed.

¶ 1 Plaintiffs, Ignacio and Cecilia Gonzalez (Ignacio and Cecilia), appeal an order of the circuit court of Cook County dismissing their personal injury complaint against defendants, the City of Prospect Heights (City), and police officer William Caponigro, in his representative

capacity as a City employee. The circuit court ruled that defendants did not owe a legal duty to plaintiffs, where Officer Caponigro responded to two prior automobile accidents at the site where Ignacio lost control of his vehicle. For the following reasons, we agree and affirm the decision of the circuit court.

¶ 2 BACKGROUND

¶ 3 The record on appeal discloses the following facts. Plaintiffs originally filed suit against the City on September 9, 2009. Plaintiffs' amended complaint, which was filed on August 27, 2010, adds Officer Caponigro as a defendant and contains the following allegations. The City was responsible for controlling and patrolling public roadways running through Prospect Heights. On December 10 and 11, 2008, ice or deep sitting water accumulated on the rightmost lane of eastbound Palatine Road, just under a viaduct at Wolf Road. On December 10, 2008, at approximately 8:54 p.m., and on December 11, 2008, at approximately 3:49 a.m., Officer Caponigro, acting as an agent and employee of the City, responded to accidents occurring on this part of eastbound Palatine Road. On both occasions, Officer Caponigro's police car acted as a barrier at the accident site. On both occasions, Officer Caponigro's police car allegedly contained barriers in the trunk which could have been used for traffic control. Officer Caponigro was aware that the City's department of public works maintained a supply of barriers and signs.

¶ 4 On December 11, 2008, at approximately 4:25 a.m., Ignacio drove through the accident site, lost control of his vehicle, and was involved in multiple collisions due to the ice or deep standing water at the site. The amended complaint alleges the City knew or should have known of the hazards at the accident site. Count I of the amended complaint alleged that Officer

Caponigro was negligent in: (1) removing his police car as a barrier at the accident site after the first two accidents; (2) leaving an accident investigation without removing the hazards or warning motorists of them; (3) failing to contact the City's department of public works to provide a sign or barrier at the accident site before leaving the site; (4) failing to remain at the accident site until the Illinois Department of Transportation could arrive; and (5) leaving the scene of an accident investigation when he knew or should have known of an existing roadway hazard that would endanger other motorists. Count II of the amended complaint alleged the City was negligent based on the alleged negligence of Officer Caponigro. Count III of the amended complaint alleged that Officer Caponigro's acts and omissions also constituted willful and wanton misconduct. Count IV of the amended complaint alleged that the City was liable for Officer Caponigro's alleged willful and wanton misconduct. In count V of the amended complaint, Cecilia sought damages under the Family Expenses Act (750 ILCS 65/15 (West 2008)), based on defendants' acts and omissions. Finally, in count VI of the amended complaint, Cecilia sought damages for loss of consortium based on defendants' acts and omissions.

¶ 5 On September 22, 2010, defendants filed a motion to dismiss the amended complaint pursuant to section 2-619 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2010)). Defendants first argued that the negligence claim against the City and all of the claims against Officer Caponigro were barred by the one-year statute of limitations contained in section 8–101 of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/8–101 (West 2008)), because they were not raised in the original complaint and Officer Caponigro was not originally a named defendant. Defendants

next argued that under the public duty rule, a municipality and its employee only owe a duty to protect the public in general, not particular persons, and are not liable for a failure to provide police protection. Lastly, defendants argued that assuming *arguendo* they owed plaintiffs a duty, defendants were immune from liability under sections 3-104, 3-105(a), 2-201, 2-202, 2-105, and 2-107 of the Tort Immunity Act (745 ILCS 10/2-105, 2-107, 2-201, 2-202, 3-104, 3-105(a) (West 2008)).

¶ 6 On October 29, 2010, plaintiffs filed their response to defendants' motion to dismiss. Plaintiffs argued that the negligence claim against the City and all of the claims against Officer Caponigro were not barred by the statute of limitations because those claims "related back" to the claims in their original complaint (see 735 ILCS 5/2-616(d) (West 2008)). Plaintiffs also argued defendants had a duty to maintain the police car as a barrier once the car was placed at the scene. Plaintiffs further argued defendants owed them a duty of care because a police officer: (1) responded to the accident site; (2) engaged in the "execution or enforcement" of the law; and (3) asserted control over the scene. Lastly, plaintiffs argued that their claims were not negated by the Tort Immunity Act provisions defendants cited.

¶ 7 On November 22, 2010, defendants filed their reply to plaintiffs' response to the motion to dismiss.

¶ 8 On December 2, 2010, the circuit court took defendants' motion to dismiss under advisement. On December 15, 2010, the circuit court issued an order striking the allegations against Officer Caponigro in his individual capacity, but retaining the allegations against him in his representative capacity. The circuit court also ruled that defendants did not owe a duty to the

plaintiffs. Accordingly, the circuit court declined to rule on whether defendants were immune from liability under the Tort Immunity Act.

¶ 9 On January 14, 2011, plaintiffs filed a motion to reconsider. On January 24, the circuit court denied the motion to reconsider. On February 9, 2011, plaintiffs filed a timely notice of appeal to this court.

¶ 10 DISCUSSION

¶ 11 I. Standard of Review

¶ 12 On appeal, plaintiffs argue the circuit court erred in dismissing their complaint by ruling that defendants did not owe plaintiffs a legal duty. A motion to dismiss under section 2-619 of the Code "admits the legal sufficiency of the plaintiff's claim but asserts 'affirmative matter' outside of the pleading that defeats the claim." *Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). The purpose of a dismissal pursuant to section 2-619 of the Code "is to dispose of issues of law and easily proved issues of fact early in the litigation." *Czarobski*, 227 Ill. 2d at 369. When reviewing a motion to dismiss under section 2-619 of the Code, this court " 'must consider whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law.' " *Czarobski*, 227 Ill. 2d at 369 (quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17 (1993)). We review an order granting a motion to dismiss under section 2-619 of the Code *de novo*. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006).

¶ 13 II. The Public Duty Rule Under Section 2-619 of the Code

¶ 14 Generally, the lack of a legal duty would be grounds for dismissing a complaint under section 2-615 of the Code for failure to state a claim upon which relief may be granted, rather than affirmative matter considered under section 2-619 of the Code. See, *e.g.*, *Downey v. Wood Dale Park District*, 286 Ill. App. 3d 194, 199-200 (1997); *Ellison v. Village of Northbrook*, 272 Ill. App. 3d 559, 560 (1995). However, the defendants in this case, a municipality and a municipal employee in his representative capacity, relied upon the public duty rule to obtain dismissal of the allegations against them. An examination of the history of governmental immunity and case law in Illinois regarding the public duty rule reveals that, in the type of case at issue here, the rule is also considered an immunity from tort liability.

¶ 15 In 1965, after the Illinois Supreme Court abolished the doctrine of sovereign immunity (see *Molitor v. Kaneland Community Unit District No. 302*, 18 Ill. 2d 11 (1959)), the legislature enacted the Tort Immunity Act to protect local public entities and public employees from liability resulting from the operation of government. *DeSmet v. County of Rock Island*, 219 Ill. 2d 497, 505 (2006) (citing *Zimmerman v. Village of Skokie*, 183 Ill. 2d 30, 43 (1998)). The purpose of enacting the Tort Immunity Act was to ensure that public funds were not dissipated by private damage awards. *DeSmet*, 219 Ill. 2d at 505; see 745 ILCS 10/1–101.1(a) (West 2010). Subsequenly, the Illinois Constitution of 1970 (Ill. Const. 1970, art. XIII, §4) reserved for the legislature the ultimate authority to determine whether local units of government were immune from liability in tort. *DeSmet*, 219 Ill. 2d at 506.

¶ 16 It is well established that the Tort Immunity Act does not impose new duties on a public entity; the Tort Immunity Act merely confers immunities and defenses. See 745 ILCS 10/1–101.1(a) (West 2010); see also *Village of Bloomingdale v. CDG Enterprises, Inc.*, 196 Ill. 2d 484, 490 (2001) (and cases cited therein); *Vega v. Northeast Illinois Regional Commuter R.R. Corp.*, 371 Ill. App. 3d 572, 582–83 (2007). Accordingly, the existence of a duty and the existence of an immunity are usually distinct issues that must be analyzed separately. *Village of Bloomingdale*, 196 Ill. 2d at 490 (citing *Barnett v. Zion Park District*, 171 Ill. 2d 378, 388 (1996)). The Tort Immunity Act implicitly recognizes duties existing at common law; therefore, we may look to common law to determine whether a public entity owes a duty. *Village of Bloomingdale*, 196 Ill.2d at 490. If a duty is found, we will turn to the Tort Immunity Act to determine whether the entity is liable for breach of that duty. *Village of Bloomingdale*, 196 Ill. 2d at 490.

¶ 17 Looking to the common law, we acknowledge the public duty rule, which generally establishes that "a municipality or its employees [are] not liable for failure to supply general police or fire protection." *Huey v. Town of Cicero*, 41 Ill. 2d 361, 363 (1968). The policy supporting the rule is that a municipality's duty is to protect the well-being of the community at large and not specific members of the public. *Zimmerman*, 183 Ill. 2d at 44. In *DeSmet*, the Illinois Supreme Court discussed the status of the public duty rule in light of viable case law. *DeSmet*, 219 Ill. 2d at 506–09. Our supreme court acknowledged that it previously concluded that the public duty rule survived the abolition of sovereign immunity and the enactment of the Tort Immunity Act in *Zimmerman* and *Huey*. *DeSmet*, 219 Ill. 2d at 506.

¶ 18 However, the *DeSmet* court suggested, based on its prior comments in *Aikens v. Morris*, 145 Ill. 2d 273, 278 n.1 (1991), that the public duty rule had been incorporated into section 4–102 of the Tort Immunity Act (745 ILCS 10/4–102 (West 2008)), which immunizes a municipality and its employees from liability for failure to provide police protection. See *DeSmet*, 219 Ill. 2d at 508–09 ("[t]his court's comments in *Aikens* suggest *** that the public duty rule, at least in this context, has been incorporated into the Tort Immunity Act as an 'immunity' "). Indeed, the Illinois Supreme Court previously referred to the public duty rule as a "common law immunity." *Calloway v. Kinkelaar*, 168 Ill. 2d 312, 326 (1995). Thus, we conclude the public duty rule – particularly as incorporated by section 4-102 of the Tort Immunity Act – is affirmative matter properly raised under section 2-619 of the Code.

¶ 19 III. Application of the Public Duty Rule

¶ 20 Having concluded the public duty rule is affirmative matter under section 2-619 of the Code, we now address the rule's applicability to the case before us. The public duty rule, as incorporated by section 4-102 of the Tort Immunity Act, provides in pertinent part:

> "Neither a local public entity nor a public employee is liable for failure to establish a police department or otherwise provide police protection service or, if police protection service is provided, for failure to provide adequate police protection or service ***."
> 745 ILCS 10/4-102 (West 2008).

Responding to the motion to dismiss, plaintiffs relied in part on section 2-202 of the Tort Immunity Act, which provides:

> "A public employee is not liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes willful and wanton conduct." 745 ILCS 10/2-202 (West 2008).

Plaintiffs argued defendants owed them a duty of care because a police officer: (1) responded to the accident site; (2) engaged in the "execution or enforcement" of the law; and (3) asserted control over the scene. Plaintiffs' argument appears to rely on the *DeSmet* court's analysis of *Doe v. Calumet City*, 161 Ill. 2d 374 (1994). *DeSmet*, 219 Ill. 2d at 519-21. The *DeSmet* court reasoned that where an officer responds to a call requiring enforcement of the traffic laws, he or she exercises a degree of control over the scene, which may give rise to liability (in cases of willful and wanton misconduct) under section 2-202 of the Tort Immunity Act. *Id.* at 521.

¶ 21 However, in *Ries v. City of Chicago*, 242 Ill. 2d 250 (2011), the court explicitly determined that to the extent *Doe* holds that section 2–202 of the Tort Immunity Act provides a willful and wanton exception to immunities under the Tort Immunity Act, it "is no longer good law." *Ries*, 242 Ill. 2d at 227. The *Ries* court reiterated its long-held view that "[w]hen the plain language of an immunity provision in the Tort Immunity Act contains no exception for willful and wanton misconduct," the legislature intended to provide immunity against both negligence and willful and wanton misconduct. (Internal quotation marks omitted.) *Ries*, 242 Ill. 2d at 224. Section 4–102 of the Tort Immunity Act contains no exception for willful and wanton misconduct. Thus, if section 4-102 of the Tort Immunity Act applies, the defendants in this case would either be immune from liability or did not owe plaintiffs a legal duty. See *Doe v. Village*

of Schaumburg, Nos. 1-09-3471, 1-09-3300, 1-09-3301, 1-09-3302, 1-09-3303 (consolidated), slip op. at 9 (Ill. App. June 30, 2011).

¶ 22 Accordingly, the issue in this case is whether Officer Caponigro's alleged acts or omissions were police protection services or execution or enforcement of the law. *Aikens*, 145 Ill. 2d at 282. Ordinarily, the determination of whether a public employee is enforcing a law is a question of fact that must be determined by the trier of fact in light of the circumstances in each case. *Lacey v. Village of Palatine*, 232 Ill. 2d 349, 367 (2009). However, a court may, as a matter of law, determine whether a public employee is enforcing a law when the facts alleged support only one conclusion. *Lacey*, 232 Ill. 2d at 367.

¶ 23 "Police protection service" under section 4-102 of the Tort Immunity Act is implicated where police are called upon to assist or locate motorists who have driven off the roadway. *DeSmet*, 219 Ill. 2d at 512. In reaching this conclusion, the *DeSmet* court approvingly cited *McElmeel v. Village of Hoffman Estates*, 359 Ill. App. 3d 824, 827-29 (2005), and *Kavanaugh v. Midwest Club, Inc.*, 164 Ill. App. 3d 213, 221 (1987). In *McElmeel*, the officer had stopped traffic in order for a tow truck to pull a minivan out of a snowy ditch. She had turned on the flashing lights on top of her squad car, as well as the flashing headlights and taillights, but did not place any flares or similar devices to notify traffic of the need to stop, when a six-car, chain-reaction collision occurred. *McElmeel*, 359 Ill. App. 3d at 826. The *McElmeel* court relied on *Long v. Soderquist*, 126 Ill. App. 3d 1059, 1064-65 (1984), where this court held that the deputy's failure to light flares near two vehicles, failure to direct the drivers to remove their vehicles from the highway, failure to warn of the presence of the vehicles on the highway, and

failure to call for assistance while assisting drivers and vehicles involved in two accidents were immunized by section 4-102 of the Tort Immunity Act, even though plaintiffs alleged that those failures constituted willful and wanton conduct. *McElmeel*, 359 Ill. App. 3d at 829. The *McElmeel* court also relied on *Kavanaugh*, 164 Ill. App. 3d at 221, in which this court concluded that section 4-102 of the Tort Immunity Act applied to the police function of responding to a call of a traffic matter involving a motor vehicle that had been driven off the roadway and into a nearby retention pond. *McElmeel*, 359 Ill. App. 3d at 829.

¶ 24 The *McElmeel* court noted that in *Fitzpatrick v. City of Chicago*, 112 Ill. 2d 211, 221-22 (1986), our supreme court held that a police officer investigating an automobile accident was "enforcing and executing the law" for the purposes of section 2-202 of the Tort Immunity Act. *McElmeel*, 359 Ill. App. 3d at 829. However, the officer in *McElmeel* was not investigating a traffic accident. *Id.* The *McElmeel* court concluded the officer was providing police protection services immune from liability under section 4-102 of the Tort Immunity Act because the officer was assisting a motorist, and not investigating the scene. *Id.* The *McElmeel* court noted that "[t]he same was true in *Long*, even though the motorists there apparently had been in an accident, as the officer there was seeking to check on a motorist's injury and possibly summon medical assistance." *Id.*

¶ 25 Moreover, *McElmeel* noted that the *Aikens* court discussed both *Fitzpatrick* and *Long* by distinguishing them, with no indication that *Long* should be considered bad law. *Id.* The *Aikens* court noted that sections 2-202 and 4-102 of the Tort Immunity Act are supported by different policy considerations. *Aikens*, 145 Ill. 2d at 283. These same policy concerns are discussed in

DeSmet, *i.e.*, an officer engaged in "execution or enforcement" of the law "exercises a degree of control over the situation and may well alter the circumstances at the scene for better-or worse." *DeSmet*, 219 Ill. 2d at 521.

¶ 26 In this case, plaintiffs allege that Officer Caponigro investigated the two prior incidents at the accident site and argue that he had control over the accident site. However, as the circuit court noted, it is undisputed that police cleared the scene 45 minutes before Ignacio's crash. Indeed, the crux of plaintiffs' complaint is that Officer Caponigro did not alter the circumstances at the scene. Moreover, Officer Caponigro's act of pulling up behind cars in the prior incidents is the type of act this court has determined to be police protection services in *McElmeel* and *Long*. The control of traffic around an accident site, unless specifically directed to particular people, is conducted for the benefit of the public generally and thus is within the scope of the public duty rule as incorporated in section 4-102 of the Tort Immunity Act. See *Long*, 126 Ill. App. 3d at 1064-65.

¶ 27 Plaintiffs argue in the alternative that defendants owed them a duty for failure to maintain the squad car or other traffic barrier at the accident site. At common law, a municipality's duty to maintain its property in a safe condition did not extend to creating or erecting public improvements, but did extend to maintaining those public improvements it does construct in a reasonably safe condition. See *Governmental Interinsurance Exchange v. Judge*, 221 Ill. 2d 195, 215 (2006). Accordingly, section 3–104 of the Tort Immunity Act provides:

> "Neither a local public entity nor a public employee is liable under this Act for an injury caused by the failure to *initially* provide regulatory traffic control devices, stop signs,

yield right-of-way signs, speed restriction signs, distinctive roadway markings or any other traffic regulating or warning sign, device or marking, signs, overhead lights, traffic separating or restraining devices or barriers." (Emphasis added.) 745 ILCS 10/3–104 (West 2008).

¶ 28 In this case, the circuit court noted that Palatine Road is a state highway controlled and maintained by the Illinois Department of Transportation. The defendants filed documents from the Illinois Department of Transportation supporting the motion to dismiss, showing that the Village of Wheeling ultimately cleared water from the accident site. On appeal, plaintiffs have not raised any question of fact regarding the ownership of the land. Rather, in their reply brief, plaintiffs simply assert that the ownership of the land is irrelevant because they are not claiming the City had a duty to fix or remove the hazard. This assertion is incorrect. In general, " 'the existence of a duty and the existence of an immunity are separate issues.' " *DeSmet*, 219 Ill. 2d at 507 (quoting *Zimmerman*, 183 Ill. 2d at 45). As cases like *Judge* indicate, the duty to maintain public improvements is part of the legal duty as a landowner. Thus, any duty defendants owed to plaintiffs would have to stem from Officer Caponigro's police work at the accident site. However, as this order explains, Officer Caponigro's police work falls within the scope of the public duty rule as incorporated in section 4-102 of the Tort Immunity Act.

¶ 29 CONCLUSION

¶ 30 In sum, Officer Caponigro, in parking his squad car behind vehicles at the accident site, provided police protection services, not execution or enforcement of the law, for the benefit of the general public within the scope of the public duty rule as incorporated in section 4-102 of the

Tort Immunity Act. Plaintiffs failed to show a genuine issue of material fact existed about whether the City owed them a duty as a landowner. Thus, the circuit court did not err in dismissing plaintiffs' amended complaint. Accordingly, the judgment of the circuit court is affirmed.

¶ 31 Affirmed.