2014 IL App (1st) 132069-U

FIRST DIVISION
JULY 28, 2014

No. 1-13-2069

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CHRISTIANA TYSON, Plaintiff-Appellant, v. JODY B. PRAVECEK, P.C., and COGAN & MCNABOLA, P.C., an Illinois Professional Corporation, Defendants-Appellees.	))))))))))	Appeal from the Circuit Court of Cook County. No. 09 L 12536 Honorable Kathy M. Flanagan, Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Hoffman and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in denying plaintiff's motion to substitute judge as of right and did not err in granting defendants' motion for summary judgment, where no genuine issue of material fact exists to support her legal malpractice claim.

¶ 2 This appeal arises from the May 24, 2013 order entered by the circuit court of Cook County, which granted summary judgment in favor of defendants Jody Pravecek (Pravecek) and law firm Cogan & McNabola, P.C. (Cogan & McNabola), in a legal malpractice action initiated by the plaintiff, Christiana Tyson (Tyson). This appeal also arises from the circuit court's June

27, 2012 order denying Tyson's "motion for substitution of judge as of right." On appeal, Tyson argues that: (1) the circuit court erred in denying her "motion for substitution of judge as of right"; and (2) the circuit court erred in granting summary judgment in favor of Pravecek and Cogan & McNabola. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 On September 25, 1999, Tyson tripped and fell on a sidewalk outside of Gately Stadium, a facility used for football games in Chicago, Illinois. As a result of the accident, Tyson allegedly suffered severe and permanent injuries. Subsequently, Tyson retained the legal services of Charles A. Conner, Jr. and his law firm, the Law Offices of Charles A. Conner, Jr., P.C. (collectively, the Conner firm), which are not parties to the instant action. On August 24, 2000, the Conner firm filed a personal injury lawsuit on behalf of Tyson against the City of Chicago (the City) and the Chicago Park District (CPD), in connection with Tyson's 1999 trip and fall accident (case No. 00 L 009711) (the underlying action).

¶ 5 On December 15, 2000, the City filed a motion to dismiss the underlying action, asserting that it neither owned nor controlled the property on which Tyson fell. On February 7, 2001, in response to the City's motion to dismiss, the CPD asserted that that it did not own or control the property. On March 23, 2001, the circuit court denied the City's motion to dismiss. On April 15, 2002, the circuit court granted Tyson's motion to voluntarily dismiss the underlying action without prejudice, stating that Tyson may refile the lawsuit within one year. Subsequently, the Conner firm withdrew from representation.

¶ 6 In April 2003, shortly before the one-year deadline for refiling the underlying action (735 ILCS 5/13-217 (West 2012)), Tyson retained the legal services of Pravecek and the law firm at

which she was employed, Cogan & McNabola. In Pravecek's discovery deposition, she testified that Tyson retained Cogan & McNabola less than two weeks prior to the deadline for refiling her personal injury lawsuit. Pravecek further testified that, in investigating Tyson's claim, Pravecek reviewed documents and case file materials that Tyson provided her, reviewed court file documents, and hired a private investigator to determine who owned the property.

¶ 7 On April 14, 2003, prior to the one-year refiling deadline, Pravecek refiled a personal injury lawsuit on behalf of Tyson in connection with her 1999 trip and fall incident (case No. 03 L 004482). The refiled complaint named the City as the sole defendant in the cause of action. On March 15, 2005, the City filed a motion for summary judgment, alleging that the walkway where Tyson fell was not owned or maintained by the City. On May 10, 2005, the circuit court granted the City's motion for summary judgment.

¶ 8 On October 22, 2009, Tyson filed the instant legal malpractice action against Pravecek and Cogan & McNabola (case No. 09 L 12536), alleging that they were negligent when they failed to name the CPD as a defendant in refiling the underlying action. In the legal malpractice complaint, Tyson further alleged that the CPD owned, managed, maintained, controlled and operated the area where she tripped and fell. She further asserted that Pravecek and Cogan & McNabola failed to exercise reasonable diligence in identifying the owner of the subject property, failed to conduct an appropriate investigation to confirm the viability of including the CPD as a defendant in the refiled underlying action, and failed to take action "commensurate with standards and practice within the community of attorneys at law to investigate, pursue, or preserve a cause of action in connection with the injuries suffered by [Tyson] on September 25, 1999."

¶ 9 On January 8, 2010, Pravecek and Cogan & McNabola filed an answer and an affirmative defense to Tyson's legal malpractice complaint, alleging that any injuries that Tyson may have sustained in the 1999 trip and fall incident was the result of her own negligence in failing to keep a proper lookout for her own safety. On April 28, 2010, Tyson filed a response denying the allegations in Pravecek and Cogan & McNabola's affirmative defense.

¶ 10 On June 27, 2012, Tyson filed a "motion for substitution of judge as of right" (motion to substitute judge), which the circuit court denied on the same day.

¶ 11 On August 7, 2012, the witness disclosure phases of the discovery process closed.

¶ 12 On November 27, 2012, Pravecek and Cogan & McNabola filed a motion for summary judgment, alleging, *inter alia*, that the CPD was protected from liability by the Tort Immunity Act (745 ILCS 10/3-106 (West 2012)) in the underlying action, and thus, the omission of the CPD as a named defendant in the refiled complaint in the underlying action did not proximately cause Tyson any injury. On that same day, November 27, 2012, Pravecek and Cogan & McNabola also filed a motion to bar Tyson's expert (motion to bar expert), Anthony Andrews (Andrews), by arguing that Andrews lacked a sufficient factual basis from which to base his opinions, and that he lacked the necessary experience to qualify as an expert regarding personal injury cases involving municipalities.

¶ 13 On February 6, 2013, Tyson filed a response to Pravecek and Cogan & McNabola's motion for summary judgment, as well as a response to their motion to bar expert. On February 25, 2013, Pravecek and Cogan & McNabola filed a reply in support of their motion for summary judgment and motion to bar expert.

¶ 14 On May 24, 2013, the circuit court granted summary judgment in favor of Pravecek and Cogan & McNabola, finding that the Tort Immunity Act applied to immunize the CPD from

liability in the underlying action so that, "even if the [CPD] had been named a defendant in the underlying action, whether it owned the subject property or not [Tyson] would not have prevailed against it." Accordingly, the circuit court found that Tyson could not prove the element of proximate cause and, thus, held that summary judgment in favor of Pravecek and Cogan & McNabola was appropriate. In light of the circuit court's decision on the motion for summary judgment, the court did not rule on the motion to bar expert.

¶ 15 On June 24, 2013, Tyson filed a timely notice of appeal.

¶ 16 ANALYSIS

¶ 17 We determine the following issues on appeal: (1) whether the circuit court erred in denying Tyson's motion to substitute judge; and (2) whether the circuit court erred in granting summary judgment in favor of Pravecek and Cogan & McNabola.

¶ 18 We first determine whether the circuit court erred in denying Tyson's motion to substitute judge, which we review *de novo*. See *Gay v. Frey*, 388 Ill. App. 3d 827, 833 (2009).

¶ 19 Tyson argues that the circuit court erred in denying her June 27, 2012 motion to substitute judge, arguing that the motion was "presented before any trial or hearing in the case and before a ruling in the case."

¶ 20 Pravecek and Cogan & McNabola counter that the circuit court properly denied Tyson's motion to substitute judge. They argue that, by the time of the filing of the motion to substitute judge, the circuit court had already made various substantial rulings and determinations as to the scheduling and disclosure of witnesses, had ruled on a motion filed by Tyson to vacate a dismissal for want of prosecution (DWP), and had ruled on a motion to set a reasonable expert fee for Tyson's treating physician. Pravecek and Cogan & McNabola contend that, even if the circuit court's previous rulings were not "substantial," the motion to substitute judge was

properly denied because Tyson did not file the motion at the "earliest practical moment" and her delay in filing the motion had given her "a chance to test the waters and form an opinion as to the court's disposition toward her case."

¶ 21 In reply, Tyson argues that the circuit court had not ruled on any substantial issues by the time of the filing of her motion to substitute judge, and that she had not had an opportunity to "test the waters or form an opinion as to the court's disposition."

¶ 22 Section 2-1001(a)(2) of the Code of Civil Procedure (the Code) provides in pertinent part the following:

> "(2) Substitution as of right. When a party timely exercises his or her right to a substitution without cause as provided in this paragraph (2),
>
> (i) Each party shall be entitled to one substitution of judge without cause as a matter of right.
>
> (ii) An application for substitution of judge as of right shall be made by motion and shall be granted if it is presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case, or if it is presented by the consent of the parties." 735 ILCS 5/2-1001(a)(2) (West 2012).

Under section 2-1001(a)(2) of the Code, a litigant is allowed one substitution of judge without cause as of right. 735 ILCS 5/2-1001(a)(2) (West 2012). The right to substitution of judge is absolute when properly made, and the circuit court has no discretion to deny the motion. *Cincinnati Insurance Co. v. Chapman*, 2012 IL App (1st) 111792, ¶ 23. " 'However, to prohibit

litigants from "judge shopping" and seeking a substitution only after they have formed an opinion that the judge may be unfavorably disposed toward the merits of their case, a motion for substitution of judge as of right must be filed at the earliest practical moment before commencement of trial or hearing and before the trial judge considering the motion rules upon a substantial issue in the case.' " *Id.* (quoting *In re Estate of Hoellen*, 367 Ill. App. 3d 240, 245-46 (2006)). A ruling is considered "substantial" in nature when it directly relates to the merits of the case. *In re Marriage of Abma*, 308 Ill. App. 3d 605, 610 (1999). Even if the trial judge did not rule upon a substantial issue, a motion for substitution of judge is properly denied if the litigant "had an opportunity to test the waters and form an opinion as to the court's disposition" of an issue. (Internal quotation marks omitted.) *Chapman*, 2012 IL App (1st) 111792, ¶ 23.

¶ 23 First, we note that both Tyson's opening and reply briefs fail to comply with Supreme Court Rule 341(h)(7) (eff. July 1, 2008), by failing to cite to the pages of the record on appeal in support of her arguments on this issue. This results in forfeiture of her arguments regarding the court's denial of the motion to substitute judge. See *First National Bank of LaGrange v. Lowrey*, 375 Ill. App. 3d 181, 211 (2007). Forfeiture aside, we find that Tyson is not entitled to relief as she contends on this basis. The record reveals that, at the time Tyson filed the June 27, 2012 motion to substitute judge, the circuit court had already made several rulings in the case. These prior rulings included the court's June 12, 2012 order vacating a previous DWP ruling against Tyson in the case; and the court's December 17, 2010 order granting Pravecek and Cogan & McNabola's motion to set a reasonable expert fee for Tyson's treating physician, Dr. Latva, who provided medical care to Tyson after she allegedly suffered injuries in the 1999 trip and fall incident. Pravecek and Cogan & McNabola had filed the motion to set a reasonable expert fee for Dr. Latva after Dr. Latva requested to be paid an amount for his participation in a discovery

deposition which Pravecek and Cogan & McNabola alleged was unreasonable. We need not determine whether either of these prior rulings by the court could be considered "substantial" under section 2-1001(a)(2) of the Code because, even if they were not "substantial," the court's denial of Tyson's motion to substitute judge was proper where she failed to file the motion at the "earliest practical moment" and had the opportunity to "test the waters and form an opinion as to the court's disposition" of an issue. See *Chapman*, 2012 IL App (1st) 111792, ¶ 23. Here, Tyson filed the motion to substitute judge on June 27, 2012, almost *three years* after she filed the instant legal malpractice action in October 2009 and, thus, it could not be concluded that the motion was filed at the "earliest practical moment." Further, we find that, after three years of litigation, which included the court's ruling granting Pravecek and Cogan & McNabola's motion to set a reasonable expert fee for Dr. Latva, Tyson had the opportunity to "test the waters and form an opinion as to the court's disposition" of an issue. Although not raised by either party, we also find that the circuit court's denial of the motion to substitute judge can be affirmed on the additional basis that Tyson provided an incomplete record on appeal. See *Moenning v. Union Pacific R.R. Co.*, 2012 IL App (1st) 101866, ¶ 38 (an appellant has the burden of presenting a sufficiently complete record of proceedings to support a claim of error; in the absence of a complete record on appeal, we presume that the order entered by circuit court was in conformity with the law and had a sufficient factual basis); *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984) ("[a]ny doubts which may arise from the incompleteness of the record will be resolved against the appellant"). In the record before us, Tyson, as the appellant, only provided documents showing her June 27, 2012 motion to substitute judge, and an order by the circuit court denying the motion on the same day. Without transcripts of the hearing at which the circuit court denied Tyson's motion to substitute judge, we must presume that the circuit court followed the law and

had a sufficient factual basis for denying her motion. Therefore, we hold that the circuit court properly denied Tyson's motion to substitute judge.

¶ 24 We next determine whether the circuit court erred in granting summary judgment in favor of Pravecek and Cogan & McNabola, which we review *de novo*. See *Collins v. St. Paul Mercury Insurance Co.*, 381 Ill. App. 3d 41, 45 (2008).

¶ 25 Tyson argues that the circuit court erred in granting Pravecek and Cogan & McNabola's motion for summary judgment. She contends that, had the CPD been named as a defendant in the refiled underlying action, the Tort Immunity Act would not have applied to immunize the CPD from liability in the underlying action. She asserts that, at the very least, a material issue of fact exists as to whether the CPD would have been protected from liability. Specifically, she argues that the Tort Immunity Act did not apply because the sidewalk on which she was injured was not property intended or permitted to be used for recreational property, and the sidewalk did not increase, beyond incidentally, the usefulness of Gately Stadium. Moreover, Tyson argues that although the basis of the circuit court's ruling did not center around the issue of ownership of the property in question, she has presented evidence that the CPD owned the property on which she fell. Tyson further argues that she has presented sufficient evidence to show that Pravacek and Cogan & McNabola deviated from the standard of care in failing to name the CPD as a defendant in the refiled underlying action.

¶ 26 Pravecek and Cogan & McNabola counter that the circuit court properly granted summary judgment in their favor, where Tyson could not prove the necessary elements for a legal malpractice cause of action. Specifically, they argue that Tyson could not demonstrate that the alleged deviation from the standard of care proximately caused her to suffer damages because, even had the CPD been included as a party defendant in the refiled underlying action,

the CPD was immune from liability under the Tort Immunity Act. Thus, they argue, Tyson could not have prevailed against the CPD in the underlying action. They further contend that Tyson has failed to present any admissible evidence that the CPD owned or controlled the property in question. Moreover, Pravecek and Cogan & McNabola contend that Tyson failed to disclose a proper expert witness to testify to their alleged deviation from the standard of care in not including the CPD as a party defendant in the refiled underlying action.

¶ 27 Summary judgment is proper where "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 2010). "In considering a motion for summary judgment, the court must view the record in the light most favorable to the nonmoving party." *Pielet v. Pielet*, 474 Ill. App. 3d 407, 419 (2010). "The purpose of summary judgment is not to try a question of fact, but to determine whether one exists" that would preclude the entry of judgment as a matter of law. *Land v. Board of Education of the City of Chicago*, 202 Ill. 2d 414, 421 (2002). "Thus, although the nonmoving party is not required to prove his case in response to a motion for summary judgment, he must present a factual basis that would arguably entitle him to judgment." *Id.* at 432.

¶ 28 To prevail on a legal malpractice claim, a plaintiff client must plead and prove that the defendant attorneys owed the client a duty of care arising from the attorney-client relationship, that the defendants breached that duty, and that as a proximate result, the client suffered injury. *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 306 (2005). "The fact that the attorney may have breached his duty of care is not, in itself, sufficient to sustain the client's cause of action." *Id.* "Even if negligence on the part of the attorney is established, no action will lie against the attorney unless that negligence proximately

caused damage to the client." *Id.* at 306-07. A plaintiff client in a legal malpractice action must prove "a case-within-a-case, that is, the plaintiff is required to prove the underlying action and what his recovery would have been in that prior action absent the alleged malpractice." *Fox v. Berks*, 334 Ill. App. 3d 815, 817 (2002). A plaintiff client must prove that, "but for" the attorney's negligence, the client would not have suffered the damages alleged. *Glass v. Pitler*, 276 Ill. App. 3d 344, 349 (1995). Further, unless the client can demonstrate that he has sustained a monetary loss as the result of some negligent act on the lawyer's part, his cause of action cannot succeed." *Northern Illinois Emergency Physicians*, 216 Ill. 2d at 307.

¶ 29 Section 3-106 of the Tort Immunity Act (the Act) provides in pertinent part as follows:

> "Neither a local public entity nor a public employee is liable for an injury where the liability is based on the existence of a condition of any public property intended or permitted to be used for recreational purposes, including but not limited to parks, playgrounds, open areas, buildings or other enclosed recreational facilities, unless such local entity or public employee is guilty of willful and wanton conduct proximately causing such injury." 745 ILCS 10/3-106 (West 2012).

The purposes of section 3-106 are to " 'prevent the diversion of public funds from their intended purpose to the payment of damage claims' " and to " 'encourage the development and maintenance of public parks, playgrounds, and similar recreation areas.' " *Callaghan v. Village of Clarendon Hills*, 401 Ill. App. 3d 287, 291 (2010) (quoting *Bubb v. Springfield School District 186*, 167 Ill. 2d 372, 378 (1995); *Kayser v. Village of Warren*, 303 Ill. App. 3d 198, 200 (1999)). It is well-settled that immunity under section 3-106 depends upon the *character* of the property

as a whole and not on the plaintiff's use of the property at the time of injury. *Callaghan*, 401 Ill. App. 3d at 292. Determination of the character of the property involves a case-by-case evaluation. *Id.* Section 3-106 may apply to facilities or structures that, though not themselves recreational, increase the usefulness of adjacent public property intended or permitted to be used for recreational purposes. *Id.*

¶ 30 In the case at bar, it is undisputed by the parties that the CPD is a "local public entity" within the meaning of section 3-106 of the Act. The parties also do not dispute that the sidewalk on which Tyson fell is "public property" under the Act. We also note that Tyson has neither alleged, argued, nor raised any arguments that the CPD's actions were "willful and wanton," in her legal malpractice complaint, response to Pravecek and Cogan & McNabola's motion for summary judgment, or briefs on appeal. Thus, the relevant question before us is whether the sidewalk on which Tyson fell was "intended or permitted to be used for recreational purposes" within the meaning of section 3-106 of the Act. See 745 ILCS 10/3-106 (West 2012).

¶ 31 In the April 14, 2003 refiled complaint in the underlying action against the City (case No. 03 L 004482), Tyson alleged that, on September 25, 1999, she sustained injuries after tripping and falling on a public sidewalk along a chain link fence surrounding Gately Stadium in Chicago, Illinois. In its March 15, 2005 motion for summary judgment (case No. 03 L 004482), the City alleged that the sidewalk where Tyson fell was not owned or maintained by the City. On May 10, 2005, the circuit court (case No. 03 L 004482) granted the City's motion for summary judgment. On October 22, 2009, Tyson filed the instant legal malpractice action, alleging that Pravecek and Cogan & McNabola were negligent when they failed to name the CPD as a defendant in the refiled underlying action. In the legal malpractice complaint, Tyson alleged that she was "a pedestrian walking on a walkway along the chain link fence surrounding

Gately Stadium next to the sewer cover lying on 103rd [Street] on the north bound side of the street between Corliss Avenue and Woodlawn Avenue" when she tripped, fell, and suffered severe injuries in 1999. She further alleged that the CPD owned, managed, controlled and operated the area where she tripped and fell. She further asserted that Pravecek and Cogan & McNabola failed to exercise reasonable diligence in identifying the owner of the subject property, failed to conduct an appropriate investigation to confirm the viability of including the CPD as a defendant in the refiled action, and failed to take actions "commensurate with standards and practice within the community of attorneys at law to investigate, pursue, or preserve a cause of action in connection with the injuries suffered by [Tyson] on September 25, 1999." On November 27, 2012, Pravecek and Cogan & McNabola filed a motion for summary judgment, alleging, *inter alia*, that the CPD would have been immune from liability under the Act, and thus, the omission of the CPD as a named defendant in the refiled complaint in the underlying action did not proximately cause Tyson any injury. On February 6, 2013, Tyson filed a response to Pravecek and Cogan & McNabola's motion for summary judgment, to which Pravecek and Cogan & McNabola filed a reply on February 25, 2013. On May 24, 2013, the circuit court granted summary judgment in favor of Pravacek and Cogan & McNabola, finding that the Act applied to immunize the CPD from liability in the underlying action so that, "even if the [CPD] had been named a defendant in the underlying action, whether it owned the subject property or not [Tyson] would not have prevailed against it." The circuit court analogized the facts in Tyson's 1999 trip and fall incident to the facts in our supreme court's decision in *Sylvester v. Chicago Park District*, 179 Ill. 2d 500 (1997). Accordingly, the circuit court found that Tyson could not prove the element of proximate cause in her legal malpractice claim and, thus, held that the entry of summary judgment was proper.

¶ 32 Viewing the record in the light most favorable to Tyson, we find that she has not raised a genuine issue of material fact so as to preclude summary judgment on her legal malpractice claim. In *Sylvester*, the plaintiff was walking on a walkway from a parking lot to attend a football game at Soldier Field when she tripped over a concrete parking abutment and fell. *Sylvester*, 179 Ill. 2d at 502. The plaintiff then brought a negligence action against the CPD to recover damages for injuries she allegedly sustained as a result of the fall. *Id.* Following a bench trial, the circuit court found in favor of the plaintiff, finding that section 3-106 of the Act did not apply to immunize the CPD from liability because "the parking lot that is access to Soldier Field is not a recreational facility." *Id.* at 504. The appellate court then affirmed the judgment of the circuit court. *Id.* at 505. On appeal, our supreme court reversed the rulings, finding that, "[a]lthough the walkways and parking lots adjacent to Soldier Field may not be primarily recreational, Soldier Field itself is certainly recreational and these facilities increase its usefulness." *Id.* at 508. The *Sylvester* court further found that, taken as a whole, Soldier Field and its adjacent walkways and parking lots are "intended or permitted to be used for recreational purposes." *Id.* The *Sylvester* court stated that, an examination of the property as a whole indicated that the parking lot in which the plaintiff fell was an "integral part" of the Soldier Field recreational facility; thus, our supreme court held that section 3-106 applied to immunize the CPD from liability. *Id.* at 511.

¶ 33 Likewise, in *Callaghan*, the plaintiff was injured when she slipped and fell on ice while walking on a public sidewalk near a public park. *Callaghan*, 401 Ill. App. 3d at 288. The plaintiff then filed a complaint alleging negligence against the Village of Clarendon Hills (the Village), and later amended the complaint to include a count of negligence against the CPD. *Id.* at 288. The Village and the CPD each filed a motion to dismiss, alleging that they were immune

from liability pursuant to section 3-106 of the Act because the sidewalk on which the plaintiff fell was recreational property. *Id.* at 288-89. The circuit court then dismissed the plaintiff's negligence claims against the Village and the CPD pursuant to section 3-106 of the Act. *Id.* at 289. On appeal, the reviewing court affirmed the circuit court's ruling, finding that section 3-106 applied to bar the plaintiff's claim where the sidewalk on which the plaintiff fell was intended to increase the usefulness of the park by providing access to the park and was therefore intended for recreational purposes. *Id.* at 298. The *Callaghan* court noted that its decision was not contingent upon whether the sidewalk was located within the park, and clarified the holding in *Sylvester*:

> "*Sylvester* does not require that the property at issue be within the boundaries of the recreational property. In *Sylvester*, the property at issue was a walkway adjacent to the stadium, not within the confines of the stadium. Moreover, the scope of section 3-106 was not unlimited in *Sylvester*. The walkway was 'bounded' and the scope of section 3-106 limited, by the walkway's location, adjacent to the stadium and not 'a considerable distance' from the recreational property. Similarly, the sidewalk here was immediately adjacent to the park. It was not down the street or around the corner. Moreover, applying *Sylvester* here is consistent with the legislative intent to encourage the development and maintenance of recreational property." *Id.* at 295.

¶ 34 Applying the principles of *Sylvester* and *Callaghan*, we find that section 3-106 of the Act would have applied to immunize the CPD from liability had the CPD been named a defendant in the refiled underlying action. In Tyson's instant legal malpractice complaint and her refiled

complaint in the underlying action (case No. 03 L 004482), she asserted that she fell on a sidewalk along the chain link fence surrounding Gately Stadium. It is undisputed by the parties that Gately Stadium was recreational property. Like the *Sylvester* plaintiff who fell on a sidewalk just outside of Soldier Field, and the *Callaghan* plaintiff who fell on a sidewalk outside of a park, Tyson fell on a sidewalk adjacent to the stadium—a facility which the parties do not dispute was used for recreational football games. While the sidewalk on which Tyson fell was not itself recreational, it provided access to Gately Stadium and, thus, increased its usefulness. Like *Sylvester*, the sidewalk here surrounds Gately Stadium and could be considered an "integral part" of Gately Stadium. We find that, under *Sylvester* and *Callaghan*, Gately Stadium and its adjacent sidewalks are intended to be used for recreational purposes within the meaning of section 3-106 of the Act. See 745 ILCS 10/3-106 (West 2012).

¶ 35 Nonetheless, Tyson argues that the facts of the case at bar are distinguishable from *Sylvester*, and argues instead that they are analogous to the facts in *Rexroad v. Springfield*, 207 Ill. 2d 33 (2003); *Adamczyk v. Township High School District 214*, 324 Ill. App. 3d 920, 923 (2001); *Johnson v. City of Chicago*, 347 Ill. App. 3d 638 (2004); and *Batson v. Pinckneyville Elementary School District #50*, 294 Ill. App. 3d 832 (1998). We find Tyson's referenced cases to be distinguishable from the facts of this case.

¶ 36 In *Rexroad*, our supreme court held that section 3-106 did not apply to protect the City of Springfield and the Board of Education of Springfield School District from liability in a negligence action initiated by a high school football team manager (the team manager), who stepped into a hole in the school parking lot and broke his ankle. *Rexroad*, 207 Ill. 2d at 36, 41-43. The *Rexroad* court found that because the high school parking lot provided access to several different areas of the school not used for recreational purposes and the character of the school

property as a whole was educational rather than recreational, any recreational use of the parking lot was so incidental that section 3-106 did not apply. *Id.* at 43. Likewise in *Adamczyk*, the reviewing court declined to apply section 3-106 to immunize a school and a school district from liability, where the school parking lot, on which the plaintiff was injured, served the school as a whole by providing access to the gymnasium, the front entrance of the school, and other nonrecreational areas. *Adamczyk*, 324 Ill. App. 3d at 924. The *Adamczyk* court found that, because the high school was an educational institution with an "overall and regular" use to educate its students, any use of the high school as a recreational facility—such as the gymnasium—was merely incidental to its regular educational function and immunity did not apply where the parking lot was substantially connected to the entire school and incidentally to the gymnasium. *Id.* at 925-26. Similarly, in *Batson*, the reviewing court held that a genuine issue of material fact existed as to whether the walkway outside the school's gymnasium, on which the plaintiff fell and allegedly suffered injuries, was part of the school's "recreational property," where the walkway promoted the usefulness of all buildings and areas—both recreational and nonrecreational—within the school complex and the walkway's character could not be conclusively determined. *Batson*, 294 Ill. App. 3d at 837-39.

¶ 37 Unlike *Rexroad*, *Adamczyk*, and *Batson*, the sidewalk in the case at bar was not on school property, but rather provided access to Gately Stadium—a recreational facility. Tyson has not alleged, and nothing in the record shows, that Gately Stadium had any purpose other than recreational. Because Gately Stadium's "overall and regular" use is to serve only as a venue for football games, the sidewalk adjacent to the chain link fence surrounding the stadium was an integral part of the recreational facility that increased its usefulness. We further reject Tyson's characterization that the sidewalk on which she fell only *incidentally* increased the usefulness of

Gately Stadium because it was "used 24 hours a day, 365 days a year for pedestrians to move along the street [for nonrecreational purposes] and only occasionally for participants and spectators to reach Gately Stadium for a sporting event" and, thus, she argues against the applicability of section 3-106. Tyson cites *Johnson*, which we find inapposite to the case at bar. *Johnson* involved a situation in which the plaintiff was injured when a gate to a fence outside the Chicago Public Library fell on him. The reviewing court found that, even assuming the library was intended to be used for recreational purposes, any recreational use of the gate and fence surrounding the library parking lot was so incidental that section 3-106 did not apply. *Johnson*, 347 Ill. App. 3d at 640-41. It is notable that, in her response to Pravecek and Cogan & McNabola's motion for summary judgment and in pleadings before this court, Tyson makes bald and conclusory assertions. Without providing a single photograph of the area,[1] exhibit, affidavit, or any other shred of evidence to support this self-serving allegation, she argues that the sidewalk at issue only incidentally increased the usefulness of the stadium. See *Land*, 202 Ill. 2d at 421 (although the nonmoving party is not required to prove his case in response to a motion for summary judgment, he must present a factual basis that would arguably entitle him to judgment); *Foutch*, 99 Ill. 2d at 392 (any doubts which may arise from the incompleteness of the record will be resolved against the appellant). Thus, we find that no reasonable trier of fact could conclude that the sidewalk at issue only incidentally increased the usefulness of the stadium. Therefore, we find that no genuine issue of material fact was raised as to whether the sidewalk surrounding

[1] In the City's motion for summary judgment in the refiled underlying action (case No. 03 L 4482), the City alluded to certain photographs depicting the area of Tyson's fall that were identified by Tyson during her deposition. It is unclear whether Tyson's deposition in the refiled underlying action or the photographs was presented to the circuit court in the instant legal malpractice action. Neither Tyson's deposition in the refiled underlying action nor the photographs are included in the record on appeal before us.

Gately Stadium was an integral part of the stadium that served to increase its usefulness, and the sidewalk was thus intended to be used for recreational purposes within the meaning of section 3-106 of the Act. Accordingly, because section 3-106 of the Act would have applied to immunize the CPD from liability had it been named a defendant in the refiled underlying action, we find that Tyson cannot prove the element of proximate cause in her legal malpractice claim.

¶ 38 Moreover, we find that Tyson cannot prove the element of proximate cause to support her claim of legal malpractice, on the additional basis that no admissible evidence had been presented that the CPD owned or controlled the property at issue. Tyson argues that the deposition testimony of Marc Gaynes (Gaynes), as special counsel to the City's Department of Planning and Development, detailed his investigation which led to the conclusion that the CPD owned the property at issue at the time of Tyson's 1999 accident. Tyson further argues that Gaynes' deposition testimony confirmed the findings of Pravecek and Cogan & McNabola's own investigator that the CPD owned and controlled the property at issue. We find Tyson's arguments on this issue to be forfeited, where her opening and reply briefs neither cite to the record on appeal nor cite to legal authority, in violation of Supreme Court Rule 341(h)(7) (eff. July 1, 2008). Forfeiture aside, we find that neither Pravcek's investigator nor Gaynes, who was deposed during discovery in the refiled underlying action (case No. 03 L 004482), had ever been disclosed as witnesses in the instant case pursuant to Supreme Court Rule 213(f)(1), (f)(2) (eff. July 1, 2002), and Tyson has not included transcripts of Gaynes' deposition in the record on appeal before us. See *Foutch*, 99 Ill. 2d at 392 (any doubts which may arise from the incompleteness of the record will be resolved against the appellant). Thus, because no reasonable trier of fact could find that the CPD owned or controlled the sidewalk based on the evidence, we find that Tyson cannot establish that, but for Pravecek and Cogan & McNabola's

alleged negligence in failing to name the CPD as a defendant in the refiled underlying action, she would not have suffered damages. Accordingly, we hold that the circuit court properly granted Pravecek and Cogan & McNabola's motion for summary judgment in the instant legal malpractice action.

¶ 39 In light of our holding, we need not address the parties' arguments as to whether Tyson had properly disclosed an expert, or whether evidence was sufficient, to show that Pravecek and Cogan & McNabola deviated from the standard of care in their representation of Tyson in the underlying action so as to establish the "breach of duty" element of the legal malpractice claim.[2]

¶ 40 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 41 Affirmed.

[2] In the May 24, 2013 order granting summary judgment in the instant case, the circuit court also declined to make a ruling on Pravecek and Cogan & McNabola's motion to bar Tyson's purported expert, Andrews, in light of the court's ruling on the motion for summary judgment.