2016 IL App (1st) 142748-U

FIRST DIVISION
August 29, 2016

No. 1-14-2748

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LISA TALMAGE, as Special Administrator Of the Estate of Kathleen Talmage,	)	Appeal from the Circuit Court of Cook County,
Plaintiff-Appellant,	)	
	)	No. 06 L 003223
v.	)	
	)	Honorable
CITY OF BERWYN, a municipal corporation,	)	Diane Larson,
	)	Judge Presiding.
Defendant-Appellee.	)	

JUSTICE MIKVA delivered the judgment of the court.
Justice Connors and Justice Harris concurred in the judgment.

O R D E R

¶ 1 *Held*: Judgment of the circuit court granting summary judgment in defendant's favor in a wrongful death action is affirmed where plaintiff failed to present evidence that any conduct for which defendant did not enjoy tort immunity was the proximate cause of the decedent's injuries.

¶ 2 This is an appeal from the circuit court's grant of summary judgment in favor of the City of Berwyn in a wrongful death action. On March 3, 2006, Stephen Pocina was traveling westbound on Windsor Avenue when he lost control of his vehicle and crashed it into the Harlem Avenue Commuter Station in Berwyn, Illinois (the Harlem station). The decedent, Kathleen

Talmage, who was working as a ticket agent, was crushed and killed when the exterior brick wall of the station collapsed. Mr. Pocina fled the scene and later pleaded guilty to reckless homicide. On behalf of her mother's estate, plaintiff Lisa Talmage (Lisa Talmage) sued, among others, the City of Berwyn (the City), alleging that it's negligence was a proximate cause of her mother's death.

¶ 3 On appeal, Lisa Talmage argues that the circuit court erred when it granted the City's motion for summary judgment. The circuit court concluded that the City was immune from liability for any failure to provide traffic control devices, warning signs, or barriers and that there was no evidence establishing that the City's act of repainting a retaining wall outside the station solid yellow instead of with stripes was the proximate cause of Kathleen Talmage's injuries. For the reasons that follow we affirm.

¶ 4 BACKGROUND

¶ 5 The parties' evidence in connection with their briefing on the City's motion for summary judgment included a police report and photographs of the scene of the crash; facts stipulated to by Mr. Pocina in connection with his guilty plea; and the deposition testimony of Mr. Pocina, witnesses to the crash, and various first responders. The evidence also included depositions of and affidavits and reports from the parties' experts. The facts as they relate to this appeal are as follows.

¶ 6 *The Crash*

¶ 7 At the time of her death, Kathleen Talmage had been an employee of BNSF Railway Company for nearly forty years and had worked as a ticket agent at the Harlem station for seven years. Shortly before 6 a.m. on March 3, 2006, police officers responding to a call of an accident at the station discovered an unoccupied Jeep Land Rover registered to Stephen Pocina almost

completely lodged within the structure, still running with the keys in the ignition, and with the driver's-side airbag deployed. A witness testified that she heard the crash and observed a white male subject running from the scene. Kathleen Talmage was discovered inside the station, having suffered obvious blunt trauma injuries. She was extracted from the debris and transported to a nearby hospital. Although Kathleen Talmage had a pulse and initially took some breaths on her own, she was unresponsive, did not regain consciousness, and died as a result of the injuries she sustained.

¶ 8 Phillip Zelezniker was at the Harlem station on March 3, 2006, and was the only eye witness who actually saw the crash. He observed Mr. Pocina's vehicle pass by him going westbound on Windsor Avenue at what he considered to be a high rate of speed. He did not recall seeing the vehicle slow down at all prior to impact or turn in an attempt to avoid the station, although it may have veered slightly to the left. The vehicle went over the retaining wall and up the embankment, became airborne, and crashed into the station. Mr. Zeleznikar later identified Mr. Pocina in a photo array on March 15 and in a physical line-up on March 23, 2006, as the person he saw exit the vehicle and flee the scene.

¶ 9 Mr. Pocina was charged with failure to report an accident involving death, leaving the scene of an accident, and reckless homicide. He pled guilty on August 27, 2008, and was sentenced to three years' felony probation and 250 hours of community service.

¶ 10 At his deposition, Mr. Pocina testified that, at the time of the crash, he was a resident of Riverside, Illinois, which lies directly west of Berwyn. He was familiar with the Harlem station. He took the train to work from Riverside to Chicago where he worked as a securities trader and had also driven past the station on Windsor Avenue a "[h]andful of times." Mr. Pocina stated that he "knew [the station] stood out in the middle of the street."

¶ 11 When asked about the events leading up to the crash, Mr. Pocina testified that he worked a normal day on March 1, 2006, and then returned to the office to clean it out overnight and retrieve his personal belongings, e-mails, and contacts because of a dispute with his employer. He drove home on the afternoon of March 2, but then drove back downtown at around 6 or 6:30 in the evening, parked at a parking garage, and met with two friends for dinner.

¶ 12 Mr. Pocina testified that he left the restaurant around 10 or 10:30 p.m. and went alone to a nearby bar until it closed, he thought probably around 2 a.m. on March 3, 2006. Mr. Pocina paid a tab totaling between one and two thousand dollars and socialized with a group of women that he met there. However, he insisted that he "had a lot of things to do the next morning," including potentially taking a drug and alcohol test for a new job, and drank only nonalcoholic beverages. When the bar closed, Mr. Pocina and some others took a taxi to the Rush Street area, where they visited "[t]wo or three" additional bars. Mr. Pocina stated at first that he did not consume alcohol at these bars either, but then stated that he believed he did at one of the bars, although he could not remember which one. He left around 4 or 4:30 a.m., took a taxi to retrieve his vehicle from the parking garage, and proceeded to drive home.

¶ 13 Mr. Pocina further testified that, as he approached the Harlem station in the early morning hours of March 3, 2006, he was driving at approximately the posted speed limit, which he believed to be 30 miles per hour. He did not believe that he was driving at a high rate of speed. He stated that his headlights were operational and the area was lit by street lights. Mr. Pocina could not recall whether he changed the radio station or made a call on his cell phone. He testified that he "believe[ed he] was concentrating on the road" but that he was tired and his "attention was focused on getting home." Mr. Pocina recalled very little about the crash itself:

"Q. Your vehicle struck the embankment on the east side of

the train station?

A. That's correct.

Q. Prior to your vehicle striking the embankment, did you make any attempt to slow down?

A. I don't think so. It is – all I remember is I either nodded off or whatever the case was. Next thing I know there was an air bag so –

Q. Do you recall applying the brakes at all?

A. I don't recall. I don't recall.

Q. Do you recall swerving prior to the point of impact to avoid the embankment?

A. I don't remember that either.

* * *

Q. Can you explain what you remember just prior to hitting the embankment and going through, to your vehicle striking the train station?

A. No, other than being tired and wanting to get home, either nodding, dozing. I don't know, you know. Next thing I know I was startled.

Q. And then what happened after you were startled? What did you notice first?

A. I noticed that the air bag had been deployed, and everything else was kind of a blur. I was – I can't speak to it.

Startled. In shock.

* * *

Q. Is your recollection now as you testify here that you think that is what happened at the time of the accident, that you did actually doze off?

A. It is quite possible."

¶ 13 Following the crash, Mr. Pocina stated that he exited the vehicle and "just started to walk." He crossed Harlem Avenue and telephoned a friend of his who was an attorney. When asked why he did not call the police, Mr. Pocina said he did not know. When he later learned that someone had been killed inside the station, he followed his lawyer's advice and did not have any contact with law enforcement.

¶14 *The Harlem Station*

¶15 The Harlem station was originally built in 1890. Photographs from 1978 show the portion of the retaining wall east of the station painted in a diagonal "object marker" pattern, either black and yellow or black and white diagonal stripes. Photographs produced in other litigation pending from 1980 to 1986, however, show that the retaining wall was later painted yellow. Employees within the City's department of public works maintained the retaining wall and painted it yellow on an as-needed basis, approximately every other year.

¶ 14 Evidence of three prior accidents in the vicinity of the Harlem station was presented to the circuit court. In 1978, a vehicle making a right turn onto eastbound Windsor Avenue collided with a westbound vehicle, just at the point where the driver had to negotiate around the Harlem station. In 1987, a car traveling westbound on Windsor Avenue ran off the road at approximately 11 p.m. and struck the southeast corner of the station building, causing a "large hole" in the brick

wall. The driver had an expired driver's license and stated that he did not see the building until it was too late to stop, due to slippery road conditions. And in 2005, a vehicle driving westbound on Windsor Avenue at approximately 1:00 a.m. veered right and sideswiped the south retaining wall, at a point just beyond the place where the road shifted to the left around the station building, when the driver changed the radio station and took his eyes off the road momentarily.

¶ 15 *Expert Testimony*

¶ 16 Lisa Talmage's expert, James Bragdon, a traffic control engineer, submitted an affidavit and accompanying expert report in which he opined that, on its own, "[t]he object marker like use of alternating light and dark stripes on the sloping wall on the east side of the station and visible to westbound Windsor Avenue traffic was the establishment of a traffic control device that failed to conform to the requirements of the Manual on Uniform Traffic Control Devices (MUTCD)" because, in his opinion, "the MUTCD, as well as the applicable customs and practices for safety in the field of Traffic Engineering, required that signs, markings and physical protective barriers be used in the approach to the Harlem Avenue Station." According to Mr. Bragdon, the City's act of painting the wall yellow made the situation worse because it "defeated the established object marker-like traffic control device" and violated the MUTCD, which specifies that yellow should be used to instruct motorists to keep to the right—in this case, the opposite direction a motorist would need to travel to avoid colliding with the station building. Mr. Bragdon noted that "[n]umerous impact marks on the yellow-painted sloping retaining wall *** indicate[d] that other motorists ha[d] failed to negotiate the reverse turn for westbound Windsor Avenue."

¶ 17 In Mr. Bragdon's opinion, the City should have installed a system of traffic control devices to mitigate the hazard that was created by the positioning of the Harlem station relative

to Windsor Avenue, including "advanced warning signs of the obstruction and the reverse curve; appropriate pavement markings guiding traffic around the obstruction in the roadway; erection of rumble strips in the westbound roadway approaching the obstruction; object markers and/or Type III barricades; and physical barriers to stop an errant vehicle." Mr. Bragdon concluded that "[t]he failure by the City of Berwyn, IL, to install proper traffic control devices on Windsor Avenue *** was a direct cause of the crash."

¶ 18 At his deposition, Mr. Bragdon agreed that Mr. Pocina's reckless driving was one cause of the crash, but reiterated his belief that the accident would not have occurred if the system of traffic control devices he recommended had been put in place:

> "Q: Was Mr. Pocina's conduct the direct cause—was Mr. Pocina's conduct as you understand it from the deposition transcripts and other evidence in this case, a direct cause of the crash and death of Kathleen Talmage?
>
> A: It was a cause. I think the major cause was the fact that the station was built out in the road.
>
> * * *
>
> Q: His driving was the cause of the accident?
>
> A: No, the failure—all of the other causes we talked about, failure to put warning signs up, barricades out, rumble strips, the barrier across. This accident would not have happened if those had been in place.
>
> Q: Would this accident have happened if he stayed awake?
>
> A: I don't know.

> Q: But you know that it would not have happened if there were signs up?
>
> A: Not signs, no. I am talking about the entire system including barriers or extension of the retaining wall. This accident would not have happened if that had been done."

¶ 19 Mr. Bragdon agreed that whether the painted retaining wall itself had any effect on Mr. Pocina's driving depended on if and when Mr. Pocina fell asleep behind the wheel:

> "A: You said that the wall not being painted yellow with the bear right kind of connotation to it, that that may have had an effect on Mr. Pocina that would, of course, be based upon when he was last cognizant of things before the dozing; correct?
>
> A: Yes."

¶ 20 Defense expert, Daniel J. Melcher, was of the opinion that the traffic control devices for Windsor Avenue at the time of the crash were not only compliant with applicable standards and guidelines, including the MUTCD, but were sufficient, under normal operating conditions, to alert drivers to the presence of the Harlem station. Mr. Melcher disagreed with Mr. Bragdon's assertion that the color yellow always indicates that motorists should pass to the right, contending instead that this applies only to longitudinal lane lines. The use of yellow paint for object markings complies with the MUTCD definition of the color as generally denoting a "warning" and, in Mr. Melcher's opinion, would not convey a confusing or misleading message to motorists.

¶ 21 *Procedural History*

¶ 22 This lawsuit was initially brought as a wrongful death and survival action against Mr.

Pocina by Kathleen Talmage's husband, Juan Talancon. The pleadings were amended a number of times as claims were added against the City, BNSF Railway Company (BNSF), and Northeast Illinois Regional Commuter Railroad Corporation (Metra); the claims against Mr. Pocina were settled; and, upon the passing of Mr. Talancon, the case was pursued by Kathleen Talmage's daughter and Mr. Talancon's son, as representatives of their parents' estates. This appeal is brought only by Kathleen Talmage's daughter (Lisa Talmage) and involves only the claims made against the City on behalf of Kathleen Talmage's estate.

¶ 23 In the operative complaint in this matter, Lisa Talmage alleged that, at the time of the crash, the City "owned and/or possessed, leased, operated, managed, controlled and/or maintained" the Harlem station and "owned, operated, managed and maintained" adjacent Windsor Avenue. Lisa Talmage alleged that defendant negligently "[m]aintained the [Harlem station] as an obstruction to westbound Windsor Avenue," "[f]ailed to install traffic control devices, warning signs and/or pavement markings to warn motorists of the obstruction," and "[f]ailed to install barricades *** or other protective devices to prevent motor vehicles from traveling up the aforementioned embankment." With respect to the retaining wall separating Windsor Avenue from the embankment leading up to the Harlem station, Lisa Talmage specifically alleged that the City negligently "[e]liminated the object marker like warning system of painted black and yellow stripes by painting over it with yellow paint in violation of the [MUTCD]," and "[i]mproperly painted the barrier wall yellow indicating that traffic should keep to the right."

¶ 24 The City moved for summary judgment based on tort immunity and a lack of proximate cause. Following argument, the circuit court granted the City's motion on October 19, 2012. It concluded that "signage immunities" protected the City from liability and that, although the City

was not immune from liability for changing the color of the retaining wall to yellow, Lisa Talmage had failed to present any evidence that this was a proximate cause of Kathleen Talmage's injuries:

> "[T]here is no evidence that changing the striping to solid yellow had any role in this accident whatsoever. The testimony seems, and it is unrebutted that he dozed off and veered off the road, so whatever the color or what it was striped, there is no evidence of proximate cause here."

¶ 25 Lisa Talmage moved for reconsideration, arguing that the City's act of altering an existing traffic control device by painting the retaining wall yellow triggered a duty to "do a full evaluation of the entire system," from which it should have concluded that warning signs, rumble strips, and barricades were also necessary, measures that Lisa Talmage insisted "could have alerted a dozing driver of the hazardous traffic configuration." The circuit court heard argument on March 22, 2013, and denied Lisa Talmage's motion, explaining:

> "THE COURT: Okay. Thank you for your argument. The motion to reconsider is denied. The Court based its ruling on the motion for summary judgment on the *** lack of proximate cause in this case, and – but to respond to some of these other issues regarding the signage, the Court agrees that the painting of the area would have be – was a change and that would have to be done with due care, reasonable care, but it doesn't create a duty to add new signage or new barriers that didn't exist prior. The immunity applies to the creation of new signage or new barriers, so the

motion is denied."

¶ 26 JURISDICTION

¶ 27 The circuit court granted summary judgment in the City's favor on October 19, 2012, but allowed claims against BNSF and Metra to continue. Those claims were later settled, as evidenced by the circuit court's final order dated August 5, 2014. Lisa Talmage timely filed her notice of appeal in this matter on September 5, 2014. We therefore have jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 28 ANALYSIS

¶ 29 The circuit court in this case granted the City's motion for summary judgment because it concluded that the City was immune from liability for any failure to provide additional traffic control devices at the Harlem station, and because Lisa Talmage offered no evidence that the City's conduct in changing the color of the retaining wall was the proximate cause of Kathleen Talmage's injuries. This court agrees with the trial court as to both of those determinations.

¶ 30 Summary judgment is appropriate where, construed liberally in favor of the party opposing judgment, "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 a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). A defendant who moves for summary judgment has the initial burden of production, which can be met by either (1) affirmatively introducing evidence that, if uncontroverted, would disprove the plaintiff's case (see *Purtill v. Hess*, 111 Ill. 2d 229, 240-41 (1986)), or (2) establishing that a lack of sufficient evidence will prevent the plaintiff from proving an essential element of the cause of action (see *Rice v. AAA Aerostar, Inc.*, 294 Ill. App. 3d 801, 805 (1998) (citing *Celotex Corp. v.*

Catrett, 477 U.S. 317, 323 (1986)), overruled on other grounds by *Country Mutual Insurance Co. v. Livorsi Marine, Inc.*, 222 Ill. 2d 303 (2006)). Where the defendant satisfies this initial burden of production, the burden then shifts to the plaintiff to show a factual basis to support the elements of his claim. *Rice*, 294 Ill. App. 3d at 805. Although summary judgment is "encouraged as an aid in the expeditious disposition of a lawsuit," it is "a drastic means of disposing of litigation and, therefore, should be allowed only when the right of the moving party is clear and free from doubt." Id. at 43. We review a circuit court's grant of summary judgment *de novo* (*Doria v. Village of Downers Grove*, 397 Ill. App. 3d 752, 756 (2009)) and may affirm "on any basis appearing in the record" (*Urban Sites of Chicago, LLC v. Crown Castle USA*, 2012 IL App (1st) 111880, ¶ 21).

¶ 31 While Lisa Talmage's appeal centers on the trial court's ruling that she failed to present evidence of proximate cause, the predicate for that ruling was that much of the City's conduct was protected by tort immunity. Therefore, before reviewing the trial court's ruling on proximate cause, we address the extent to which the City's conduct was not actionable, because of immunity.

¶ 32 A. Tort Immunity

¶ 33 Lisa Talmage does not dispute that the City is protected from liability by the Local Governmental and Governmental Employees tort Immunity Act (Tort Immunity Act or Act) (745 ILCS 10/1-101 *et seq.* (West 2006)) for the failure to *provide* traffic control devices. Section 3-104 of the Act immunizes municipalities from liability for injuries 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."

745 ILCS 10/3-104 (West 2006). The language is unconditional: a municipality cannot be liable for a failure to initially provide a traffic control device, even if the municipality had notice of a dangerous condition, was negligent, and that negligence proximately caused a plaintiff's injuries. *West v. Kirkham*, 147 Ill. 2d 1, 6-7 (1992).

¶ 34 In order to overcome the absolute immunity that protects the City from liability for the failure to provide traffic control devices, Lisa Talmage cites to Section 3-102 of the Tort Immunity Act, which provides that a local public entity has a limited duty to *maintain* its property in a reasonably safe condition. That section, which if applicable would provide only qualified immunity, provides:

> "Except as otherwise provided in this Article, a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used, and shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition." 745 ILCS 10/3-102(a) (West 2006).

¶ 35 Lisa Talmage argues that, by painting the retaining wall, the City "undertook to establish a system of traffic control," triggering a duty to install the additional safety measures suggested by Mr. Bragdon. The circuit court rejected this argument, concluding that, just because the City

had a duty to exercise due care in maintaining traffic control devices, that did not create a duty to add new signage or barriers that did not previously exist. We reach the same conclusion.

¶ 36 This section of the tort immunity act, as the language makes clear, is directed only to "maintenance." "Maintenance involves preserving the roadway, keeping it up, not permitting it to fall into a state of disrepair, and involves, for example, the filling of potholes, or repairing deteriorated portions of the roadway." *Ross v. City of Chicago*, 168 Ill. App. 3d 83, 87 (1988); see also *Robinson v. Atchison, Topeka & Santa Fe R.R. Co.*, 257 Ill. App. 3d 772, 776 (1994) ("[t]he term 'maintenance' implies repair and upkeep").

¶ 37 The evidence in this case indicates that the City's employees faithfully painted the retaining wall outside the Harlem station yellow approximately every other year. Photographs reveal that, at the time of the crash, the wall was intact and brightly painted; not crumbling, faded, obscured or deteriorated in any way.

¶ 38 If it were true, as Lisa Talmage suggests, "that in order to maintain the area in a safe manner, the[City was] required to install additional safety devices," the Act would not distinguish between maintenance and the installation of new devices. None of the authorities Lisa Talmage cites supports this result and we must reject it where the General Assembly clearly delineated between the two in separate sections of the Act (compare 745 ILCS 10/3-104 (West 2006) and 745 ILCS 10/3-102(a) (West 2006)). See *In re Application of the County Collector*, 356 Ill. App. 3d 668, 670 (2005) ("The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature" and "[a] statute should be construed, if possible, so that no part of the statute is rendered superfluous or meaningless." (Internal quotation marks omitted.)).

¶ 39 Because no evidence was presented to show that Kathleen Talmage's injuries resulted

from the City's failure to "maintain" the retaining wall, we need not consider whether the prerequisites for liability under section 3-102 are present here, *i.e.*, whether the City had actual or constructive notice that the retaining wall created an unsafe condition or whether Mr. Pocina's driving constituted an intended and permitted use of the property.

¶ 40 B. Proximate Cause

¶ 41 There is clearly conduct by the City that is not protected by absolute or even modified tort immunity. The fact that the City eliminated the painted black and white or black and yellow stripes, by painting over them with yellow paint, is a modification of an existing traffic control device, conduct for which a municipality enjoys no immunity under the Act. See *Martinelli v. City of Chicago*, 2013 IL App (1st) 113040, ¶ 18 ("a unit of local government *** is liable in tort to the same extent as a private party unless the Act applies"). The circuit court acknowledged this when it agreed that the painting of the retaining wall was "a change" that the City was required to make while exercising due care. Because the City enjoys no immunity from liability for the allegedly negligent modification of an existing traffic control device, we must consider whether there was evidence that this modification proximately caused Kathleen Talmage's injuries.

¶ 42 The term "proximate cause" encompasses two distinct concepts: cause in fact and legal cause. *Young v. Bryco Arms*, 213 Ill. 2d 433, 446 (2004). The first calls on us to determine whether the injury would still have occurred, even absent the alleged negligence, and the second to consider, as a matter of public policy, how far a defendant's responsibility should extend. *Id.* A proximate cause is thus one "which produces the injury through a natural and continuous sequence of events unbroken by any effective intervening cause." *Novander v. City of Morris* 181 Ill. App. 3d 1076, 1078 (1989). It is the plaintiff's burden to "affirmatively and positively

show that the defendant's alleged negligence caused the injuries for which the plaintiff seeks recovery." (Internal quotation marks omitted.) *Bermudez v. Martinez Trucking*, 343 Ill. App. 3d 25, 29 (2003).

¶ 43 Although proximate cause is normally an issue of fact for the jury, if a court would be required to direct a verdict because "what is contained in the pleadings and affidavits would *** constitute[] all of the evidence before the court and upon such evidence there would be nothing left to go to a jury, and the court would be required to direct a verdict, then a summary judgment should be entered." *Fooden v. Board of Governors of State Colleges & Universities*, 48 Ill. 2d 580, 587 (1971). Accordingly, summary judgment is routinely upheld where the evidence establishes no more than the possibility that the defendant's negligence caused the plaintiff's injury. See *Kimbrough v. Jewel Cos.*, 92 Ill. App. 3d 813, 817-18 (1981) (affirming a grant of summary judgment where the plaintiff could not remember why she fell on the entry ramp of the defendant's store and could provide no other eyewitnesses or evidence to establish causation); *Monaghan v. DiPaulo Construction Co.*, 140 Ill. App. 3d 921, 924-25 (1986) (affirming a grant of summary judgment where the plaintiff, who was thrown from his motorcycle, could not recollect the accident and nothing in the record gave rise to a reasonable inference that it was caused by the defendant city's failure to illuminate a median strip that was under construction); *Geelan v. City of Kankakee*, 239 Ill. App. 3d 528, 529-30 (1992) (affirming a grant of summary judgment where the plaintiff could offer no testimony regarding what caused her daughter's vehicle to collide with the wall of an underpass, beyond speculation that poor lighting may have caused the accident).

¶ 44 Lisa Talmage contends that the original black and white or black and yellow stripes "may have alerted a driver who momentarily nodded off to the hazardous traffic configuration present

in the westbound lanes of Windsor approaching the station" and "may reasonably have worked to slightly alter the course of [Mr. Pocina's] vehicle, just prior to the point he became inattentive moments before the collision." Lisa Talmage insists that the circuit court invaded the province of the jury by concluding that Mr. Pocina would have driven off the road and into the Harlem station regardless of what color the retaining wall was painted.

¶ 45 For its part, the City argues that summary judgment was proper where, "not only was Mr. Pocina dozing or nodding off at the time he caused the accident, but he had also driven westbound on Windsor Avenue several times prior to the accident" and "was familiar with the design and layout of the station and roadway."

¶ 46 As an initial matter, we reject the City's argument that, even if the retaining wall was painted differently, it would not have provided Mr. Pocina with any information he did not already possess because he had driven past the station a "[h]andful of times," and "knew it stood out in the middle of the street." Warnings serve not only to inform us of unknown dangers, but also "to remind us of hazards of which we are already aware but may, due to distraction, momentarily forget." *Harnischfeger Corp. v. Gleason Crane Rentals, Inc.*, 223 Ill. App. 3d 444, 459 (1991). The fact that Mr. Pocina was generally aware of the location of the Harlem station did not preclude Lisa Talmage as a matter of law from arguing that he and other motorists needed to be reminded of the station's placement in order to safely navigate around it on Windsor Avenue.

¶ 47 In response to the City's contention that Pocina was "was nodding or dozing off when he drove off the road, and thus he wasn't seeing paint color or anything else at the time." Lisa Talmage characterizes Mr. Pocina as merely a "distracted driver" for whom the stripes "may have" made a difference. She argues, citing our decision in *Martinelli,* that the conduct of a

distracted driver is completely foreseeable and does not constitute an intervening cause or a sole proximate cause that would relieve the City of liability or break the chain of causation. *Martinelli*, 2013 Ill. App. (1st) 113040 ¶ 27-30.

¶ 48 *Martinelli* is instructive but ultimately unhelpful to Lisa Talmage in this case. *Martinelli* also involved a traffic accident in which the City's actions were alleged to have been a proximate cause of a serious injury to the plaintiff by a driver. In that case, evidence was presented that the City's conduct in temporarily removing equipment and workers who were alerting motorists to the presence of ongoing road work was an "effective abandonment" of the injured plaintiff that "allowed the accident to occur." ¶ 25. The *Martinelli* court rejected the City's argument that the driver's conduct in reaching for his cigarettes should be deemed the sole cause of the accident or an unforeseeable intervening cause of the plaintiff's injuries. As the *Martinelli* court pointed out, "distracted driving" is "eminently foreseeable" and did not relieve the City of any liability. *Id.* at ¶ 29-30.

¶ 49 The City attempts to distinguish *Martinelli* in part on the basis that Mr. Pocina committed the criminal offense of reckless homicide, consumed alcohol and generally engaged in conduct far more extreme than the driver in *Matinelli*. The City relies on a line of cases in which third parties were either intoxicated or intentionally disobeyed applicable traffic laws and in which the courts found such conduct to be an intervening cause of the accident, relieving the municipality of liability. See, *e.g.*, *Thompson v. County of Cook*, 154 Ill. 2d 374, 382-83 (1993) (an intoxicated motorist attempted to elude law enforcement by driving 80 or more miles per hour in an area where the posted speed limit was 35 miles per hour); *In re Estate of Elfayer*, 325 Ill. App. 3d 1076, 1083-84 (2001) (an intoxicated motorist blacked out and drove across a median into oncoming traffic); *Newsom v. Thompson*, 202 Ill. App. 3d 1074, 1081-82 (1990) (a motorist

crossed a street from an area under construction in order to make an illegal u-turn).

¶ 50 We need not, however, decide where the line is between these cases and *Martinelli* as to when bad driving is no longer foreseeable. The important distinction between this case and *Matinelli* is that here there simply was no evidence of a causal connection between the change in color of the retaining wall—the only conduct by the City that is not protected by immunity—and the injuries to Katherine Talmage.

¶ 51 In response to the City's motion for summary judgment, Lisa Talmage was required to offer some evidence that the City's negligence was the proximate cause of Kathleen Talmage's injuries. While proximate cause can be shown by circumstantial evidence, and a plaintiff can rely on reasonable inferences which can be drawn from the facts, Lisa Talmage was required to show more than "mere speculation, guess, surmise or conjecture." *Wilson v. Bell Fuels, Inc.*, 214 Ill. App. 3d 868, 873, (1991).

¶ 52 There was simply no evidence of this necessary causal connection. Mr. Pocina testified that it was "quite possible" he dozed off, but that he could not remember for sure what happened just prior to the point of impact. The testimony of the only eyewitness who saw the crash was that Mr. Pocina did not brake or steer to avoid the station building at any time, even after he made contact with the curb. Together, this was strong circumstantial evidence that Mr. Pocina was asleep. There was no other evidence, circumstantial or direct, from which it could reasonably be inferred that Mr. Pocina saw the yellow retaining wall before the crash. As Lisa Talmage's expert acknowledged, the color of the wall could only be a factor "based upon when [Mr. Pocina] was last cognizant of things before the dozing."

¶ 53 Lisa Talmage and her expert attempt to get around this problem by conflating the color of the retaining wall and the failure of the City to install the additional safety devices that Mr.

Bragdon believed should have been added and that Lisa Talmage contends were part of "maintenance." Mr. Bragdon's testimony on causation pointed to the City's "failure to put warning signs up, barricades out, rumble strips, the barrier across." In his opinion, "[t]his accident would not have happened if those had been in place." He made it clear that he was "talking about the entire system including barriers or extension of the retaining wall."

¶ 54 However, as outlined above, any failure by the City to put up warning signs, rumble strips, or a barrier is not actionable because of the absolute immunity provided by Section 3-104 of the Tort Immunity Act. Thus Lisa Talmage was required to present some evidence that the color of the retaining wall was, in itself, a proximate cause of the crash. This she failed to do.

¶57 CONCLUSION

¶ 55 The circuit court in this case did not err in granting summary judgment in the City's favor where there was no evidence—direct or circumstantial—that the City's action in painting the retaining wall yellow, instead of keeping the black and white or black and yellow stripes, was a proximate cause of the death of Kathleen Talmage and where this was the only alleged act of negligence by the City that was not protected by absolute immunity.

¶ 1 Affirmed.