NO. 5-09-0543

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

JERRY W. ALVIS, JR.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Perry County.
	)	
v.	)	No. 07-L-12
	)	
THE CITY OF DU QUOIN, a Municipal Corporation, and LAURA BOOKER, Administrator of the Estate of James Booker, City of Du Quoin Chief of Police,	)	Honorable
	)	Richard A. Brown,
Defendants-Appellees.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Spomer and Goldenhersh concurred in the judgment.

R U L E 2 3 O R D E R

Held: The City of Du Quoin and James Booker did not owe a duty of care to the plaintiff, because they did not supervise or control the work performed and the plaintiff was not an employee of the City. The City's decision to hire Graham's Painting Company was not negligent or willful or wanton, because the plaintiff is not a third party entitled to a duty of care and the hiring decision was a discretionary policy that is granted immunity under the Tort Immunity Act. The City and James Booker cannot be held liable for failing to enforce the Road Worker Safety Act, because the defendants were not contractors, subcontractors, or their authorized agents and the plaintiff failed to establish the elements necessary to show that a special duty was owed to him.

The plaintiff, Jerry W. Alvis, Jr., appeals the judgment entered by the circuit court of Perry County granting a summary judgment in favor of the defendants, the City of Du Quoin (the City), a municipal corporation, and Laura Booker, the administrator of the estate of James Booker. For the following reasons, we affirm.

Graham's Painting Company (Graham's) was a subcontractor for the City, and the City had orally contracted with Graham's to paint the city's crosswalks in order to "spruce it up"

for the Du Quoin county fair. The City had previously hired Graham's to paint the crosswalks in past years, and Graham's had performed this work.

The plaintiff had worked for Graham's as a painter and drywall finisher since 2000. The plaintiff had previously painted the crosswalks two or three times during his employment with Graham's. At no time did Graham's owner, Eric Graham, ever provide flagmen at the work sites, and the plaintiff had never requested that Eric Graham, Graham's, or the City provide flagmen at the work sites. Eric Graham supervised the plaintiff's work, and if the plaintiff had concerns or problems about his work conditions, he reported those problems to Eric Graham.

On the day of the incident, August 18, 2006, the plaintiff was working with Mike Fornear. The plaintiff had already been painting the crosswalks for approximately one or two weeks. The plaintiff was painting a crosswalk at the intersection of Main Street and Oak Street. Main Street is a two-lane road that runs in an east and west direction. Diagonal parking is located on both sides. The crosswalks run in a north and south direction and are located across Main Street and at various intersecting streets, including Oak Street.

Upon their arrival at the work site that morning, the plaintiff and Fornear had placed orange traffic cones to block the westbound traffic lane on Main Street. The cones were the only safety equipment used, and no one had instructed them how to arrange the orange traffic cones. After arranging the traffic cones, Fornear set up a generator that was connected to an airless sprayer that connected to a three-wheeled spraying machine. Once the equipment was ready, the plaintiff began painting a part of the crosswalk extending over the westbound lane of Main Street. Fornear continued to monitor the spraying machine and the generator. As the plaintiff was painting, he was struck by a car driven by Gary W. McMurray. The last thing that the plaintiff remembered before being struck was standing near the center of Main Street painting the crosswalk.

A little before 6 a.m., McMurray, age 62, was traveling westbound on Main Street on his way to Fresenius Health Care for dialysis. As he approached the intersection of Main and Oak Streets, the eastbound lane of Main Street was open and there were no vehicles traveling eastbound. Although McMurray admitted that there was nothing obstructing his view of the traffic cones or the plaintiff, he claimed that he did not see the plaintiff, the painting machine, or anyone else in the crosswalk. He drove through the traffic cones and struck the plaintiff. The plaintiff was knocked approximately 20 feet. As a result, the plaintiff suffered serious brain injuries and other injuries. McMurray claimed that he did not see the plaintiff because there had been no warnings, such as flashing lights. He also stated that had there been flagmen, he would have avoided the plaintiff. McMurray was issued a traffic ticket.

Officer James Booker, deceased, had been the chief of police for the City. On the morning of the incident, he had been stationed in his police vehicle observing traffic on a side street near the work site. Chief Booker had observed the plaintiff painting the crosswalk.

On June 15, 2007, the plaintiff filed a complaint sounding in four counts against the City and Booker. Count I (negligence) and count III (willful and wanton conduct) alleged that the City owed a duty to direct or grant permits to be carried out by a third person to ensure that the work on the public way and a crosswalk was conducted so that it did not endanger persons working on the construction site, that the City breached this duty by failing to provide a flagman in violation of section 2 of the Road Worker Safety Act (430 ILCS 105/2 (West 2008)), that the City contracted with Graham's to paint the crosswalk when it knew or should have known that the painting would require a flagman and Graham's would not provide a flagman, that the City failed to oversee the painting and require that Graham's provide a flagman, that the City failed to "shut down the job," that the City failed to give a warning or citation to Graham's that it was in violation of section 2 of the Road Worker

Safety Act, and that the City failed to provide a safe workplace. Count II (negligence) and count IV (willful and wanton conduct) alleged that Booker failed to notify the City that it was in violation of section 2 by allowing Graham's to paint without a flagman when Main Street was reduced to one lane, that Booker failed to "shut down the job," that Booker failed to give a warning or citation to Graham's that it was in violation of section 2, and that Booker permitted Graham's to paint the crosswalks when he knew or should have known that the construction mandated a flagman and that Graham's did not provide a flagman.

On August 9, 2007, the defendants filed a motion to dismiss arguing that the complaint should be dismissed pursuant to section 2-615 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-615 (West 2008)) because the plaintiff failed to allege sufficient facts to state a claim for negligence or willful and wanton conduct against the City or Booker. The defendants also argued that the complaint should be dismissed pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2008)) because the defendants are protected by the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/2-201 (West 2008)). On November 5, 2007, James Booker died, and on March 31, 2008, Laura Booker, as the administrator of the estate of James Booker, was substituted for James Booker.

The trial court entered an order denying the defendant's motion to dismiss and further ordered the defendants to file a responsive pleading within 20 days. The City filed an answer and affirmative defenses on February 4, 2008, alleging that it was protected from liability under sections 2-201, 2-103, 2-104, 2-205, 2-206, and 3-104 of the Tort Immunity Act (745 ILCS 10/2-201, 2-103, 2-104, 2-205, 2-206, 3-104 (West 2008)). Laura Booker filed an answer and affirmative defenses on March 2, 2008, arguing that Booker was protected by sections 2-201, 2-205, 2-206, and 3-104 of the Tort Immunity Act.

On April 7, 2009, the defendants moved for a summary judgment. On July 28, 2009,

the circuit court granted the defendants' motion for a summary judgment, finding that the defendants had immunity pursuant to sections 3-104, 2-206, 2-103, and 2-104 of the Tort Immunity Act. The court went on to hold that the City did not retain supervision or control of the painting project, the City owed no duty of care to the plaintiff because the plaintiff was an employee of Graham's, and the City's decision to hire Graham's was a discretionary policy decision which has immunity pursuant to section 2-201. On August 18, 2009, the plaintiff filed a motion to reconsider and vacate the summary judgment, which the trial court denied on September 22, 2009. The plaintiff filed a timely notice of appeal on October 9, 2009.

A motion for a summary judgment must be granted when the pleadings, depositions, and admissions on file, together with the affidavit, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2006). Accordingly, an order granting a summary judgment is reviewed *de novo*. *Shannon v. Boise Cascade Corp.*, 208 Ill. 2d 517, 524 (2004).

We first address the plaintiff's allegation of negligence and argument that the City owed him a duty of care. The plaintiff argues that the City failed to provide a flagman, failed to oversee the painting and require that Graham's provide a flagman, failed to "shut down the job," and failed to give a warning or citation to Graham's and failed to provide a safe workplace. The elements of a cause of action based on negligence "are the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury caused by that breach." *McLean v. Rockford Country Club*, 352 Ill. App. 3d 229, 232-33 (2004). Actual damages, like duty, breach, and causation, is an essential element of a negligence claim. *Shehade v. Gerson*, 148 Ill. App. 3d 1026, 1031 (1986). A plaintiff alleging negligence must come forward with evidence sufficient for a trier of fact to reasonably conclude that he or she suffered an injury to his or her person or property sufficient to withstand a properly supported summary judgment motion. *Gillion v. Tieman*, 86 Ill. App. 3d 147 (1980). A plaintiff

alleging negligence must demonstrate that the responsible defendant's alleged acts or omissions proximately caused his or her injuries. *Abrams v. City of Chicago*, 211 Ill. 2d 251, 258 (2004).

A landowner who employs an independent contractor to perform work is generally not liable for the independent contractor's acts or omissions. *Gregory v. Beazer East*, 384 Ill. App. 3d 178, 186 (2008). "This is because the owner generally does not supervise the details of the independent contractor's work and, thus, is not in a good position to prevent negligence, whereas the independent contractor's employees have submitted to the independent contractor's right to monitor and direct such details as their employer." *Gregory*, 384 Ill. App. 3d at 186.

Section 414 of the Restatement (Second) of Torts introduces the "retained control exception" to the general rule and provides, "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." Restatement (Second) of Torts §414, at 387 (1965). Section 414 renders the retention of control key in imposing liability. *Gregory*, 384 Ill. App. 3d at 186. "The comments accompanying section 414 discuss a ' "a continuum of control" ' from which Illinois courts have gleaned the necessary degree of control a defendant must exercise to be subject to liability under this section." *Gregory*, 384 Ill. App. 3d at 186-87 (quoting *Calderon v. Residential Homes of America, Inc.*, 381 Ill. App. 3d 333, 341 (2008) (quoting *Martens v. MCL Construction Corp.*, 347 Ill. App. 3d 303, 315 (2004))). Comment *c* of section 414 states as follows:

> "In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not

enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do work in his own way." Restatement (Second) of Torts §414, Comment *c*, at 388 (1965).

The plaintiff argues two exceptions to this general rule: (1) the City retained control of the work and (2) the City owed a nondelegable duty to protect him while he painted the crosswalks. However, the undisputed facts establish that the City, a landowner, employed Graham's, an independent contractor, to paint crosswalks on its land and that the plaintiff, an employee of Graham's, was injured while painting a crosswalk on the City's land while working for Graham's. It is further undisputed that there was no written contract between the City and Graham's and that the City had hired Graham's to perform the same work in the past. The record reveals that the City's public works director, Dale Spencer, never advised Eric Graham, the owner of Graham's, how the job was to be performed. Spencer also did not discuss any safety measures, including the use of flagmen at the work site. No city employees were furnished for the job. Graham's supplied the paint, equipment, and men to perform the work. No one from the City, including Spencer, supervised the work Graham's was hired to perform.

The plaintiff had been employed by Graham's since 2000. He admitted that Eric Graham was responsible for furnishing the equipment and supplies and supervising his work. It was Eric Graham who notified the plaintiff about the location of the job and the work to be performed. If there was a problem at the work site or with the work conditions, the

plaintiff reported these matters to Eric Graham and not to the City. This was not the first time that the plaintiff had painted the crosswalks in the City. In fact, he had done so several times before during his employment with Graham's. At no time during these prior jobs was a flagman provided by Graham's or the City, and no one had instructed the plaintiff how to arrange the orange traffic cones. Accordingly, we reject the plaintiff's argument that the City retained control of the work.

The plaintiff also argues that the City owed him a nondelegable duty to protect him while he painted the crosswalk. In support of his proposition, he cites cases that pertain to injuries to third parties and discuss nondelegable duties set forth in sections 416 and 418 of the Restatement (Second) of Torts (Restatement (Second) of Torts §§416, 418 (1965)). *Village of Jefferson v. Chapman*, 127 Ill. 438 (1889); *Cole v. City of East St. Louis*, 158 Ill. App. 494 (1910); *Lau v. City of Chicago*, 153 Ill. App. 50 (1910); *Coultas v. City of Winchester*, 208 Ill. App. 3d 238 (1991). Section 416 provides, "One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken[] is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise." Restatement (Second) of Torts §416, at 395 (1965). Section 418 provides as follows:

> "(1) One who is under a duty to construct or maintain a highway in reasonably safe condition for the use of the public, and who entrusts its construction, maintenance, or repair to an independent contractor, is subject to the same liability for physical harm to persons using the highway while it is held open for travel during such work, caused by the negligent failure of the contractor to make it reasonably safe for travel, as though the employer had retained the work in his own hands.

(2) The statement in Subsection (1) applies to any place which is maintained by a government for the use of the public, if the government is under the same duty to maintain it in reasonably safe condition as it owes to the public in respect to the condition of its highways." Restatement (Second) of Torts §418, at 400 (1965).

In the instant case, there was no injury to a third person. This case involves an injury to an employee of an independent contractor hired by the City to paint the crosswalks. Sections 416 and 418 do not apply to employees of independent contractors. Section 416 relates to harm caused by an independent contractor to "others." Not one of the cases cited by the plaintiff involved an injured employee of a contractor.

Section 418 relates to harm caused by an independent contractor to "persons using the highway while it is held open "for" the use of the public." Restatement (Second) of Torts §418(1), (2), at 400 (1965). In the cases cited by the plaintiff, the plaintiffs were injured by a dangerous condition on the City's property. In the instant case, there is no evidence that the plaintiff's injury was caused by a condition on the City's land. Section 418 applies "only to harm suffered as a result of the dangerous condition of the highway or other public place, as distinguished from harm caused by the activities of the contractor." In this case, the harm was caused by the activities of Graham's and McMurray. Accordingly, we also reject the plaintiff's argument that the City owed a nondelegable duty to protect him.

Next, the plaintiff alleges that the City negligently and willfully and wantonly contracted with Graham's to paint the crosswalks when it knew or should have known that the painting would require a flagman and that Graham's would not provide a flagman. The negligent hiring of a contractor in Illinois is governed by section 411 of the Restatement (Second) of Torts, which provides as follows:

"An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor

(a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or

(b) to perform any duty which the employer owes to third persons." Restatement (Second) of §411, at 376 (1965).

Under this section, in order to prevail the plaintiff must be a "third person." Thus, the question is whether an employee of a contractor is a "third person" entitled to bring a claim for the negligent hiring of the employee's own employer. Although this question has not been conclusively answered in Illinois, the court in *Recio v. GR-MHA Corp.*, 366 Ill. App. 3d 48, 58 (2006), stated that it appeared that an employee of a negligently retained entity is not within the class of third parties to whom a duty of care in hiring an independent contractor extends. The plaintiff in the instant case is not a "third person" entitled to a duty of care from the City.

In any event, even if we were to conclude that the plaintiff is a third person as required in section 411 of the Restatement (Second) of Torts, section 2-201 of the Tort Immunity Act provides in part that "a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of discretion even though abused." 745 ILCS 10/2-201 (West 2008). Under the plain language of section 2-201, immunity will not attach unless the plaintiff's injury results from an act performed or omitted by the employee in determining policy and in exercising discretion. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 373 (2003). Cases considering section 2-201 have recognized a distinction between "discretionary duties, the negligent performance of which does not subject a municipality to tort liability, and ministerial duties, the negligent performance of which can subject a municipality to tort liability." *Snyder v. Curran Township*, 167 Ill. 2d 466, 473 (1995). Discretionary acts have been defined as those which are unique to the

particular public office, while ministerial acts are those which a person performs on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, and without reference to the official's discretion regarding the propriety of the act. *Snyder*, 167 Ill. 2d at 474. Policy decisions are those that require the governmental entity to balance competing interests and to make a judgment call on what solutions will best serve each of those interests. *Snyder*, 167 Ill. 2d at 474. In the instant case, the City's determination of whom to hire is a discretionary policy decision because it involved a consideration of multiple factors and was not an action taken pursuant to a prescribed set of rules. Thus, we conclude that the City is immune from any liability for negligently or willfully or wantonly contracting with Graham's.

The plaintiff next argues that the City failed to provide a flagman in violation of section 2 of the Road Worker Safety Act and that Booker failed to notify the City that it was in violation of section 2 of the Road Worker Safety Act by allowing Graham's to paint without providing a flagman. Section 2 states in part, "At all times during which men are working where one-way traffic is utilized, the contractor or his authorized agent in charge of such construction will be required to furnish no fewer than two flagmen ***." 430 ILCS 105/2 (West 2008). Section 6 states in pertinent part, "Any contractor, subcontractor, or his or her authorized agent *** who knowingly or wilfully violates any provision of this Act[] shall be responsible for any injury to person or property occasioned by such violation, and a right of action shall accrue to any person injured for any damages sustained thereby ***." 430 ILCS 105/6 (West 2008). The Road Worker Safety Act only applies to contractors, subcontractors, or their authorized agents. In the instant case, the defendants are not "contractors, subcontractors, or his or her authorized agents" as required for liability under the Road Worker Safety Act. A "contractor" has been defined as a party who enters into a contract with the owner of certain property to perform some type of work thereon. *Richard*

v. Illinois Bell Telephone Co., 66 Ill. App. 3d 825, 848 (1978). A "subcontractor" has been defined as a party who contracts with the contractor to do a part of the work that the contractor has previously agreed to perform. *Richard*, 66 Ill. App. 3d at 848. The defendants do not fall within either of these definitions. Graham's was the contractor in the instant case. Accordingly, it was Graham's duty to furnish flagmen and not the City's duty. Booker cannot be held liable for failing to notify the City that it was in violation of section 2 of the Road Worker Safety Act by allowing Graham's to paint without providing a flagman. Booker was not required to do so.

The plaintiff also argues that the defendants are liable for failing to enforce the Road Worker Safety Act. The public-duty rule establishes that "a municipality or its employees is 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 v. Skokie*, 183 Ill. 2d 30, 44 (1998). An exception to the public-duty rule exists where the plaintiff can establish that a municipality or its employee owes him a special duty that is different from its duty to the general public. *Burdinie v. Village of Glendale Heights*, 139 Ill. 2d 501, 507-09 (1990). Four elements must be proven by the plaintiff to establish that special duty: (1) the defendant must be uniquely aware of the particular danger or risk, (2) the plaintiff must allege specific acts or omissions on the part of the defendant with respect to danger, (3) the specific acts or omissions must be either affirmative of willful in nature, and (4) the injury must occur while the plaintiff is under the direct and immediate control of employees or agents of the municipality. *Burdinie*, 139 Ill. 2d at 508.

In the instant case, the plaintiff argues that the defendants did not enforce the Road Worker Safety Act. The plaintiff contends that Booker, who was stationed in his police vehicle near the work site, owed a duty to protect him by stopping the job or making a

necessary arrest. However, the plaintiff fails to establish that he has shown that all four elements exist to establish the special duty to him. Thus, the defendants did not owe the plaintiff a duty to protect him from being struck from a motorist by enforcing the Road Worker Safety Act. Furthermore, even if the defendants owed the plaintiff that duty, that duty is no different than the defendants' duty to the public. Accordingly, the special-duty rule does not apply in the instant case, and the defendants cannot be held liable for the failure to enforce the Road Worker Safety Act.

The plaintiff next argues that the defendants are not protected by the Tort Immunity Act. Sections 2-103 and 2-205 of the Tort Immunity Act grant immunity to local public entities and public employees for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law. 745 ILCS 10/2-103, 2-205 (West 2008). Sections 2-104 and 2-206 of the Tort Immunity Act grant immunity to a local public entity or a public employee for an injury caused by the issuance, denial, suspension, or revocation of, or by the failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar authorization where the entity or the public employee is authorized by enactment to determine whether or not the authorization should be issued, denied, suspended, or revoked. 745 ILCS 10/2-104, 2-206 (West 2008).

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 [*sic*]." 745 ILCS 10/3-104 (West 2008). Section 3-104 has been held to represent the legislature's clear intent to " 'immunize absolutely the failure to initially provide a traffic control device even where that failure might "endanger the safe movement of traffic." ' "

(Emphasis omitted.) *Jefferson v. City of Chicago*, 269 Ill. App. 3d 672, 677 (1995) (quoting *West v. Kirkham*, 147 Ill. 2d 1, 8 (1992)). In *Jefferson*, the plaintiff complained that the city failed to provide a flagman on the scene to warn motorists about a narrowed roadway. *Jefferson*, 269 Ill. App. 3d at 677-78. The circuit court granted the city's motion for a summary judgment, finding that the city was immunized by the Tort Immunity Act. *Jefferson*, 269 Ill. App. 3d at 674. The appellate court affirmed the circuit court's decision, finding that the plaintiff's allegation that the city failed to place a flagman on the scene ran afoul of section 3-104 of the Tort Immunity Act. *Jefferson*, 269 Ill. App. 3d at 678. Under the Tort Immunity Act, the City is a "local public entity" and Booker is a "public employee." 745 ILCS 10/1-206, 1-207 (West 2008). Accordingly, we conclude that the defendants are provided immunity pursuant to the Tort Immunity Act. We note that the immunity granted to the defendants under sections 2-103, 2-104, 2-201, 2-205, 2-206, and 3-104 is absolute. See *Anthony v. City of Chicago*, 382 Ill. App. 3d 983, 993 (2008); *Foster & Kleiser v. Chicago*, 146 Ill. App. 3d 928, 932 (1986); *Glenn v. City of Chicago*, 256 Ill. App. 3d 825, 843 (1993); *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 196 (1997); *Jefferson v. City of Chicago*, 269 Ill. App. 3d 672, 677 (1995).

For the foregoing reasons, we affirm the judgment entered by the circuit court of Perry County granting a summary judgment in favor of the defendants.

Affirmed.