IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Michelle Lee, independent administrator of the estate of Andrew R. Lee, deceased,	)	
Plaintiff,	)	
v.	)	No. 19 L 8291
Matthew J. Cage, Room 183, Inc. d/b/a Room 183, an Illinois corporation; Vance S. Woods, and the City of Markham,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

The record supporting a summary judgment motion must contain evidence establishing the plaintiff's inability to plead essential elements of duty, breach, and proximate cause. The evidentiary record must similarly support claims of statutory immunity. Here, neither the law nor the facts support the defendants' arguments for summary judgment except for statutory immunity for failing to supervise an employee's conduct. For those reasons, the defendants' summary judgment motion is granted, in small part, and denied, for the most part.

Facts

On the evening of March 8, 2019 and the morning of March 9, 2019, Room 183 and its staff served alcohol to Andrew Lee and Matthew Cage. Cage became intoxicated by the time he and Lee left Room 183. At some point, Cage began driving a car north on Interstate 57; Lee was in the front passenger seat.

An audio-visual dash camera from an Illinois State Police vehicle supplies nearly all the remaining pertinent facts underlying the present motion. The video shows that at some point before 2:55 a.m. on March 9, 2019, a vehicular accident had occurred on southbound Interstate 57. At approximately 2:55 a.m., an Illinois State trooper arrived at the scene and parked his squad car on the left-hand shoulder of southbound Interstate 57 behind the cars involved in the vehicular accident. The trooper had activated

the squad car's emergency oscillating lights, and they remained on while the trooper was at the scene.

At approximately 2:57 a.m., an emergency vehicle responded to the scene. It is believed the vehicle is a police vehicle, but the video does not clearly identify it. That vehicle parked on the left-hand shoulder of northbound Interstate 57, directly across the concrete median from the vehicles involved in the accident. That vehicle's emergency oscillating lights had been activated and remained on at all times.

At approximately 2:59 a.m., the purported police vehicle left with the arrival of an ambulance from Buds Ambulance Service. The ambulance also parked on the left-hand shoulder of northbound Interstate 57 across the median from the vehicles involved in the vehicular accident. The ambulance had its emergency oscillating lights on as it approached and kept them on while parked on the shoulder.

At approximately 3:00 a.m., Markham firefighter Vance Woods drove a City of Markham fire engine to the scene.[1] Woods drove north on Interstate 57 and parked the engine partially on the left-hand shoulder of northbound Interstate 57 behind the ambulance and partly in the left-most driving lane. The engine's emergency oscillating lights had been activated and remained on while at the scene.

At approximately 03:07:39, Woods sounded the engine's air horn. At approximately 03:07:41, Cage drove his car into the rear of the Spartan engine. The impact resulted in Lee's death.

Michelle Lee, as administrator of Andrew Lee's estate, filed suit against the defendants, including Woods and Markham. The remaining negligence claims against Woods are that he failed to: (1) take evasive measures to avoid the collision; or (2) position the engine safely on the roadway. The remaining willful and wanton claim against Woods is that he failed to position the engine safely. The remaining negligence allegation against Markham, through the *respondeat superior* doctrine, is premised on Woods' alleged negligent conduct. The remaining willful and wanton claims against Markham are that it failed to: (1) position the fire truck safely on the roadway; and (2) supervise the provision of adequate notice to approaching vehicles.

---

[1] The parties incorrectly identify the 1999 Spartan Pumper as a fire truck. Since a pumper pumps water, the vehicle is a fire engine, not a fire truck.

Analysis

The defendants bring their summary judgment motion pursuant to the Illinois Code of Civil Procedure. 735 ILCS 5/2-1005. Summary judgment is authorized "if 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." *Id.* 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. *See Land v. Board of Educ. of the City of Chicago*, 202 Ill. 2d 414, 421, 432 (2002). A defendant moving for summary judgment may disprove a plaintiff's case by showing the plaintiff lacks sufficient evidence to establish an element essential to a cause of action; this is the so-called "*Celotex* test." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), *followed Argueta v. Krivickas*, 2011 IL App (1st) 102166, ¶ 6. A court should grant summary judgment on a *Celotex*-style motion only when the record indicates the plaintiff had extensive opportunities to establish his or her case but failed in any way to demonstrate he or she could do so. *Colburn v. Mario Tricoci Hair Salons & Day Spas, Inc.*, 2012 IL App (2d) 110624, ¶ 33.

If the defendant presents uncontradicted facts sufficient to support summary judgment as a matter of law, the nonmoving party cannot rest on the complaint and other pleadings to create a genuine issue of material fact. *See Harrison v. Hardin Cnty. Cmty. Unit Sch. Dist. No. 1*, 197 Ill. 2d 466, 470 (2001). Rather, a plaintiff creates a genuine issue of material fact only by presenting enough evidence to support each essential element of a cause of action that would arguably entitle the plaintiff to judgment. *Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 85 (1st Dist. 2004). To determine whether a genuine issue as to any material fact exists, a court is to construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the opponent. *See Adams v. Northern Ill. Gas Co.*, 211 Ill. 2d 32, 43 (2004). The inferences drawn in favor of the nonmovant must, however, be supported by the evidence. *Destiny Health, Inc. v. Connecticut Gen'l Life Ins. Co.*, 2015 IL App (1st) 142530, ¶ 20. A triable issue precluding summary judgment exists if the material facts are disputed, or if the material facts are undisputed but a reasonable person might draw different inferences from the undisputed facts. *Id.*

The defendants' first argument is that they owed Lee no duty for his safety. To determine a local governmental entity's duties, if any, courts are to refer to the common law. *See Village of Bloomingdale v. CDG Enterps., Inc.*, 196 Ill. 2d 484, 490 (2001). In other words, if there exists no common-law duty, there is no cause of action. To determine if a duty exists, a court is

to analyze whether a relationship existed between the plaintiff and the defendant for which the law would impose a duty on the defendant for the plaintiff's benefit. *See Doe-3 v. McLean Cty. Unit Dist. No. 5 Bd. of Directors*, 2012 IL 112479, ¶ 22, *quoting Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 436 (2006). The "relationship" is "a shorthand description for the analysis of four factors: (1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing the burden on the defendant." *Id., citing Simpkins v. CSX Transp., Inc.*, 2012 IL 110662, ¶ 18. A court's analysis of the duty element focuses on the policy considerations inherent in these four factors and the weight accorded to each based on the case's particular circumstances. *Id.* Duty is generally a question of law to be decided by the court, *see Choate v. Indiana Harbor Belt R.R.*, 2012 IL 112948, ¶ 22, if, however, the existence of a duty depends on disputed underlying facts, the existence of those relevant facts is a question for a trier of fact. *Combs v. Schmidt*, 2012 IL App (2d) 110517, ¶ 32.

The Supreme Court has explained that, in addition to specific duties owed by defendants to plaintiffs, there exists a broader generalized duty of care. As explained:

> [T]his court has long recognized that "every person owes a duty of ordinary care to all others to guard against injuries which naturally flow as a reasonably probable and foreseeable consequence of an act, and such a duty does not depend upon contract, privity of interest or the proximity of relationship, but extends to remote and unknown persons." Thus, if a course of action creates a foreseeable risk of injury, the individual engaged in that course of action has a duty to protect others from such injury. This does not establish a 'duty to the world at large,' but rather this duty is limited by the considerations discussed above. [(That is, whether a plaintiff and a defendant stand in such a relationship to one another that the law imposes upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff; which is itself a "shorthand description" of the four factors the court considers when determining whether a duty exists.)] An independent 'direct relationship' between parties may help to establish the foreseeability of the injury to that plaintiff. . . but is not an additional requirement to establishing a duty in this context.

Simpkins, 2012 IL 110662, ¶ 19 (citation omitted).

The defendants argue they owed Lee no duty based on a provision of the Illinois Vehicle Code. According to the defendants, section 5/11-205 authorizes emergency vehicles with activated emergency lights to stand anywhere and, therefore, a duty for the safety of others arises only if a public employee is driving an emergency vehicle. The relevant portions of section 11-205 provide that:

> (a) The provisions of this Chapter applicable to the drivers of vehicles upon the highways shall apply to the drivers of all vehicles owned or operated by . . . any . . . city . . . and subject to such specific exceptions as set forth in this Chapter with reference to authorized emergency vehicles.
> (b) The driver of an authorized emergency vehicle, when responding to an emergency call . . . or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this Section, but subject to the conditions herein stated.
> (c) The driver of an authorized emergency vehicle may:
> 1. Park or stand, irrespective of the provisions of this Chapter;
>
> * * *
>
> (d) The exceptions herein granted to an authorized emergency vehicle, other than a police vehicle, shall apply only when the vehicle is making use of either an audible signal when in motion or visual signals meeting the requirements of Section 12-215 of this Act.
> (e) The foregoing provisions do not relieve the driver of an authorized emergency vehicle from the duty of driving with due regard for the safety of all persons, nor do such provisions protect the driver from the consequences of his reckless disregard for the safety of others.
> (f) Unless specifically made applicable, the provisions of this Chapter, except those contained in Section 11-204 and Articles IV and V of this Chapter 1 shall not apply to persons, motor vehicles and equipment while actually engaged in work upon a highway but shall apply to such persons and vehicles when traveling to or from such work.

625 ILCS 5/11-205(a)-(f).

Section 11-205 does not support the defendants' no-duty argument for a variety of reasons. First, subsection (b) permits emergency vehicles various privileges when responding to an emergency call. Here, Woods was not responding to an emergency call when Cage drove into the back of the fire engine; rather, Woods had arrived at the scene seven minutes earlier.

Second, subsection (d) is of no assistance despite Woods keeping the fire truck's oscillating lights on and using the air horn before the collision because, once again, the fire truck was not in the process of responding to a call. Third, the privileges provided in section 11-205 do not apply here because, under subsection (e), they do not protect a driver from the consequences of reckless disregard for the safety of others. Importantly, that phrase is not limited to the time in which the emergency vehicle is responding to an emergency call. Fourth, subsection (f) limits the application of any privileges to the time emergency vehicles are traveling to or from work on a highway, but specifically do not apply to persons or motor vehicles while they are engaged in work on a highway. Here, it is uncontested that Woods had arrived and parked at the scene for seven minutes before the collision.

If is unsurprising that the Vehicle Code does not support the defendants' no-duty argument because the code would otherwise be at odds with the traditional four-element duty analysis. First, it is entirely foreseeable that any vehicle, regardless of whether the driver was intoxicated, might collide with a fire engine parked partially in the driving lane of an interstate highway. *See, e.g., Yoder v. Ferguson*, 381 Ill. App. 3d 353, 363 (1st Dist. 2008). Given the speed of vehicles on interstate highways, it is also highly likely such a collision could lead to substantial injuries or death. Third, the burden of parking the fire engine wholly out of a driving lane is essentially non-existent. The video makes plain that the ambulance's location did not prevent Woods from parking the engine fully on the shoulder. Fourth, the consequence of placing that burden on the defendants is consistent with the Vehicle Code and what is expected of all drivers, regardless of the type of vehicle.

The defendants argue next that, even if they owed Lee a duty, they did not breach that duty. They argue specifically that their conduct was neither negligent nor willful and wanton. It is also important to recognize that Illinois law does not provide an independent cause of action for willful and wanton conduct. *Doe-3 v. McLean County Unit Dist. No. 5*, 2012 IL 112479, ¶ 19 (citing *Krywin v. Chicago Transit Auth.*, 238 Ill. 2d 215, 235 (2010), and *Ziarko v. Soo Line R.R.*, 161 Ill. 2d 267, 274 (1994) (citing cases)). Rather, to recover damages based on willful and wanton conduct, a plaintiff must plead and prove the basic elements of a negligence claim—duty, breach, and proximate cause of injury—plus a deliberate intention to harm or a conscious disregard for the plaintiff's welfare. *Doe-3*, 2012 IL 112479, at ¶ 19. Willful and wanton conduct is defined by the Local Governmental and Governmental Employees Tort Immunity Act (TIA) as, "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference or conscious disregard for the safety of others or their property." 745 ILCS 10/1-210. To rise to the level of willful and wanton

conduct, an act or failure to act must be sufficiently outrageous to shock the conscience. *See Romito v. City of Chicago*, 2019 IL App (1st) 181152, ¶ 30 (citing *Oravek v. Community Sch. Dist. 146*, 264 Ill. App. 3d 895, 900 (1st Dist. 1994)). *See also Burlingame v. Chicago Park Dist.*, 293 Ill. App. 3d 931, 934 (1st Dist. 1997); *Tagliere v. Western Springs Park Dist.*, 408 Ill. App. 3d 235, 244 (1st Dist. 2011). It is also true that the question of whether a defendant's conduct amounts to willful and wanton conduct is usually a question of fact for the jury. *Torres v. Peoria Park Dist.*, 2020 IL App (3d) 190248, ¶ 23. "Whether conduct is willful and wanton depends on the circumstances of each case." *Harris v. Thompson*, 2012 IL 112525, ¶ 41.

The defendants posit that the video evidence establishes Woods did not act negligently or willfully and wantonly by parking the fire engine mostly on the shoulder. That legal conclusion may ultimately be true, but viewing the present facts in the light most favorable to Lee, there exist questions a jury must address. For example, a jury could find parking a fire engine partly in a traffic lane on a busy interstate highway is negligent, particularly since there appeared to be room for Woods to have parked the fire engine entirely on the shoulder. A jury could also find the same conduct to be willful and wanton because Woods knew he parked the engine partly in a driving lane and conclude that such a position could interfere with vehicles travelling in the furthest left lane on Interstate 57. That conclusion is credible because Woods must have been looking behind the engine for on-coming traffic before activating the engine's air horn.

The defendants next argue that Cage was the proximate cause of Lee's death. Proximate cause contains two elements: (1) cause in fact; and (2) legal cause. *Krywin v. Chicago Transit Auth.*, 238 Ill. 2d 215, 225-26 (2010). Cause in fact requires the defendant's conduct be a material and substantial factor in bringing about the plaintiff's injury, or, in the absence of the defendant's conduct, the injury would not have occurred. *Id.* at 226. If a plaintiff's injury results from a third person's independent conduct, the issue is whether the intervening cause is a type a reasonable person would see as a likely result of the complained-of conduct. *See Young v. Bryco Arms*, 213 Ill. 2d 433, 449 (2004). In other words, if the plaintiff's injury resulted from a third person's independent conduct, not the defendant's negligence, the defendant's negligence is only a condition and not a proximate cause of the injury. *Thompson v. County of Cook*, 154 Ill. 2d 374, 383 (1993); *In re Estate of Elfayer*, 325 Ill. App. 3d 1076, 1083-84 (1st Dist. 2001); *Ball v. Waldo Twnshp.*, 207 Ill. App. 3d 968, 973 (4th Dist. 1990).

When considering cause in fact, courts generally employ either the traditional "but for" test or the "substantial factor" test. *See Nolan v. Weil-McLain*, 233 Ill. 2d 416, 431 (2009). Under the "but for" test, "'a defendant's

conduct is not the cause of an event if the event would have occurred without it.'" *Id.* (quoting *Thacker v. UNR Industries, Inc.*, 151 Ill. 2d 343, 354 (1992)). Under the "substantial factor" test, "the defendant's conduct is said to be a cause of an event if it was a material element and a substantial factor in bringing the event about." *Id.* (internal quotation marks omitted). The Supreme Court has clarified that if an injury results from the subsequent, independent acts of a third party, the defendant's conduct may nevertheless remain a material and substantial element of the injury if the intervening cause was of a type that a reasonable person would see as likely or foreseeable based on the defendant's conduct. *See City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 407 (2004).

As to the second element, legal cause is present if the injury is of the type a reasonable person would see as a likely result of his or her conduct. *First Springfield Bk. & Trust v. Galman*, 188 Ill. 2d 252, 257-58 (1999); *Simmons v. Garces*, 198 Ill. 2d 541, 558 (2002); *Abrams v. City of Chicago*, 211 Ill. 2d 251, 258 (2004). In short, legal cause involves an assessment of foreseeability. *Lee v. Chicago Transit Auth.*, 152 Ill. 2d 432, 456 (1992). Courts ask whether the injury is the type that a reasonable person would see as a "likely result" of his or her conduct, or whether the injury is so "highly extraordinary" that imposing liability is not justified. *Id.*; *see also City of Chicago*, 213 Ill. 2d at 395 (legal cause "is established only if the defendant's conduct is so closely tied to the plaintiff's injury that he should be held legally responsible for it") (internal quotation marks omitted).

Proximate cause is generally a question of fact to be decided by the trier of fact, *Fenton v. City of Chicago*, 2013 IL App (1st) 111596, ¶ 27, and it is in this case. It is certainly possible that Cage would not have struck the engine had it been parked fully on the shoulder. On the other hand, given Cage's intoxication, it is possible the accident would have occurred regardless. Although Lee's death resulted from Cage's drunk driving, the inescapable issue is whether Woods' intervening cause—parking the engine partly in a driving lane—is a factor a reasonable person would see as a likely leading to the collision.

The defendants next argue they are immune under a variety of Tort Immunity Act provisions. First, the defendants claim immunity under section 2-204. That section states: "Except as otherwise provided by statute, a public employee, as such and acting within the scope of his employment, is not liable for an injury caused by the act or omission of another person." 745 ILCS 10/2-204. Section 2-204 is of no use to the defendants here because the privileges granted to emergency vehicles under the Vehicle Code do not apply to vehicles at work on a highway. 625 ILCS 5/11-205(f).

The same result is true for the TIA discretionary immunity provision. That section states: "Except as otherwise provided by Statute, 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 such discretion even though abused." 745 ILCS 10/2-201. For section 2-201 immunity to apply, the defendant must show the particular decision at issue was both discretionary and a determination of policy. *Harinek v. 161 N. Clark St. Ltd. P'ship*, 181 Ill. 2d 335, 341 (1998). Conduct is discretionary if it is performed on a given set of facts in a prescribed manner, in obedience to a mandate of legal authority, and without reference to the official's discretion as to the act's propriety. *Harrison v. Hardin Comm. Sch. Dist.*, 197 Ill. 2d 466, 472 (2001); *Harinek*, 181 Ill. 2d at 343. Conduct is considered to be policy making if it involves balancing competing interests and making a judgment call as to what solution will best serve those interests. *Harrison*, 197 2d at 472; *Harinek*, 181 Ill. 2d at 342.

Woods argues he would have had to balance competing interests in deciding where to park his fire engine. That statement is wholly unsupported by the record. Even if it were true, there is nothing in the record suggesting Woods was even in the position to determine policy within the rubric of section 2-201. In sum, section 2-201 provides no immunity to the defendants.

The defendants next argue they are immune under a combination of TIA sections 5-106 and 2-202. Section 5-106 provides:

> Except for willful or wanton conduct, neither a local public entity, nor a public employee acting within the scope of his employment, is liable for an injury caused by the negligent operation of a motor vehicle or firefighting or rescue equipment, when responding to an emergency call, including transportation of a person to a medical facility.

745 ILCS 10/5-106. The provision explicitly applies only to vehicles responding to an emergency call. *See Hampton v. Cashmore*, 265 Ill. App. 3d 23 (2d Dist. 1994); *Williams v. City of Evanston*, 378 Ill. App. 3d 590 (1st Dist. 2007); *Young v. Forgas*, 308 Ill. App. 3d 553 (4th Dist. 1999); *Carter v. Simpson*, 328 F.3d 948 (7th Cir. 2003). This court knows of no case in which section 5-106 has applied to a situation in which an emergency vehicle has already responded to an emergency call. Section 5-106 is, therefore, inapplicable here.

Section 2-202 provides that, "[a] public employee is not liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes willful and wanton conduct." 745 ILCS 10/2-202. Even if Woods is assumed to be executing and enforcing the law at the time Cage collided with the fire engine, there remains, as explained above, a question of fact as to whether Woods acted willfully and wantonly by parking the fire engine partly in an Interstate 57 traffic lane.

The defendants next argue that Markham is immune from liability because Woods is immune. Such a result is possible under TIA section 2-109. That section provides: "A local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable." Since there is a question of fact whether Woods was negligent or willful and wanton, Markham cannot claim *respondeat superior* immunity under section 2-109.

Finally, the defendants argue they are immune from Lee's claim that they failed to supervise the provision of adequate notice to approaching vehicles. TIA section 3-108 explicitly states that:

> (a) Except as otherwise provided in this Act, neither a local public entity nor a public employee who undertakes to supervise an activity on or the use of any public property is liable for an injury unless the local public entity or public employee is guilty of willful and wanton conduct in its supervision proximately causing such injury.
> (b) Except as otherwise provided in this Act, neither a local public entity nor a public employee is liable for an injury caused by a failure to supervise an activity on or the use of any public property unless the employee or the local public entity has a duty to provide supervision imposed by common law, statute, ordinance, code or regulation and the local public entity or public employee is guilty of willful and wanton conduct in its failure to provide supervision proximately causing such injury.

745 ILCS 10/3-108. Supervision includes training, *Flores v. Palmer Marketing, Inc.*, 361 Ill. App. 3d 172, 175-76 (1st Dist. 2005), instructing, *Gillmore v. City of Zion*, 237 Ill. App. 3d 744, 751-52 (2d Dist. 1992), and warning, *Payne v. Lake Forest Com. H.S. Dist.*, 268 Ill. App. 3d 783, 784, 788 (2d Dist. 1994). The immunity applies to the supervision of any activity on public property, including construction and maintenance. *Epstein v. Chicago Bd. of Ed.*, 178 Ill. 2d 370 376 (1997); *Gusich v. Metropolitan Pier & Expo. Auth.*, 326 Ill. App. 3d 1030, 1033 (1st Dist. 2001). The immunity also applies to claims of improper supervision of a local public entity's employees. *Flores*

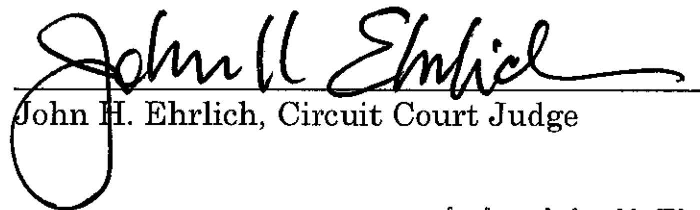
v. Palmer Marketing, Inc., 361 Ill. App. 3d 172, 175-76 (1st Dist. 2005). The immunity also applies to claims of a failure to supervise activities on public property other than that owned by the defendant-local public entity. *See Albert v. Board of Ed.*, 2014 IL App (1st) 123544, ¶¶ 49-50.

The plain language of section 3-108 is applicable here for at least three reasons. First, the record is plain that Markham did not undertake to supervise Woods or his decision where to park the engine; consequently, immunity under subsection (a) applies. Second, no case, statute, ordinance code, or regulation required Markham to supervise Woods at the scene of an emergency call; consequently subsection (b) applies. Third, section 3-108 immunity applies in a situation in which the alleged lack of supervision occurred on property owned by public entity other than Markham. As a result, the defendants are immunize from Lee's lack-of-supervision claims.

Conclusion

For the reasons presented above, it is ordered that:

1. The defendants' summary judgment motion as to count seven, paragraph 18(d), and any other claim against any defendant for failing to supervise, is granted;
2. The remainder of the defendants' summary judgment motion is denied.



John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

MAR 08 2022

Circuit Court 2075