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

Michele L. Guzick,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	No. 11 L 8349
City of Chicago, a municipal corporation,	)	
Cleopatra Neri, Florencio Neri, and	)	
Citimortgage, Inc., a foreign corporation,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Under the common law, landowners, including local governmental entities, are not liable for injuries to persons caused by open-and-obvious property conditions. Local governmental entities are also statutorily immune from liability for their failures to warn and inspect for those conditions. Since the plaintiff was injured on a parkway defect that she knew existed and posed a hazard, the defendant's summary judgment motion must be granted and the case dismissed with prejudice.

FACTS

In June 2011, Michele Guzick moved into a house located at 6832 West 63rd Place in the City of Chicago. According to Guzick, sometime that June and on July 3 she called the City's 3-1-1 non-emergency-response number to report that the sewer in front of her house appeared to be collapsing and that an adjoining grassy area in the parkway had a hitch in it.[1] Guzick also alleges that around the same time she called Alderman Michael R. Zalewski's office to

[1] Photographs in the record show that the sewer catch basin is actually located in front of the adjoining property, 6828 West 63rd Place.

express her concern about the apparent sewer collapse and surrounding depression.

On July 19, 2011, Guzick was mowing the parkway in front of her house. At some point she wanted to line up the mower so that she could get it close to the curb. To do that she stepped backward, placing both feet into the depressed area. The area collapsed beneath her, and within seconds both of Guzick's legs went into a hole. Guzick's husband had to help extricate her.

Guzick sued four defendants seeking damages for her injuries. At present, Guzick has an amended complaint and dismissed each defendant except the City. Of the two remaining causes of action, each presents the same factual allegations. Count one claims the City's acts and omissions were negligent while count two claims they were willful and wanton. Each count claims that the City failed to: (1) maintain the parkway; (2) prevent the condition; (3) repair it; (4) inspect the property; (5) warn of the condition; and (6) respond to and act upon prior complaints about the condition of the sewer catch basin and surrounding concrete and asphalt.

Guzick testified at her deposition that she knew of the depression before she stepped in it. She also testified that she knew that if she stepped in the depression she might fall. Guzick did not recall if she looked backward before she stepped backward to align the lawnmower. She admitted that nothing prevented her from stepping to the side of the depression. She also admitted that nothing distracted her at the time of her fall. Guzick testified that the depression did not collapse until she set her feet down into the depression.

The City's 3-1-1 representative, Daphne Ward, averred that all calls made to 3-1-1 for non-emergency service are saved in the service-request system. Ward attached to her affidavit the service requests for the area 6800 - 6850 West 63rd Place from July 9, 2009 to August 9, 2011. The records indicate that 3-1-1 did not receive any service requests for the catch basin or parkway located at 6828 West 63rd Place. The records do, however, indicate that 3-1-1 received one

call from Guzick during that same 25-month period. On July 6, 2011, Guzick called 3-1-1 and requested an inspection for a parkway cave in at 6829 West 63rd Place. (The record does not indicate whether this address was a data-entry error.) The records further indicate that the only entry made by Alderman Zalewski's office in the 3-1-1 system about 6828 West 63rd Place occurred on July 15, 2011.

Guzick's retained a professional structural engineer, Scott Leopold, as an expert witness. Leopold averred based on photographs that the concrete pavement cracking and asphalt patching around the sewer catch basin indicated that an inspection was necessary. He also averred that the photographs indicated that, more likely than not, a sinkhole had formed beneath the parkway. He further averred that the sinkhole would have taken several years to form.

The City filed a summary judgment motion directed at Guzick's amended complaint. The City presents five arguments. First, the City argues that count two is duplicative of count one. Second, the City argues that it owed Guzick no duty because the depression into which she stepped was open and obvious. The remaining three arguments rest on two provisions of the Governmental and Governmental Employees Tort Immunity Act. The City argues that it is immune for failing to warn Guzick of the allegedly dangerous condition. *See* 745 ICLS 10/3-104. The City also argues that it is immune from liability because it had no duty to inspect its property and had no notice of the defect. *See* 745 ILCS 10/3-102.

ANALYSIS

The Code of Civil Procedure authorizes summary judgment, "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." 735 ILCS 5/2-1005. A defendant moving for summary judgment may disprove a plaintiff's case in one of two ways. A defendant may introduce affirmative evidence that, if uncontroverted, would entitle the defendant to judgment as a matter of law – the so-called "traditional test." *See Purtill v. Hess*, 111 Ill. 2d 229, 240-41

(1986). Alternatively, a defendant may establish that the plaintiff lacks sufficient evidence to establish an element essential to a cause of action – the so-called "*Celotex* test." *See Williams v. Covenant Med. Cntr.*, 316 Ill. App. 3d 682, 688-89 (4th Dist. 2000), *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

The purpose of a summary judgment motion 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 Ed.*, 202 Ill. 2d 414, 421 & 432 (2002). The nonmoving party is not expected to prove its case in response to a summary judgment motion, but is required to present a factual basis as to each element that would arguably entitle the nonmoving party to judgment. *See id.* at 432. If the party seeking summary judgment presents facts that, if not contradicted, are 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).

A legally recognized cause of action in tort is one that alleges facts, not conclusions that, if proven, would establish that: (1) the defendant owed the plaintiff a duty; (2) the defendant breached the duty; and (3) the breach proximately caused the plaintiff's injury. *See Iseberg v. Gross*, 227 Ill. 2d 78, 86-87 (2007). To create a genuine issue of material fact in a tort action, a plaintiff must present enough evidence in response to a summary judgment motion to support each of these essential elements. *See Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 85 (1st Dist. 2004).

I. Count Two Duplicates Count One.

Guzick's amended complaint presents one common-law cause of action each for negligence and willful-and-wanton conduct. Illinois tort law has long recognized that, "[n]egligence is not the same as wantonness . . . ." *Quad Cnty. Distrib. Co. v. Burroughs Corp.*, 68 Ill. App. 3d 163, 166 (2d Dist. 1979). Negligence constitutes, "mere inadvertence, mistake, errors of judgment and the like. . . ." *Sank v.*

Poole, 231 Ill. App. 3d 780, 786 (4th Dist. 1992), *citing* Restatement (Second) of Torts § 908, cmt. *b*, at 465 (1979). Under the common law, "willful and wanton misconduct 'approaches the degree of moral blame attached to intentional harm, since the defendant deliberately inflicts a highly unreasonable risk of harm upon others in conscious disregard of it.'" *Id.*, *quoting Loitz v. Remington Arms Co.*, 138 Ill. 2d 404, 415-16 (1990), *quoting, in turn, Bresland v. Ideal Roller & Graphics Co.*, 140 Ill. App. 3d 445, 457 (1st Dist. 1986). The Tort Immunity Act provides a substantially similar definition. *See* 745 ILCS 10/1-210 ("a course of conduct which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others . . . .")

It follows that the factual pleading requirements necessary to establish a cause of action for negligence are far less rigorous than those for willful-and-wanton conduct. Indeed, if the operative facts and the injury pleaded in simple negligence and willful-and-wanton causes of action are the same, then the counts bringing those causes of action are duplicative. *See Pippen v. Petersen & Houpt*, 2013 IL App (1st) 111371, ¶ 28, *citing Neade v. Portes*, 193 Ill. 2d 433, 440-45 (2000), and others. Duplicative counts are, of course, not the same as alternative pleading. *Cf. Collins v. Reynard*, 154 Ill. 2d 48, 50 (1992) (legal malpractice claims may be pleaded in tort or breach of contract based on the same facts), *with Neade*, 193 Ill. 2d at 445 (medical negligence and breach of fiduciary duty counts are duplicative if based on the same facts and injury); *see also Pippen*, ¶ 29.

In this case, Guzick's negligence and willful-and-wanton counts rely on identical factual allegations and claim the same injury. Indeed, count two, "repeats, realleges and incorporates by reference" the first six paragraphs of factual allegations in count one. The only difference between the two counts is that count one, paragraph eight, refers to the City's "careless and negligent acts and/or omissions," while count two refers to the City's "willful and wanton misconduct; [sic] acts and/or omissions." Guzick fails, however, to allege any additional facts in count two that the City deliberately inflicted a highly unreasonable risk of harm on her by acting or failing to act as

claimed. Without specific factual allegations sufficient to establish willful-and-wanton conduct, count two is duplicative of count one and cannot stand.

Apart from the legal prohibition against duplicative counts, it remains unexplained why Guzick brought count two at all. Presumably, Guzick believes that a jury hearing the words "willful and wanton" attached to the City's conduct would readily grant her greater monetary damages. Yet Guzick gets to utter the words "willful and wanton" only if she has evidence to support the claim. If Guzick may establish a cause of action for simple negligence employing a more generous evidentiary standard, it makes no sense to establish willful-and-wanton conduct based on the same facts. In other words, the City is actually doing Guzick a favor by not holding her to a far more rigorous evidentiary standard. While this court does not indulge favors, it will grant the City's motion for summary judgment as to count two because it is legally and factually correct.

II. The City Owed Guzick No Duty.

Guzick claims that the City breached its duty to her by failing to maintain the sewer catch basin and parkway and, thereby, prevent her injury. The question of whether a duty exists is one of law for a court to decide. *See Burns v. City of Centralia*, 2014 IL 116998, ¶ 13. To determine if a duty exists, a court is to analyze whether the parties' relationship imposed on the defendant a duty 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; *see also Bucheleres v. Chicago Pk. Dist.*, 171 Ill. 2d 435, 456 (1996). 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.*

In Illinois, landowners owe a common-law duty of ordinary care to maintain property in a reasonably safe condition. *See Ward v. K mart Corp.*, 136 Ill. 2d 132, 150-51 (1990) (adopting Restatement (Second) of Torts § 343). Our courts also recognize an exception to that duty for known dangers created by open-and-obvious conditions. *See id.* at 149-51 (adopting Restatement (Second) § 343A). A condition is open and obvious as a matter of law if "'both the condition and the risk are apparent to and would be recognized by a reasonable [person] . . . exercising ordinary perception, intelligence, and judgment.'" *Bonner v. City of Chicago*, 334 Ill. App. 3d 481, 484 (1st Dist. 2002), *quoting Deibert v. Bauer Brothers Constr. Co., Inc.*, 141 Ill. 2d 430, 435 (1990) (adopting the definition of "obvious" from the Restatement (Second) of Torts § 343A, cmt. *b*, at 219 (1965)). It follows that an open-and-obvious condition presents only a slight risk of injury because the condition can reasonably be avoided, *see Ward*, 136 Ill. 2d at 148; consequently, the burden placed on the defendant to remedy such a defect plays a reduced role. Whether a particular condition is open and obvious is assessed based on a reasonable person's objective knowledge, not the plaintiff's subjective knowledge. *Bonner*, 334 Ill. App. 3d at 484.

The open-and-obvious exception applies equally to private landowners and local governmental entities. *See, e.g., Bucheleres*, 171 Ill. 2d 435, 447-48. Indeed, to determine a local governmental entity's duty, if any, to maintain its property, courts are to refer to the common law. *See Village of Bloomingdale v. CDG Enterps., Inc.*, 196 Ill. 2d 484, 4990 (2001). It should be noted that the City errs in presenting its duty argument by conflating the open-and-obvious exception to a landowner's duty with Tort Immunity Act section 3-102. While the statute codifies the common-law duties that existed at the time of enactment, *see Vesey v. Chicago Housing Auth.*, 145 Ill. 2d 404, 412-13 (1991), the duties pertinent in this lawsuit derive from the common law, not the Tort Immunity Act.

The City's pleading error does not alter this court's analysis. The record presented in this case supports the City's contention that the depression into which Guzick stepped was open and obvious.

That is the only possible conclusion because Guzick testified that she called 3-1-1 on multiple occasions as well as Alderman Zalewski's office to complain about the apparent catch basin collapse and surrounding parkway depression. Guzick admitted that she knew the depression posed a tripping hazard and that she could have stepped outside the depression when lining up the lawn mower. Despite knowing the danger the depression posed, Guzick does not recall looking backward before stepping backward to line up the lawn mower. In other words, Guzick's own testimony indicates that she failed to use ordinary care for her own safety.

Leopold's affidavit does not help Guzick's case. He believes that the concrete pavement cracking and asphalt patching around the sewer catch basin indicated that an inspection was necessary. Even Guzick, a non-expert, apparently agreed, as indicated by her calls to 3-1-1 and her alderman.

Guzick seeks to avoid applying the open-and-obvious exception to the parkway depression in two ways. First, she argues that grass covered the depression and obscured its depth. Even if that were true, Guzick knew of the depression's location regardless of its appearance and admitted that it posed a tripping hazard. Second, Guzick argues that she did not know the depression would collapse under her feet. This argument proves too much. The open-and-obvious exception does not require that a person know the particular risk that will lead to their injury. If that were true, there would be far less of an incentive for persons to avoid hazardous conditions for their own safety. A person may assume a known risk, but public policy favors avoiding unknown risks. In short, Guzick should have avoided the depression precisely because she had no idea what could happen, including both of her legs falling into a hole.

The record makes clear that the open-and-obvious exception to the duty to maintain property in a reasonably safe condition applies in this case. That conclusion disposes of Guzick's claims based on the City's failure to maintain the parkway in a reasonably safe condition. As a result, subparagraphs 8(a), (b), (c), and (f) are dismissed with prejudice.

III. Tort Immunity Act Section 3-104 Immunizes The City From Liability For Failing To Warn.

At common law, a landowner owes no duty to persons for open-and-obvious dangers unless the landowner should anticipate the harm of the condition. *See* Restatement (Second) of Torts § 343A(1), at 218 (1965). The Illinois Supreme Court has explained that comment *e* to Section 343A(1) provides that a landowner,

> may reasonably assume that one entering upon the land will protect himself by the exercise of ordinary care, or that the enterer will voluntarily assume the risk if he does not succeed in doing so. Reasonable care on the part of the possessor, therefore, does not ordinarily require precautions, or even a warning, against dangers which are known to the visitor, or so obvious to him that he may be expected to discover them. This rule seems to excuse both the failure to warn and the failure to take precautions in relation to the condition on the land, as long as the danger was open and obvious to the plaintiff.

Blue v. Environmental Eng., 215 Ill. 2d 78, 106 (2005).

The statutory corollary to the common-law rule is found in Tort Immunity Act section 3-104. That section 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.

745 ILCS 10/3-104. Illinois courts have recognized that the statute, as written, is too narrow to fit the common-law rule. As a result, section 3-104 is now properly applied to pedestrian traffic as well.

See Prostran, 349 Ill. App. 3d at 91, *citing Bonner*, 343 Ill. App. 3d at 487, and *Ramirez v. Village of River Grove*, 266 Ill. App. 3d 930, 932 (1st Dist. 2004).

As noted in section II, the parkway depression about which Guzick complains was, by her own admission, open and obvious. Since Tort Immunity Act section 3-104 immunizes local governmental entities from liability for failing to warn of open-and-obvious dangers to pedestrians on public property, the City is immune from liability based on Guzick's claims that it should have warned her of the depression. As a result, subparagraph 8(e) is dismissed with prejudice.

IV. Tort Immunity Act Section 3-102 Immunizes The City From Liability For Failing To Inspect.

The common law provides that a municipality's general duty is to maintain its property in a reasonably safe condition. *See Wagner v. City of Chicago*, 166 Ill. 2d 144, 150 (1995). This principle is codified in the Tort Immunity Act. *See Lawson v. City of Chicago*, 278 Ill. App. 3d 628, 634 (1st Dist. 1996). Illinois common law does not, however, impose on local governmental entities a duty to inspect their property. Placing such a burden on local governmental entities, particularly on one as large as the City would simply be too great. *See, e.g., In re Estate of Elfayer*, 325 Ill. App. 3d 1076, 1082 (1st Dist. 2001) ("that burden on defendant would be too great; no municipality would undertake even the most minor or necessary improvements on our roads for fear of facing liability"), *citing cases*. Indeed, the Tort Immunity Act recognizes that onerous burden by providing that:

> [a] public entity does not have constructive notice of a condition of its property that is not reasonably safe within the meaning of Section 3-102(a) if it establishes either: (1) The existence of the condition and its character of not being reasonably safe would not have been discovered by an inspection system that was reasonably adequate considering the practicability and cost of inspection weighed against the likelihood and magnitude of the potential danger to which

failure to inspect would give rise to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the public property and for uses that the public entity actually knew others were making of the public property or adjacent property; or (2) The public entity maintained and operated such an inspection system with due care and did not discover the condition.

745 ILCS 10/3-102(b)(1) & (2).

Guzick has presented no facts from which this court could conclude or even infer that a reasonably adequate inspection system in Chicago would have discovered the property defect about which she complains. Since there exists no duty to inspect and the City does not have an inspection system, the City cannot be liable for failing to do something not imposed by the common law or by statute. As a result, subparagraph 8(d) in count one must be dismissed with prejudice. Since section 3-102 disposes of Guzick's last remaining claim, there is no need to consider the City's argument based on an alleged lack of notice.

CONCLUSION

For the reasons presented above, it is ordered that:

(1) the City's summary judgment is granted; and
(2) this case is dismissed with prejudice.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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Circuit Court 2075