SECOND DIVISION
FILED: November 10, 2009

No. 1-08-2969

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CHERIE PETERSON, Plaintiff-Appellant, v. COCHRAN, CHERRY, GIVENS, SMITH & MONTGOMERY, L.L.C., and Illinois limited liability company, JAMES D. MONTGOMERY, JR., JAMES M. SANFORD, DONALD J. NOLAN, LTD., an Illinois corporation d/b/a NOLAN LAW GROUP, and TODD R. McQUISTON, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 04 L 10841 Honorable James D. Egan, Judge Presiding.

ORDER

The plaintiff, Cherie Peterson, appeals from the trial court's entry of summary judgment in favor of the defendants, Cochran, Cherry, Givens, Smith & Montgomery, L.L.C., James D. Montgomery, Jr., James M. Sanford (collectively, the Cochran defendants), Donald J. Nolan, Ltd., d/b/a Nolan Law Group, and Todd R. McQuiston (collectively, the Nolan defendants), on her claims of legal malpractice. For the reasons that follow, we affirm in part, reverse in part, and remand for further proceedings.

The pleadings, depositions, and written discovery established the following relevant facts. On February 4, 1996, the plaintiff was involved in an automobile collision with a vehicle driven by

George Donner, Jr., a Chicago Housing Authority (CHA) police officer. At the time of the accident, Donner and his partner, James Gaston, were responding to an emergency call for assistance from a fellow officer, and the plaintiff was a passenger in a car driven by Victor Lymon. The two vehicles collided in the intersection of 39th and State Streets in Chicago. The plaintiff initially retained the law firm of Karlin & Fisher as her counsel and filed suit in January 1997 against Donner and the CHA, asserting that she sustained personal injuries as a result of negligent conduct by Donner and that the CHA, as Donner's employer, was vicariously liable for his negligence. The complaint contained no allegations that Donner's actions constituted willful and wanton conduct.

The Karlin & Fisher firm subsequently withdrew as plaintiff's counsel and was replaced by the Nolan defendants in June 2000. The Nolan defendants voluntarily dismissed the case in July 2000 and timely refiled the suit in June 2001, in accordance with section 13-217 of the Code of Civil Procedure (the Code) (735 ILCS 5/13-217 (West 2006)). As in the previous action, the claims asserted in the refiled complaint were premised on negligence, and no allegations of willful and wanton conduct by Donner were asserted.

The plaintiff discharged the Nolan defendants as her attorneys in September 2001, and the Cochran defendants were substituted as plaintiff's counsel in December of that year. On December 26, 2001, the CHA answered the complaint and asserted as an affirmative defense that it was immune from liability under the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/1-101 et seq. (West 2000)). Five months later, in May 2002, the plaintiff voluntarily dismissed her claim against Donner. In January 2003, the CHA moved for dismissal under section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2002)), contending

that it was immune from suit under sections 2-109 and 2-202 of the Tort Immunity Act (745 ILCS 10/2-109, 2-202 (West 2002)) because Donner was engaged in the execution or enforcement of law at the time of the collision and because the plaintiff had not alleged that Donner's actions constituted willful and wanton conduct. The circuit court granted the CHA's motion to dismiss with prejudice on March 31, 2003.

Following the dismissal of her claim against the CHA, the plaintiff discharged the Cochran defendants and retained a fourth law firm. On April 29, 2003, the plaintiff's new counsel filed a motion seeking reconsideration of the judgment and requesting leave to file an amended complaint to include allegations of willful and wanton conduct on the part of Donner. The plaintiff's post-judgment motion was denied.

On appeal from the dismissal judgment, the plaintiff argued that the circuit court erred in finding that Donner was engaged in the execution or enforcement of law, and she contended that the denial of her request for leave to amend her complaint constituted an abuse of discretion. Peterson v. Chicago Housing Authority, No. 1-03-1838, slip op. at 2, 4 (unpublished order under Supreme Court Rule 23). This court disagreed and affirmed the dismissal of the plaintiff's claim against the CHA with prejudice. Peterson, slip op. at 8-9. In rejecting the plaintiff's argument that the circuit court abused its discretion in denying her leave to amend, this court held that the plaintiff had forfeited the right to challenge the trial court's ruling based on her failure to attach a proposed amended pleading to the motion. Peterson, slip op. at 10-11. Further, the court noted that, even if that issue had been preserved for appeal, the circuit court did not abuse its discretion in refusing to allow the plaintiff leave to amend where she had ample opportunity to allege willful and wanton

conduct by Donner during the almost two years that the refiled complaint was pending and the seven years following the incident. Peterson, slip op. at 11.

The plaintiff then retained a fifth law firm and filed the instant legal malpractice action against the Nolan defendants and the Cochran defendants, claiming that both law firms were negligent in failing to allege that Donner had acted in a willful and wanton manner. The circuit court entered summary judgment in favor of the Nolan defendants, based upon its determination that the conduct of that firm was not the proximate cause of the loss of the plaintiff's personal injury claims because her claims were still viable when she discharged the Nolan defendants in September 2001.

Thereafter, the Cochran defendants moved for summary judgment on the basis that their failure to allege willful and wanton conduct by Donner was not the proximate cause of the plaintiff's loss of her personal injury action because, even if such allegations had been included in the complaint, they were not supported by the evidence. The Cochran defendants contended that they could not be held liable to the plaintiff for legal malpractice where she would not have prevailed in her personal injury action against the CHA.

In support of their motion for summary judgment, the Cochran defendants submitted the deposition testimony of Donner and Gaston, Donner's partner, Victor Lymon, the driver of the car in which the plaintiff was riding, Kenneth Davis, an eyewitness, and the plaintiff. The relevant portions of that deposition testimony are summarized as follows.

Donner testified that, upon receiving the call for assistance from a fellow officer, he and Gaston proceeded toward the designated location. Donner stated that the emergency lights and siren of the CHA vehicle were immediately activated, but he could not recall specifically whether he or

Gaston had turned the equipment on. According to Donner, he was traveling south on State Street toward the intersection with 39th Street. The traffic light was green, and the intersection was clear of other traffic, giving him the right of way. Donner testified that he was driving at approximately 40 miles per hour as he proceeded through the intersection. He observed some cars stopped at the light in the eastbound lanes of 39th Street and another car stopped in the westbound lane. Donner testified that he did not see Lymon's car until after the collision, explaining that a newsstand located on the northeast corner of the intersection might have obstructed his view of Lymon's westbound car. Donner acknowledged that he was obligated to obey all traffic laws unless his emergency lights and siren were activated. In addition, he stated that, in accordance with CHA protocol, an officer who was proceeding through a red light at a controlled intersection was responsible for making sure that the intersection was clear. According to Donner, the massive front-end damage to Lymon's car and the extensive damage to the left side of the CHA vehicle indicated that Lymon's car struck the CHA vehicle.

Gaston testified that the emergency lights and siren of the CHA vehicle were on as he and Donner responded to the request for assistance, but he could not recall exactly which of them had activated the equipment. He also testified that they had a green light as they approached 39th Street and that Lymon's car struck the CHA vehicle when they were halfway through the intersection. Gaston stated that he could not recall how fast the CHA vehicle was traveling when it collided with Lymon's car. In addition, he also acknowledged that, unless the emergency lights and siren were activated, a CHA officer was obligated to obey all traffic laws. Gaston further stated that CHA officers were trained to look out for the safety of others, even when using the emergency lights and

siren.

Kenneth Davis testified that on the morning of the accident the weather was clear and traffic was light. Prior to the accident, he was driving eastbound on 39th Street and was stopped at the traffic light that controlled the intersection with State Street. There were no cars in front of him, and he saw Lymon's westbound car stopped in the left-turn lane. Davis stated that Lymon had a green light when his car entered the intersection, but the light changed to red while Lymon waited for the oncoming traffic to clear so he could turn left. After the light changed to red, Lymon's car began to turn left when Donner's vehicle, which then had the green light, entered the intersection. Davis testified that, as Lymon's car was turning, it was struck by the CHA vehicle. Davis further stated that the emergency lights and the siren of the CHA vehicle were not activated when the collision occurred. According to Davis, there was nothing that would have obstructed Donner's view of Lymon's car. Davis also testified that the posted speed limit was 30 miles per hour and that the CHA vehicle was traveling between 40 and 50 miles per hour.

Victor Lymon testified that, before the accident, he was driving westbound on 39th Street, while the plaintiff was asleep in the front passenger seat and three other passengers slept in the back seat. According to Lymon, he was in the right-hand lane of the westbound traffic approaching State Street and had the green light. He intended to cross the intersection and proceed west a couple of blocks to the entrance ramp for the Dan Ryan expressway. Lymon testified that he did not stop at the intersection and that he had no intention of turning left onto southbound State Street. According to Lymon, he was driving through the intersection at between 15 and 20 miles per hour when his car was struck by the CHA vehicle. Lymon further stated that the CHA vehicle's emergency lights and

siren were not on when the collision occurred. Lymon testified that the CHA vehicle was traveling at approximately 60 miles per hour and that he saw that vehicle just "a split second" before the accident.

The plaintiff testified that she was asleep in the front passenger seat of Lymon's car prior to the accident. Accordingly, she had no recollection of the circumstances leading up to the collision.

Upon consideration of this evidence, the circuit court granted the Cochran defendants' motion for summary judgment, finding as a matter of law that the plaintiff could not prove that their failure to amend the complaint in the underlying action was the proximate cause of the dismissal of her personal injury claims because there was no evidence of willful and wanton conduct on the part of Donner. This appeal followed.

We initially address the plaintiff's contention that the circuit court erred in granting summary judgment in favor or the Nolan defendants because her personal injury claims against Donner and the CHA were not viable at the time the Nolan defendants were discharged. This argument is without merit.

The purpose of summary judgment is not to try a question of fact, but rather to determine whether a genuine issue of material fact exists. Williams v. Manchester, 228 Ill. 2d 404, 417, 888 N.E.2d 1 (2008). Summary judgment is appropriate where the pleadings, depositions, admissions, and affidavits on file, viewed in the light most favorable to the nonmoving party, show 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); Williams, 228 Ill. 2d at 417. If the plaintiff fails to establish any element of her claim, the entry of summary judgment is proper. Williams, 228 Ill. 2d at 417. This

court reviews the grant or denial of summary judgment de novo. Williams, 228 Ill. 2d at 417.

The basis of a legal malpractice claim is that the plaintiff would have recovered for an injury caused by a third party if the plaintiff's attorney had not been negligent. Eastman v. Messner, 188 Ill. 2d 404, 411, 721 N.E.2d 1154 (1999); Cedeno v. Gumbiner, 347 Ill. App. 3d 169, 174, 806 N.E.2d 1188 (2004). To prevail in an action for legal malpractice, the plaintiff must plead and prove (1) the existence of an attorney-client relationship that establishes a duty on the part of the attorney; (2) a negligent act or omission constituting a breach of that duty; (3) proximate cause establishing that "but for" the attorney's malpractice, plaintiff would have prevailed in the underlying action; and (4) actual damages. Cedeno, 347 Ill. App. 3d at 174; Mitchell v. Schain, Fursel & Burney, Ltd., 332 Ill. App. 3d 618, 620, 773 N.E.2d 1192 (2002). In general, the issue of proximate cause in a legal malpractice case is considered to be a factual question to be decided by the trier of fact. Nettleton v. Stogsdill, 387 Ill. App. 3d 743, 753, 899 N.E.2d 1252 (2008). However, the issue may be decided as a matter of law where the facts are undisputed and there can be no difference in the judgment of reasonable persons as to the inferences that may be drawn from the facts. Nettleton, 387 Ill. App. 3d at 753.

Illinois courts have repeatedly held that where the underlying cause of action remained viable after the discharge of the former attorney, it cannot be said that the plaintiff lost the cause of action due to the attorney's negligence. Cedeno, 347 Ill. App. 3d at 174; Mitchell, 332 Ill. App. 3d at 620; Land v. Greenwood, 133 Ill. App. 3d 537, 540-41, 478 N.E.2d 1203 (1985). Under such circumstances, the plaintiff can prove no set of facts that would connect the attorney's conduct with any damage sustained. Cedeno, 347 Ill. App. 3d at 174; Mitchell, 332 Ill. App. 3d at 620-21; Land,

133 Ill. App. 3d at 540-41.

In this case, the plaintiff discharged the Nolan defendants in September 2001, approximately three months after her cause of action was refiled. There is no indication in the record that, as of September 2001, there was any procedural bar or other prohibition preventing the plaintiff from alleging that Donner had engaged in willful and wanton conduct. Therefore, at the time the Nolan defendants were discharged, the plaintiff's claims against both Donner and the CHA remained viable. See Cedeno, 347 Ill. App. 3d at 176; Mitchell, 332 Ill. App. 3d at 620-21; Land, 133 Ill. App. 3d at 540-41.

In reaching this conclusion, we find that the plaintiff's reliance on Lopez v. Clifford Law Offices, P.C., 362 Ill. App. 3d 969, 841 N.E.2d 465 (2005), is misplaced. In Lopez, the court held that a question of fact existed as to whether the defendant law firm proximately caused the plaintiff's loss of a viable cause of action despite the fact that the limitations period had not expired at the time the law firm discontinued its representation of the plaintiff. Lopez, 362 Ill. App. 3d at 983. The Lopez decision was premised on the fact that the defendant misinformed the plaintiff as to the length of the limitations period and the fact that the plaintiff did not retain a new attorney until after the statute of limitations had expired. Lopez, 362 Ill. App. 3d at 981-83. Because Lopez was premised on facts that are drastically different from those presented here, it does not govern the instant case.

We also reject the plaintiff's contention that her cause of action was never viable because willful and wanton conduct by Donner had not been alleged. The plaintiff has confused the viability of her claim with the adequacy of her pleading. Contrary to the plaintiff's assertion, a viable cause of action does not spring into existence only after it has been sufficiently alleged in a pleading.

Rather, in general, a cause of action in tort accrues when the plaintiff suffers injury. Hermitage Corp. v. Contractors Adjustment Co., 166 Ill. 2d 72, 77, 651 N.E.2d 1132 (1995). The determination of whether a cause of action is viable does not hinge upon whether the claim has been properly pled, but, rather, on whether it could have been properly pled. See generally McGee v. Danz, 261 Ill. App. 3d 232, 236-37, 633 N.E.2d 234 (1994) (recognizing that the plaintiff's underlying cause of action was viable despite the fact that it had not been alleged in a pleading); Harvey v. Mackay, 109 Ill. App. 3d 582, 587, 440 N.E.2d 1022 (1982) (same). In this case, at the time the Nolan defendants were discharged in September 2001, there was no procedural bar preventing the plaintiff from alleging that Donner had engaged in willful and wanton conduct. Therefore, the plaintiff's personal injury claims were viable when she discharged that law firm.

Moreover, the fact that the trial court ultimately denied the plaintiff's request for leave to amend in April 2003 has no bearing on whether her claims were viable in September 2001. The decision of whether to grant or deny a motion for leave to amend is within the broad discretion of the trial court. Loyola Academy v. S & S Roof Maintenance, Inc., 146 Ill. 2d 263, 273-74, 586 N.E.2d 1211 (1992). Although this court found no abuse of discretion in the denial of the plaintiff's request to amend, that ruling was premised on the fact that the plaintiff made no effort to allege willful and wanton conduct by Donner until her case had been dismissed, more than 15 months after she received the CHA's answer alleging the affirmative defense of governmental immunity. See Peterson, slip op. at 10-11. That decision does not alter the fact that the plaintiff's claims were viable when the Nolan defendants were discharged in September 2001.

Based on the foregoing analysis, we conclude that the trial court did not err in finding, as a

matter of law, that the plaintiff was unable to prove any set of facts establishing that the conduct of the Nolan defendants proximately caused the loss of her personal injury action. Accordingly, the grant of summary judgment in favor of the Nolan defendants is affirmed.

We next consider the plaintiff's argument that the trial court erred in granting summary judgment in favor of the Cochran defendants based on its finding that no genuine issue of material fact existed as to whether Donner's actions constituted willful and wanton conduct. In particular, the plaintiff contends that the record presents factual questions regarding whether Donner was driving at an excessive speed, failed to use the emergency lights and siren, and failed to yield the right of way to Lymon's vehicle. The plaintiff asserts that the totality of these circumstances demonstrates that the court erred in finding, as a matter of law, that Donner had not engaged in willful and wanton conduct. We must agree.

Summary judgment is a drastic means of disposing of litigation and, therefore, should be granted only when the right of the moving party is clear and free from doubt. Adames v. Sheahan, 233 Ill. 2d 276, 296, 909 N.E.2d 742 (2009). A triable issue of fact exists where there is a dispute as to material facts or where the material facts are undisputed but reasonable persons might draw different inferences from those facts. Williams, 228 Ill. 2d at 417. In ruling on a motion for summary judgment, the court must construe the record strictly against the movant and liberally in favor of the opponent. Williams, 228 Ill. 2d at 417. As noted above, this court reviews the grant or denial of summary judgment de novo. Williams, 228 Ill. 2d at 417.

In presenting a claim for legal malpractice, the plaintiff must prove a "case within a case." Webb v. Damisch, 362 Ill. App. 3d 1032, 1038, 842 N.E.2d 140 (2005); Cedeno, 347 Ill. App. 3d

at 174. Therefore, in deciding whether the trial court erred in granting summary judgment in favor of the Cochran defendants on the plaintiff's claims of legal malpractice, we must examine whether the evidence in the record demonstrated that the plaintiff would have prevailed in her personal injury action against the CHA.

Section 2-109 of the Tort Immunity Act provides that "[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." 745 ILCS 10/2-109 (West 2006). The Act further 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 (West 2006). In this case, it has been established that Donner was a public employee who was engaged in the execution or enforcement of law. See Peterson, slip op. at 8-9. As a consequence, the CHA could not have been held liable for the plaintiff's injuries unless she could show that Donner's actions constituted willful and wanton conduct. See Urban v. Village of Lincolnshire, 272 Ill. App. 3d 1087, 1094, 651 N.E.2d 683 (1995).

The determination of whether an officer's actions amount to willful and wanton misconduct generally is a factual question to be decided by the trier of fact. Calloway v. Kinkelaar, 168 Ill. 2d 312, 326, 659 N.E.2d 1322 (1995); Williams v. City of Evanston, 378 Ill. App. 3d 590, 597, 883 N.E.2d 85 (2007). However, the issue decided by the trial court as a matter of law when all of the evidence, viewed in the light most favorable to the nonmovant, so overwhelmingly favors the movant that no contrary determination based on that evidence could ever stand. See Williams, 378 Ill. App. 3d at 597; Shuttlesworth v. City of Chicago, 377 Ill. App. 3d 360, 366, 879 N.E.2d 969 (2007); see also Young v. Forgas, 308 Ill. App. 3d 553, 562, 720 N.E.2d 360 (1999).

Under the Tort Immunity Act, "willful and wanton conduct" is defined as "a course of action 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 or their property." 745 ILCS 10/1-210 (West 2006); Pfister v. Shusta, 167 Ill. 2d 417, 421, 657 N.E.2d 1013 (1995). The supreme court has characterized willful and wanton conduct as " 'a hybrid between acts considered negligent and behavior found to be intentionally tortious. * * * Under the facts of one case, willful and wanton misconduct may be only degrees more than ordinary negligence, while under the facts of another case, willful and wanton acts may be only degrees less than intentional wrongdoing.' " Pfister, 167 Ill. 2d at 422, quoting Ziarko v. Soo Line R.R. Co., 161 Ill. 2d 267, 275-76, 641 N.E.2d 402 (1994). In automobile collision cases, willful and wanton conduct is demonstrated where the defendant had notice that would alert a reasonable person that a substantial danger was involved, but the driver failed to take reasonable precautions under the circumstances. Hampton v. Cashmore, 265 Ill. App. 3d 23, 31-32, 637 N.E.2d 776 (1994), citing Valiulis v. Scheffels, 191 Ill. App. 3d 775, 789, 547 N.E.2d 1289 (1989); see also Kirshenbaum v. City of Chicago, 43 Ill. App. 3d 529, 533, 357 N.E.2d 571 (1976).

Illinois courts have held that the failure to activate emergency lights or sirens, alone, does not in and of itself constitute willful and wanton conduct. Shuttlesworth, 377 Ill. App. 3d at 368; see also Williams, 378 Ill. App. 3d at 600; see also 625 ILCS 5/11-205(d) (West 1996) (exempting police vehicles from mandatory use of visual or audible signals when vehicle proceeds in contravention of traffic signals or regulations). Similarly, the mere fact that the driver of an emergency vehicle exceeds the speed limit is insufficient to establish that he engaged in willful and

wanton conduct. See Shuttlesworth, 377 Ill. App. 3d at 368; see also 625 ILCS 5/11-205(c)(3) (West 1996) (permitting driver of emergency vehicle to exceed maximum speed limit so long as he does not endanger life or property). However, section 11-205(e) of the Illinois Vehicle Code specifically provides that these privileges do not relieve the driver of an emergency vehicle from the duty of driving with due regard for the safety of all persons and that such prerogatives do not protect the driver from the consequences of his reckless disregard for the safety of others. 625 ILCS 5/11-205(e) (West 1996).

In this case, the record contains a number of differing versions of the circumstances that preceded the collision between the CHA vehicle and the car driven by Lymon. Though Donner and Gaston testified that their emergency lights and siren were activated at the time of the collision, this testimony was contradicted by both Lymon and Davis. In addition, Donner stated that he was driving at approximately 40 miles per hour, which was inconsistent with Lymon's testimony that Donner was traveling at approximately 60 miles per hour and Davis' testimony that Donner was driving between 40 and 50 miles per hour. Donner and Gaston testified that they had a green light when they entered the intersection, which was clear, and that Lymon's car collided with their vehicle as they proceeded through the intersection. However, Lymon stated that he was proceeding through the intersection on a green light at a speed of 15 to 20 miles per hour when his car was struck by the CHA vehicle. Davis testified that Lymon had a green light when he entered the intersection and that the light changed to red while he waited for the oncoming traffic to clear so he could turn left.

Viewing this evidence in a light most favorable to plaintiff, the record indicates that the CHA vehicle was traveling at approximately 60 miles per hour, which was 30 miles per hour over the

speed limit, and that the emergency lights and siren were not activated when the vehicle entered the intersection. In addition, there was no obstruction preventing Donner from seeing Lymon's car, which was in the intersection and visible to southbound traffic before the CHA vehicle entered the intersection. Although Davis' and Lymon's descriptions of the event are inconsistent with each other, it is within the province of the trier of fact to resolve conflicts in the evidence, to pass upon the credibility of the witnesses, and to decide what weight should be given to the witnesses' testimony. Maple v. Gustafson, 151 Ill. 2d 445, 452, 603 N.E.2d 508 (1992).

When considered together, the circumstances set forth above are sufficient to create a question of fact as to whether Donner had notice of a substantial danger and failed to exercise reasonable precautions under the circumstances. See Meck v. Paramedic Services of Illinois, 296 Ill. App. 3d 720, 730, 695 N.E.2d 1321 (1998) (totality of evidence in summary judgment proceeding created genuine issue of material fact as to whether conduct of defendant was willful and wanton); People v. Zator, 209 Ill. App. 3d 322, 329, 568 N.E.2d 162 (1991) (excessive speed combined with other circumstances indicating conscious disregard for safety of others is sufficient to establish recklessness, which is equivalent to willful and wanton conduct). Consequently, we cannot say as a matter of law that no reasonable jury could find that Donner had proceeded into the intersection with utter indifference to, or in conscious disregard of, the plaintiff's safety.

For the foregoing reasons, we affirm the grant of summary judgment in favor of the Nolan defendants, reverse the summary judgment for the Cochran defendants, and remand the cause to the circuit court for further proceedings consistent with the views expressed herein.

Affirmed in part, reversed in part, and remanded.

HOFFMAN, J., with THEIS and KARNEZIS, J.J., concurring.