No. 128602

IN THE
SUPREME COURT OF ILLINOIS

CLARK ALAVE, Plaintiff-Appellee, v. CITY OF CHICAGO, Defendant-Appellant	)	Appeal from the appellate Court of Illinois, First Judicial District, No. 1-21-0812 There heard on appeal from the Circuit Court of Cook County, Illinois, County Department, Law Division, No 19 L 010879 The Honorable **Jerald Cleary,** Judge Presiding

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On Petition for Leave to Appeal from the Appellate Court of Illinois
First Judicial District, No. 1-21-0812
There Heard on Appeal from the Circuit Court of Cook County, Illinois
County Department, Law Division
No. 2019 L 010879
The Honorable Gerald Cleary, Judge Presiding

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BRIEF OF PLAINTIFF-APPELLEE

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On June 8, 2019, Plaintiff, Clark Alave, rode his bicycle with traffic, on the right side of the roadway at Leland Avenue approaching the intersection at Western Avenue in the City of Chicago. At this intersection, Defendant/Appellant City of Chicago owns, approved, licenses, and derives income from a Divvy bicycle rental station. The City installed large signs at this City owned Divvy station advertising its location and purpose. While Mr. Alave rode his bicycle through a crosswalk, across the street from a Divvy bicycle rental station, he encountered a gapingly large pothole, causing him to fall and suffer serious injuries. The Circuit Court, in dismissing Mr. Alave's Complaint, finding that the City did not intend bicycling at that location on the roadway, despite the presence of the Divvy station. The Appellate Court reversed, citing a multi-part analysis, from which it concluded that the City intended bicycle riding at the location of Mr. Alave's fall. This Court granted the City's petition for leave to appeal. This appeal follows.

ISSUE PRESENTED

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By the City's ownership, licensing, placement and income derived from a Divvy bicycle rental station, including the large signs advertising the station's presence, at the location of Mr. Alave's injury, along with use regulation of sidewalks, is it reasonable to conclude the City intended bicycles to be operated on the roadway at the location of Mr. Alave's fall?

ARGUMENT

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The City of Chicago goes to great lengths to compare its owned, income generating Divvy program, to general public and private bicycle racks that exist throughout the city. The City uses a flawed equivocation to conclude that it has no intent that bicycles it owns are ridden away from Divvy Stations, or in the area of Divvy stations, even writing on page 19 of its brief that "A bicycle sharing station does not necessitate bicycle use." The reality differs. In a joint-venture with Divvy, the City of Chicago owns, approves, licenses, and derives income from the Divvy bicycle rental program, wherein bicycles are rented out, and fees charged according to time usage through numerous Divvy Stations, including the one adjacent to where Mr. Alave was injured. C. 108, C. 122. The City also approved of large signage at the location of this incident, advertising its Divvy rental bicycles from this location to the general public. Regardless of the foregoing, the City now argues that it had no intent that bicycles be operated in the area of the Divvy station that it owns, licenses and derives income from.

Mr. Alave asks this Court to follow years of precedent, and look at the nature of the property where Mr. Alave's injury occurred. In doing so, it is clear that the City intends bicycles to be ridden at that location. The City is engaged in a joint-venture with Divvy, renting out bicycles it owns, and advertising to the world the ability to ride bicycles from that location, for a payment that provides revenue to the City itself. C.122. The Appellate Court correctly evaluated the circumstances, holding that by owning, renting out bicycles, placing signs for these bicycle rentals and banning riding on the sidewalk for cyclists over the age 12, the City not only

permitted, but also intended that bicycles are operated at the location of Mr. Alave's fall and injury.

Much as this Court and the various Appellate Courts decline to apply *Molway v. City of Chicago*, 239 Ill. 486 (1909), to other bicycle matters, due to it coming into existence over "50 years before the Tort Immunity Act," to the extent the Court has concerns about *Boub's* application to this case, the matter at bar provides this Court with an opportunity to address the expanded use of bicycles and bicycle rentals in the modern era, that did not exist at the time this Court issued its opinion in *Boub*. *Boub v. Township of Wayne*, 183 Ill. 2d 520 (1998). Simply, use of bicycles and the expectation surrounding them is different and has evolved since this Court's previous decisions.

A. A Bicycle sharing station, owned by the City, along with its signs advertising its use is an affirmative manifestation of intent that bicycles are to be operated on the roadway at that location.

Where Mr. Alave was operating his bicycle, looking to his left at the location of this incident, he would see a Divvy bicycle rental station and large Divvy signs advertising the bicycle rentals to members of the public. C.12, C.30, C.108. This station is owned by the City of Chicago and approved through a process the city engages in. C. 38, C.122. "Proposed Divvy station locations are reviewed and selected by City staff, representatives of our operator and a consultant engineer." C. 122. Moreover, the City of Chicago generates revenue from the Divvy stations, including the one at issue in this case. *Alave*, 2022 IL App (1st) 210812, at 16, C 123. As the City conceded, "Divvy stations are located throughout the city, and sometimes not near a designated bicycle route." *Id*.

1. The Appellate Court properly analyzed the nature of the area to determine that bicycles were intended and permitted on the roadway at the location of Mr. Alave's fall.

When evaluating a municipality's intent, one must look to the nature of the property itself. *Boub v. Township of Wayne*, 183 Ill.2d 520 (1998); *Wojdyla v. City of Park Ridge*, 148 Ill.2d 417 (1992). "Intent, being a mental state, can rarely be disconcerned from direct proof and must ordinarily be inferred from the facts." *Vaughn v. City of West Frankfort*, 258 Ill.App.3d 424, quoting *Blacks Law Dictionary 727 (5th ed. 1979).*

Factors such as paved roads regulated by traffic signs and signals, roadway markings, signs or meters on the sidewalk or parkway or painted markings on the curb can be illustrative in determining the nature of the property's intended use. *Wojdyla*, at 426. "In other words, "it is necessary to look at pavement markings, signs, and other physical manifestations of the intended use of the property."" *Boub,* 183 Ill.2d at 528, 234 Ill.Dec. 195, 702 N.E.2d 535."

Thus, the first inquiry that the Court should make is what is the nature of the area and are there any physical manifestations of the City of Chicago's intent at or near the location of this incident. *Boub*, 183 Ill. 2d at 528. The Plaintiff attached and incorporated a photograph to the Complaint at Law and Amended Complaint that shows the exact area at issue. C.12, C.30, C.108 (color photograph). The pothole at issue in the crosswalk is clearly depicted. C.30. Viewing the top portion of the photograph, the Divvy Station and signage are clearly visible in their hallmark colors blue and gray, to anyone traveling either direction on Leland Avenue. C.30. Thus, a reasonable person at this intersection not only sees signage for Divvy bicycle rental,

but they can actually walk up to the Divvy station, rent a bicycle, and ride away on their own, paying for time used on the rented bicycle from the minute of the rental and through the return of the rented bicycle. The City owns the Divvy bicycle rental stations/bikes and receives income for renting bicycles at this exact location. C.38, C. 122. Divvy/Lyft and the City are in a financial relationship that has generated over $7,500,000.00, through 2021, in income for the City, the intent of the Divvy station at that location is to rent and use bicycles. C.109, C.123. The City explains that "critically, the court relies on "affirmative manifestations" to determine municipal intent." City Brief at 9, quoting *Boub*, 183 Ill.2d at 535. How can the City's "affirmative manifest[ation]" of intent be any clearer than owning and renting bicycles at the location of Mr. Alave's crash?

The results in the cases that the City relies upon differ, as each cited case has materially different facts, with the commonality that each fact pattern must be evaluated on a case-by-case basis. In *Boub*, the Plaintiff, a consummate athlete, was riding his bicycle across a one-lane bridge, the surface was wood planking with asphalt patching. *Boub*, 183 Ill. 2d at 522 The Plaintiff, traveling 33-35 mph, was injured when his front tire became stuck between two planks on the bridge. *Id.* At the time of the incident, there was no signage either warning of the danger, or indicating that the area was suitable for bicycles. *Id.* This Court held, in the absence of any affirmative manifestation of intent, bicycles were not intended on the bridge and the Boub Plaintiffs' case could not stand. Critically, in the *Boub* case, the Township of Wayne did not own, and was not advertising bicycle rental or renting out bicycles at the location of the incident. *Id*. Had the Township of Wayne been

renting out bicycles at the location of the incident, it is believed that this Court's analysis would differ.

While the facts of *Berz v. City of Evanston*, 2013 IL App(1st) 123763, differ substantially from the case at bar, the rules of law cited support "intended and permitted" use in this case. In *Berz*, the Plaintiff was riding a bicycle in an alley. *Id*. There were no signs, roadway markings or other manifestations that would indicate bicycle use. *Id*. The Court did not find the citations to Evanston Municipal Code as relevant to intent in that circumstance. *Id*. at 739. Critically, in the *Berz* case, the City of Evanston did not own, and was not advertising bicycle rental or renting out bicycles at the location of the incident. *Id*. Had the City of Evanston erected bicycle rental signage and rented out bicycles in the alley where the incident took place, it is believed the Appellate Court's analysis would differ.

Latimer, as cited by the City is another case where the facts differ substantially, but the rules of law support "intended and permitted" use are applicable in this case. *Latimer v. Chicago Park District*, 323 Ill.App.3d 466 (1st Dist. 2001). In *Latimer*, the Plaintiff was injured when she fell from her bicycle on a part of Clyde Avenue where the pavement was broken and uneven. *Id*. at 468. Citing *Wojdyla, Vaugh, Sisk* and *Boub*, the Court found there were no signs or markings to indicate that the City intended bicycles to be operated at that location. *Id*. at 470. Critically, in the *Latimer* case, the Chicago Park District did not own and was not advertising and renting out bicycles at the location of the incident. *Id*. If the Chicago Park District erected bicycle rental signage and rented out bicycles at the location of the incident, it is believed the Appellate Court's analysis would differ.

The recent case of *Olena v. City of Chicago*, 2022 IL App (1st) 210342-U, also differs in fact, but the rules of law endorsed therein support intent in this case. In *Olena*, the Plaintiff made general allegations that the City, through its various agencies, promoted plans "to make Chicago the most bike friendly city in the United States", has a Divvy program, and therefore, the "City's intention that bicyclists use all roads, including streets with unmarked bicycle lanes." *Id*. at 4. The First District, looked at the specifics in that case, and appreciated that there were no bicycle lanes or other roadway markings, nor was there a Divvy station in the area of the incident, nor were there any other criteria that supported a finding of "intended and permitted." *Id*. "In this case, Olena has failed to demonstrate the City's intent that bicyclists are both permitted *and* intended users of the street where the accident occurred." *Id*. at 11. Critically, in the *Olena* case, the City of Chicago was not engaged in renting out bicycles at the location of the incident. *Id*. If the City erected bicycle rental signage and rented out bicycles where the *Olena* incident occurred, it is believed the Appellate Court's analysis would differ.

Akin to every other citation, this Court in *Sisk* concluded that, although it was impossible for the pedestrian to walk on a sidewalk or in a crosswalk, a pedestrian's use of a street will not be deemed an intended use absent some "manifestations of intent with regard to use of the property by pedestrians." *Sisk*, 167 Ill.2d 343, 351 (1995). *Sisk* was operating a motor-vehicle, when he inadvertently struck a concrete bridge which crossed a creek. After the collision, the Plaintiff exited his automobile to examine it for damage, at which point he fell from the bridge into the creek bed below. *Id* at 346. The Plaintiff alleged that "weeds which had grown in and around

the aforesaid concrete bridge. . .visually obscured the edge of the aforesaid roadway" *Id*. at 346. This Court in *Sisk*, held that (a) the Plaintiff's use of the roadway as a pedestrian was not intended at the location of the incident, and that (b) pedestrians are not intended and permitted users for all "rural county roads." *Id*. at 348. In *Sisk* this Court held, "We need to look no further than the property itself to determine the municipality's manifestations of intent with regard to use of the property by pedestrians." *Id*. at 351. This Court held, "there are no such manifestations to indicate that Williamson County intended pedestrians to walk on its country roads, much less the specific road and bridge complained of by the Plaintiff in the case at bar." *Id*. at 351. Notably, in Sisk, the municipal entity was not renting out hiking shoes to pedestrians at the location of the incident. Had the Defendant municipality been engaged in a business venture that necessitates walking at the location of the incident, it is believed this Court's analysis would differ. *Sisk* reinforces that the facts of each matter have to be reviewed individually to determine "intent." *Id*.

Vaughn and *Wijdyla* are similarly applicable in legal theory only as both were pedestrian cases. *Vaughn v. City of West Frankfort*. 166 Ill.2d 155 (1995). *Wojdyla v. City of Park Ridge*, 148 Ill.2d 417 (1992). Both cases stand for the proposition that the facts of every matter must be evaluated individually. *Id*.

Evaluating the citations and applying the same to this case, the nature of the specific area where Mr. Alave fell is one of bicycle rentals and advertising for the City of Chicago's owned Divvy program. The Appellate Court appreciated that a business venture-renting bicycles-at the location of this incident, conveys an intent that bicycles are operated at this location. Any person in Chicago can walk up with

a debit card, credit card or use a cell phone with Chicago's Divvy app, the CTA's Ventra app, or the Lyft app to rent, take out and start riding a bicycle at the location of this incident. The City through its licensing agreement, receives income from that rental; income to the City from the Divvy program has already exceeded $7,500,000.00 as of 2021. C.117. Further, and although alone not sufficient to establish intent, it is a violation of City Municipal Code, for Mr. Alave to ride his bicycle on the sidewalk at the location of this incident. C. 47.

This case differs from every one of the City's citations in that here, there is an affirmative manifestation of intent at the location of Mr. Alave's incident; after careful or not so careful evaluation, the City placed at this location a large Divvy sign advertising rentals of bikes that it owns and makes money from. The City's *post hoc* protest that a Divvy station is nothing more than bicycle racks should be rejected. Divvy stations are thought the city, engineered and placed, only after after careful consideration and approval of the alderman. C.122. This case is not about generalities of what this or other municipalities "intends" in other locations. This case is about what the City of Chicago intended at the exact location where Mr. Alave's incident occurred, and that is for bicycles to be rented and used.

1. A Divvy bicycle rental station, at the location of the Plaintiff's incident, is an affirmative physical manifestation of intended use of bicycles.

The City argues that "a bicycle sharing station is not an affirmative physical manifestation of intended use of the roadway." City's Brief p. 14. The City owns the stations and has full control over the approval process that goes into the placement of its Divvy stations. C. 122, C.123. As the Appellate Court recognized

in this case, through its evaluation and approval process the City has placed Divvy stations on streets with bicycle lanes and streets without bicycle lanes. *See Alave*, at p. 12 ¶31.

Further, the City's ordinance generally prohibiting biking on sidewalk and its interrogatory response conceding the City does not expect people to walk their bicycles on sidewalks when outside of bike lanes, combined with the joint-venture income generating Divvy station is more than enough to demonstrate intent. Beyond any of the City's assertions, there is something additional in this fact pattern that shows Clark Alave was an intended and permitted user of the area of roadway that this accident occurred.

(a) Other municipalities' bicycle programs are irrelevant to the determination in this case.

The City improperly introduces new Chicago cycling documents for the first time to this Court. While the City is correct this Court can take judicial notice of facts on government websites, those facts must not be subject to reasonable dispute. Ill. R. Evid. 201(b). Instead, the City uses this new evidence to argue it plans designated bike routes through careful study and planning, considering safety and infrastructure design. City Brief at 15. First, none of those "facts" are found in the newly introduced documents. More importantly, the relevance to this case is dubious: by arguing on the City studies and plans for bike lanes, the City argues by implication without explicitly saying that it has not performed that same study for Divvy locations, which appear on the very same documents the City is attempting to introduce. That defies all reason. At all events, the City's introduction and use of

these documents and arguments regarding its planning for bike lanes, along with its implied arguments that it has not safely planned for Divvy bike station location at the location of Mr. Alave's injury should not be considered by this Court. The proper time for such arguments was before the Circuit Court.

Through these new materials, the City raises four other municipalities (Aurora Bike Share, Grayslake Bike Share, Canton Bike Share and Rock Falls Bike share) apparently to support its assertion that bicycle stations do not demonstrate intent to bicycles to use the roads and stations, and therefore, this Court should reject "intent" in this case. Initially, like much of the City's brief, this argument and these citations are made for the first time before this Court and should not be considered. However, to the extent that this Court wishes to view these materials, over objection, they do not by any means support the City's assertions of "intent." Reviewing these other municipality bike share maps shows that those City's, like the City, places bicycles share rental stations on roads they intend bikers to ride.

Intent can be shown through various means. Simply, all cases say you have to evaluate the nature of the area and location; look to the sides of the road for signs, and "other manifestations of intent". Looking to the side of the road at the location of Mr. Alave's injury sees a Divvy rental station, owned, approved and placed by the City of Chicago. It is great that the City is citing to a post act remedial measure in that it is <u>now</u> putting a bicycle lane at the location of Mr. Alave's injury, however, that does not change the nature of the area and physical manifestations of intent that were present when Mr. Alave used the roadway.

The Appellate Court correctly looked at the nature of the area and all factors to determine intent, as our case law instructs. A Divvy station, in its customary baby blue and gray, to any person, symbolizes bicycle rental and use. If the City did not intend for bicycles at this location, it should not be renting them from this location. If the City does not intend that bicycles be operated around Divvy stations and out of bike lanes, the logical answer is to only place the Divvy Stations in locations with bicycle lanes. This is not how the City has approached this new technology, that did not exist at the time of *Boub*. If the City can earn income from these bicycle rentals, it is incumbent that they maintain the area around the rental locations in a safe condition for the very bicyclists this income is derived from. Had that been done, this matter would not be before the Court. The City, in its brief concedes, "like many municipalities across the state, the City provides bicycle sharing stations for the convenience of residents and visitors who wish to use bicycles for all sorts of purposes. . ." City Brief at 16. By providing these stations, moreover earning income for doing so, the City's intent is clear; it has a duty to maintain the area around Divvy stations for bicycle usage.

(b) The websites for "other" municipalities do not support the City's argument; rather emphasize that Mr. Alave's use was intended.

For the first time, in its Brief before this Court, the City raises bicycle share programs in Aurora, Grayslake, Canton and Rock Falls, Illinois, apparently to support its assertion that bicycle stations do not demonstrate intent to bicycles to use the roads and the only way to show intent is through a bicycle map and bicycle lane markings and signs. City Brief at 15-17. This is not the law–intent can be demonstrated through various means. *Boub*, *supra.* Initially, like much of the City's

brief, this argument and these citations are made for the first time before this Court and should not be considered. However, to the extent that this Court wishes to view these materials, they do not by any means support the City's assertions of "intent". Instead, superimposing the bicycle maps over the various rental stations demonstrates that, like the City, these municipalities only place bicycle rental locations at a location intended for bicycling. The other municipalities' programs and locations further defeat the City's *post hoc* assertions about potential confusion of its liability.

Aurora's bike share program has a total of three bicycle rental stations. https://www.aurora-il.org/1051/Bike-Share. Superimposing the bicycle rental locations over the City of Aurora Bicycle Map, it is easy to see that Aurora only placed its rental stations in areas that are "more comfortable" for "Preferred on-road Bike Routes." https://www.aurora-il.org/DocumentCenter/View/1404/City-of-Aurora-Bike-Map-PDF.

By placing its bicycle rental stations in areas suited for bicycles, Aurora demonstrates its intent clearly.

Similarly, Grayslake Bike Share Program has 5 bicycle rental stations. https://villageofgrayslake.com/686/Grayslake-Bike-Share-Program. All of Grayslake bicycle rental stations appear to be either: a) attached to a bicycle friendly route; or b) part of a park or Metra station. https://villageofgrayslake.com/686/Grayslake-Bike-Share-Program; *see* also https://villageofgrayslake.com/DocumentCenter/View/9341/Grayslake-Village-Cente

r-Bike-Path-Map?bidId=; *see* also, https://villageofgrayslake.com/DocumentCenter/View/4164/Bike-Path-Map?bidId=. Thus, the locations of bicycle rental in Grayslake appear to be either adjacent to "bike path sign" or in a park; in either location, the cyclist would be an intended and permitted user. To the extent this municipality placed bicycle rental stations, it did so in public parks-areas intended for riding.

The Canton program demonstrates another bicycle rental program that is substantially different from the instant case. https://www.illinoisriverroad.org/places/united-states/illinois/canton/nature-outdoor-recreation/bike-share-program/ "The Bike Share is a partnership between Graham Health System and the Canton Park District. You can rent a bike at three locations in Canton: Wallace Park, Lakeland Park, and Graham Medical Group. *Id*. Two of the three locations for bicycle rental are parks, where riders are intended and permitted, the third is a hospital/medical complex. For the direct area around the bike-share program in Canton at the Graham Medical Group, it is believed usage would be "intended and permitted,"

Finally, the City's citation to the Rock Falls program, again, yields similar support for "intended and permitted" for this case. https://visitrockfalls.com/bike-share/. The Rock Falls bicycle rental program is based in a park with trails. "All the bikes are located at the RB&W Riverfront Park in Rock Falls right next to the Holiday Inn Express & Suites." https://visitrockfalls.com/bike-share/. If you rent a bicycle in Rock Falls, you start out in a public park with bicycle trails. Without question, the area around the bike rental location in Rock Falls is intended for bicyclists.

Likewise, it should be without question that the area around bicycle rental stations in Chicago is "intended and permitted" for bicycle usage.

B. The First District evaluated the facts of this matter and gave specific guidance as to where, in relation to Divvy, the City's duty applies.

The Appellate Court identified that this was the first time it was confronted with a case where the Plaintiff was injured in direct proximity to a specific Divvy station. *Alave v. City of Chicago*, 2022 IL App (1st) 210812. "The relevance of bicycle rental stations to the question of intended use of nearby streets is a question of first impression." *Id* at P. 15, para 38. In *Olena v. City of Chicago*, the Court posited that the City having a Divvy program alone was not a basis of liability. *Olena v. City of Chicago*, 2022 IL App. (1st) 210342-U. The First District appreciated that this case differed from *Olena*, in that the accident actually occurred in an area that would likely be used by a Divvy rider, or "a stones throw" from a Divvy station. *Id*. Appreciating that every case must be evaluated individually, the Appellate Court enunciated 5 factors to consider on the issue of intent, specifically Divvy rental stations. They are:

1) The streets and sidewalks adjacent to the Divvy station. *Alave*, 2022 Il App (1st) 210812 ¶ 38;
2) The streets in close proximity to the Divvy station, ¶ 39;
3) The roadway in close proximity to the area of the Divvy station. *Id*.
4) The street at or near the Divvy stations until the rider reaches a designated bicycle path. *Id*.
5) Streets where bicyclists go to and from Divvy Stations. ¶ 40.[1]

[1] The City of Chicago attributed two additional factors, however, they are subsets of clearly spelled out primary considerations.

Contrary to the City's argument, these 5 criteria do not create a vague or undiscoverable obligation; ie., the sky is not falling should a Court find intended bicycle use in these areas. They are specific, more importantly, each case's fact pattern must be evaluated individually. If the City wants to know its area of obligations, the First District clearly instructed it to look at the areas where it rents bicycles through these stations. Of course, some of the stations were placed where the City has bicycle lanes, and therefore, no evaluation is necessary. For the Divvy stations that the City placed in areas without bicycle lanes, such as the instant one, the factors for evaluation are clear and concise and notably, do not change existing law.

2. The City's assertion that "A bicycle sharing station does not necessitate bicycle use" is ridiculous.

Confusingly, after placing the Divvy station, approving the signage, and deriving income from it, the City asks this Court to endorse its theory that: "A bicycle sharing station does not necessitate bicycle use." City Brief at p. 19. There is no use other than bicycle rental for a Divvy station. You cannot rent cars, trucks, or motorcycles from it. Its only purpose is to rent out and accept the return of bicycles. That is, the City is earning money from renting out bicycles while asking this Court to believe there is some unknown dual purpose of the Divvy stations. There is not. One using a Divvy station for its intended purpose either rents out or returns a bicycle. Once renting that bicycle, as the Appellate Court noted:

> "Bicycle renters ride the bicycles they rent to the intended bicycle lane, and the City is well aware of this factor. In the case at bar, the City has approved and generates revenue from a series of bicycle rental stations throughout the city, including one within about 100 feet of where Plaintiff's accident took

> place. As such, in this case, unlike prior precedents, the City certainly intends that bicycles be ridden on the roadway in close proximity to the area of the Divvy stations." *Alave*, ¶ 39.

A bicycle rental station is to bicycle rentals what a fishing pole rental is to fishing. A person cannot engage in the activity without the essential tool, which, whether a bicycle or fishing pole, can be procured through the rental. There is no other use of a Divvy rental station than to rent bicycles. People do not rent bicycles with the intent on walking them, particularly when they are charged by the minute, nor does the City advance the same. People use the Divvy station to rent bicycles, and those bicycles are necessarily ridden away from the Divvy station by foot power. To hold otherwise would be disregarding common sense.

A. The Parties agree that a "Curatola-type exception" does not translate to this case.

The City spends significant space arguing that a Curatola-type exception does not apply in this case. City Brief at 20-25. This entire argument is beside the point. *Curatola v. Village of Niles*, 154 Ill.2d 201(1993). In Curatola, this Court provided a narrow exception to "intended and permitted" when a person parks on a street and, inherently, must walk on the street to access their vehicle. *Id*. While first appearing to suggest a narrow exception can be tailored in this case, the City retreated to its posture that "a *Curatola*-type exception does not translate to this case." The Plaintiff/Appellee agrees that a *Curatola* exception is not appropriate in this case.

The Plaintiff's conduct does not establish the nature of the area for the evaluation in this case–moreover, "the intended use of the property is determined by the City's

intent, not the users." *Alave*, ¶26. The City's intent for the area is controlling for all bicyclists, not just Mr. Alave. The City cannot seriously advance before this Court that it expects cyclists to rent Divvy bicycles and walk them to bicycle lanes.

> In fact, even for Divvy users, bicycling on the roadway near a Divvy station is not necessary in order to use the Divvy station. There are other options, including walking a bicycle on the sidewalk. (City's Brief at 23).

First, it is unclear how the City now advances that it "intends" Divvy or any other bicycles to be walked around Divvy stations. In answering a special interrogatory, the City stated: "It is not the City's expectation that persons using bicycles will walk their bicycles at all points when not in a designated bicycle lane." C.123. While the City now argues walking is an option, the truth, and practicality are otherwise. When a person pays and rents a bicycle, they ride that bicycle. The City by renting that bicycle in an area without bicycle lanes, by necessity and common practice, must be ridden on the street. By compelling riding the bicycle on the street, in the area of this incident, the City has demonstrated its intent. Mr. Alave and any other cyclist in the city are to benefit from this intent-moreover, holding the same will make bicycling safer for everybody in the City of Chicago.

B. The Appellate Court did not "extend" *Curatola* in this case

On page 24 of the Defendant's Brief, it is insinuated that the Appellate Court extended *Curatola* in this fact pattern. City Brief at 24. This contention is unsupported. *Curatola* deals with intent and pedestrians around street parked cars. *Curatola* and its progeny, *Ramirez* and *Green,* carve and limit the pedestrian exception to the specific pedestrian parking. *See* e.g. *Ramirez v. City of Chicago*, 212 Ill. App.3d 751, 754 (1st Dist. 1991) (pedestrian who was injured where parking

was allowed but who was not accessing a legally parked vehicle was not an intended user of the street." *Id*. *Greene v. City of Chicago*, 209 Ill.App3d 311, 313-14 (1st Dist. 1991). The nature of both Greene and Remirez required finding that a person walking in a street, for no reason, was not an intended and permitted user; however, a person walking in a street to a specific vehicle was an intended and permitted user. *Id*.

Here, the question is, does a bicycle rental station show intent for bicycles to be used. The answer, as the First District held, is affirmative.

C. The totality of the factors supports affirming the First District's opinion.

Mr. Alave is not suggesting that the Divvy station alone is the basis for liability. Nor is Mr. Alave suggesting that the use restriction on the sidewalk, alone, is the basis for liability. Nor is he suggesting that the large signage for Divvy bicycle rentals at the location of his injury alone is the basis for liability. Nor is he suggesting that this bicycle rental station, generating income for the City, alone, is the basis for liability. He is not suggesting that the lack of bike lanes adjacent to this income producing Divvy station alone is the basis for liability. Combining all these factors is the basis for liability. The City of Chicago admitted:

> "The Divvy system is owned by the City of Chicago and is currently operated on our behalf by Lyft. Generally, proposed Divvy station locations are reviewed and selected by City staff, representatives of our operator and a consultant engineer. Once a consensus on a location is reached, Divvy station locations are provided to the relevant alderman for review. A key goal of the Divvy program is to connect residents to transit. The Divvy location at Leland and Western is adjacent to the CTA's Western Avenue Brown Line Station." C.122

The City owns the Divvy system; the City placed the Divvy station "adjacent to the CTA's Western Avenue Brown Line Station." C. 122. By the City's own admission, it chooses the locations for its Divvy stations. By the City's own admission it has earned over $7.5 million dollars for these bicycle rentals, before 2021, more now. (C.122, C.123) The City's "key goal"is for Divvy stations to connect residents to transit. Beyond the City's new *post hoc* arguments before this Court, nothing suggests the City intends to achieve this goal by residents renting out and then walking those bikes. In fact, such an assertion is contrary to the City's earlier interrogatory response and reality. All of these factors together justify affirming the Appellate Court's decision in this case. It is time to bring the law up to the modern realities of bicycle use and municipal encouragement of bicycle use.

2. The City's own code indicates that Mr. Alave is to have all the "rights" of a vehicle:

The Appellee, asks this Court to take Judicial Notice of the City of Chicago Municipal Code 9-52-010. City of Chicago Municipal Code 9-52-010 reads:

> "(a) Every bicyclist upon a roadway shall be granted all of the rights and shall be subject to all all of the duties applicable to the driver of a vehicle by the laws of this state declaring rules of the road applicable to vehicles or by the traffic ordinances of this city applicable to the driver of a vehicle, except as otherwise explicitly provided in this code, or as to those provisions of laws and ordinances which by their nature can have no application. https://codelibrary.amlegal.com/codes/chicago/latest/chicago_il/0-0-0-2645812https://codelibrary.amlegal.com/codes/chicago/latest/chicago_il/0-0-0-2645812

Facially, reading this statute, Mr. Alave shall be subject to all of the "rights and shall be subject to all of the duties," applicable to the driver of a vehicle. All of the rights, includes the right to be free from negligence, a right enjoyed by drivers of a

vehicle at this same location. What metaphorical "right" is the City of Chicago describing with 9-52-010? Inherently, if Mr. Alave was subject to all the same rights as a vehicle, at the location of this incident, which by statute he was, that includes the right to be "intended" much like a vehicle is at this exact same location. *Id*.

This Court has not considered a matter with these facts, juxtaposed on City of Chicago Municipal Code 9-52-010. There is only one conclusion–the City has demonstrated its intent and Clark Alave should be considered an intended and permitted user of the area of roadway upon which he was injured.

* * * *

The totality of the circumstances here, in particular the City of Chicago's ownership, licensing, and placement decision of a Divvy bicycle rental station convey the intent that bicycles are rented and indeed ridden away from the Divvy station. Once this intent is determined, the Plaintiff, as a bicycle operator in the same area, is established as an "intended and permitted" user of the roadway, and therefore, should be permitted to pursue City liability for his bicycle accident.

CONCLUSION

This Court should affirm the Appellate Court's judgment on the facts of this matter.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341(a) & (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 21 pages

/s/ Erron H. Fisher
ERRON H. FISHER, Attorney

CERTIFICATE OF FILING/SERVICE

I certify under penalty of law as provided in 735 ILCS 5/1-109 that the statements in this instrument are true and correct and that the foregoing brief was served on all counsel of record via Odyssey File & Serve, Illinois, on March 22, 2023.

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128602

APPENDIX

128602

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2022 IL App (1st) 210812
No. 1-21-0812
Opinion filed May 18, 2022

THIRD DIVISION

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

CLARK ALAVE, Plaintiff-Appellant, v. THE CITY OF CHICAGO, Defendant-Appellee.	))))))))))	Appeal from the Circuit Court of Cook County. No. 2019 L 010879 The Honorable Gerald Cleary, Judge, presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court, with opinion.

Justices Ellis and Burke concurred in the judgment and opinion.

OPINION

¶ 1 This is a case of first impression. Plaintiff Clark Alave filed a complaint for negligence against defendant, the City of Chicago (City), as a result of falling off his privately owned bicycle as a result of hitting a pothole in the street at the crosswalk near a Divvy station at the intersection of West Leland Avenue and North Western Avenue. The City filed a motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (Code). 735 ILCS 5/2-619(a)(9) (West 2018). The trial court granted the City's motion to dismiss, which claimed that plaintiff was not both a permitted and intended user of the roadway on which the accident occurred and so, as an affirmative matter, the City owed plaintiff no duty under section 3-102

of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act). 745 ILCS 10/3-102 (West 2018). The motion to dismiss did not mention the fact that plaintiff was riding his bicycle through a crosswalk.

¶ 2 On this direct appeal, plaintiff claims that the trial court incorrectly concluded that the City owed him no duty under the Tort Immunity Act and that a series of factors demonstrate that the question of whether plaintiff was both a permitted and intended user of the roadway, and thus whether the City owed him a duty, is sufficiently unclear at this early stage of the proceedings to render inappropriate the trial's court decision to grant the City's motion to dismiss.

¶ 3 For the following reasons we reverse the decision of the trial court and remand for further proceedings.

¶ 4 BACKGROUND

¶ 5 On October 3, 2019, plaintiff filed a complaint for negligence against defendant, the City, in the circuit court of Cook County. That complaint was amended on December 12, 2019, and the amended complaint is the complaint at issue in the instant appeal. In the amended complaint, plaintiff alleged that on June 8, 2019, at about 9 p.m., plaintiff was riding his bicycle on the street westbound along the right side of West Leland Avenue when he struck a pothole that was in the crosswalk just before the intersection with North Western Avenue,[1] causing plaintiff to be thrown from the bicycle and to suffer injuries including fractured teeth, facial

[1]Plaintiff's complaint does not specify which street he was riding on near the intersection of West Leland Avenue and North Western Avenue, nor the direction of travel. However, the photograph of the pothole attached to the complaint, combined with plaintiff's allegation that he was riding on the right side of the street, indicate the street and direction of travel.

cuts, scarring, injury to his left hip, and injury to his right shoulder. Plaintiff alleged that the roadway was dark and partially illuminated by artificial lighting at the time of his injury.

¶ 6 A photograph of the pothole plaintiff allegedly struck, which was attached to the complaint, depicts a crater in the right lane of the street at West Leland Avenue and the crosswalk crossing it, approximately four feet from the curb. The pothole depicted in plaintiff's photograph appears to be four to five inches deep at its deepest point, with an inch or so at the bottom filled with loose gravel and debris. Plaintiff alleged that defendant had actual knowledge of the defect or would have had knowledge, had it exercised reasonable diligence.

¶ 7 Plaintiff further alleged that the City had in place, at the time of plaintiff's injury, an ordinance prohibiting bicyclists over the age of 12, like plaintiff, from riding bicycles on sidewalks. Chicago Municipal Code § 9-52-020(b) (amended Apr. 10, 2019). Plaintiff's complaint also alleged that the City either directly or knowingly permitted the erection of a Divvy bicycle rental station near the location of the incident at bar in this case. A Divvy station is a location where bicycles can be rented for use by the general public. Plaintiff's photograph of the pothole also depicts the Divvy station, which appears to be about 100 feet away from the pothole. Plaintiff was not riding a Divvy bicycle at the time of the accident but was using the roadway where bicyclists go to and from the Divvy station.

¶ 8 Plaintiff alleged that the City owed a duty to exercise reasonable care for the safety of intended and permitted users of the roadway, including plaintiff, and that the City breached that duty by failing to maintain the roadway in a safe state of repair, by failing to repair defects in the roadway surface, by failing to warn bicyclists of the pothole, by failing to light the pothole, by creating a situation that posed an unreasonable risk of injury to bicyclists, and/or by permitting a dangerous pothole to exist for an unreasonable amount of time. Plaintiff further

alleged that one of the listed acts or omissions by the City caused his accident and thereby his injuries and the associated damages.

¶ 9 On May 17, 2021, the City filed a motion to dismiss the complaint pursuant to section 2-619(a)(9) of the Code. 735 ILCS 5/2-619(a)(9) (West 2018). In the motion, the City argued that plaintiff was not an intended user of the roadway at the time of his accident and therefore the City owed him no duty under Tort Immunity Act.

¶ 10 The parties conducted limited written discovery in connection with the City's motion to dismiss. Among the documents produced during this limited discovery was a set of special interrogatories from plaintiff to the City and requests to produce from plaintiff to the City for eleven different sets of documents under Illinois Supreme Court Rule 214 (eff. July 1, 2018). Among the documents produced by the City was an affidavit from David Smith certified under section 1-109 of the Code. 735 ILCS 5/1-109 (West 2018). David Smith, speaking in his role as the projects administrator for the Chicago Department of Transportation, averred various things about an attached "2019 Chicago Bicycling Map" (bicycle map) and where bicycle paths do and do not exist relative to the site of plaintiff's accident. The bicycle map depicts officially designated bicycle lanes, as well as the locations of Divvy bicycle rental stations.

¶ 11 In plaintiff's response to the City's motion to dismiss, he argued that, since crosswalks are intended for use by pedestrians and bicyclists are pedestrians, he was a permitted and intended user of the roadway at the site of the incident. Plaintiff further argued that the City's admission in discovery that "it does not intend for people to walk their bicycles within city limits, while outside of a bicycle lane," rendered him a permitted and intended user of the roadway at the site of the incident. Plaintiff further argued that the text of the Tort Immunity Act, in referring to the City's duty of care to "permitted and intended users" meant not users who were both

intended and permitted, but users who were permitted as well as users who were intended. In the response, plaintiff implied but did not directly argue that municipal ordinances dictating how bicycles are to be used on municipal roadways convey intent that those roadways be used by bicyclists.

¶ 12 In the City's reply to plaintiff's response to the City's motion to dismiss, the City argued that the presence of a Divvy station did not convey intent, that there was no authority to support the argument that the city's ordinance prohibiting adults from riding bicycles on the sidewalk conveyed intent that they ride in the street, that bicyclists are not pedestrians and therefore are not intended users of crosswalks, that the city ordinances dictating how bicycles should be ridden on municipal roadways do not render bicyclists intended users of those roadways, that mere foreseeability of use does not render that use intended, and that the word "intended" should not be read as superfluous to the Tort Immunity Act.

¶ 13 On July 6, 2021, the trial court entered an order dismissing plaintiff's complaint with prejudice on the basis that plaintiff had not created a sufficient question of fact as to whether he was an intended user of the roadway. In reaching this conclusion, the trial court relied on the precedents of *Boub v. Township of Wayne*, 183 Ill. 2d 520, 528-529 (1998), and *Latimer v. Chicago Park District*, 323 Ill. App. 3d 466, 470 (2001), for the proposition that the intended use of a roadway is to be derived from markings on the roadway, signage, and other physical manifestations. Since there were no such markings or signage at the site of the accident, the trial court found that there was no question of fact to preclude the dismissal of the complaint because the map showed that plaintiff was traveling on his bicycle in an area that was not designated for bicycle traffic. The trial court further rejected plaintiff's argument that the Tort Immunity Act should be read to require a duty of care on the part of the City toward both

intended and permitted users, separately, as well as the plaintiff's argument that the incident occurring in a crosswalk rendered him an intended and permitted user.

¶ 14 Plaintiff filed a notice of appeal on July 12, 2021, and this timely appeal followed.

¶ 15 ANALYSIS

¶ 16 On appeal, plaintiff argues that a combination of factors, specifically the illegality of riding on the sidewalk at the accident site, the city's response to one of plaintiff's special interrogatories, and the proximity of a Divvy station to the accident site, sufficiently suggest that plaintiff was an intended user of the roadway to preclude the trial court's grant of the City's motion to dismiss under section 2-619. While plaintiff mentions that the incident occurred in a crosswalk in his appellate brief, he does not renew his argument that this renders him an intended user because bicyclists are pedestrians and crosswalks are intended for pedestrians, nor does he renew his argument that the scope of the Tort Immunity Act should be widened to include permitted users, nor does he renew his argument that municipal ordinances dictating how bicycles are to be ridden on municipal roadways render bicyclists intended users of those roadways. Those arguments are, accordingly, forfeited, but we address them nonetheless.

¶ 17 "A motion to dismiss, pursuant to section 2-619 of the Code, admits the legal sufficiency of the plaintiffs' complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiffs' claim." *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006); *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006). "[T]he movant is essentially saying ' "Yes, the complaint was legally sufficient, but an affirmative matter exists that defeats the claim." ' " *Reynolds v. Jimmy John's Enterprises*, LLC, 2013 IL App (4th) 120139, ¶ 31 (quoting *Winters v. Wangler*, 386 Ill. App. 3d 788, 792, (2008)). Dismissal is

permitted based on certain listed "defects" (735 ILCS 5/2-619(a)(1)-(8) (West 2020)) or some "other affirmative matter" (735 ILCS 5/2-619(a)(9) (West 2020)) outside the complaint. *Reynolds*, 2013 IL App (4th) 120139, ¶ 31.

¶ 18 On an appeal from a section 2-619 dismissal, our standard of review is *de novo*. *Hernandez v. Lifeline Ambulance LLC*, 2020 IL 124610, ¶ 14; *Solaia Technology*, 221 Ill. 2d at 579. *De novo* review means that we perform the same analysis a trial court would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). "Under the *de novo* standard of review, this court owes no deference to the trial court." *People v. Williams*, 2013 IL App (1st) 111116, ¶ 75 (citing *Townsend v. Sears, Roebuck & Co.*, 227 Ill. 2d 147, 154 (2007)).

¶ 19 In ruling on a section 2-619 motion to dismiss, a court must interpret the pleadings and supporting materials in the light most favorable to the nonmoving party. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367-68 (2003). "[A] court must accept as true all well-pled facts in the plaintiff's complaint and any reasonable inferences that arise from those facts." *Hernandez*, 2020 IL 124610, ¶ 14. Additionally, we may affirm on any basis appearing in the record, whether or not the trial court relied on that basis and whether or not the trial court's reasoning was correct. *Khan v. Fur Keeps Animal Rescue, Inc.*, 2021 IL App (1st) 182694, ¶ 25; *Mullins v. Evans*, 2021 IL App (1st) 191962, ¶ 59.

¶ 20 For a motion to be properly brought under section 2-619, the motion (1) must be filed "within the time for pleading" and (2) must concern one of nine listed grounds. 735 ILCS 5/2-619(a) (West 2020). In the case at bar, there is no indication that defendant failed to file a timely motion, so we turn to the grounds that defendant asserts.

¶ 21 A section 2-619 motion is permitted on only the following grounds:

"(1) That the court does not have jurisdiction of the subject matter of the action, provided the defect cannot be removed by a transfer of the case to a court having jurisdiction.

(2) That the plaintiff does not have legal capacity to sue or that the defendant does not have legal capacity to be sued.

(3) That there is another action pending between the same parties for the same cause.

(4) That the cause of action is barred by a prior judgment.

(5) That the action was not commenced within the time limited by law.

(6) That the claim set forth in the plaintiff's pleading has been released, satisfied of record, or discharged in bankruptcy.

(7) That the claim asserted is unenforceable under the provisions of the Statute of Frauds.

(8) That the claim asserted against defendant is unenforceable because of his or her minority or other disability.

(9) That the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a) (West 2020).

¶ 22 Subsection (a)(9) permits dismissal when an affirmative matter outside of the pleadings bars the claim. 735 ILCS 5/2-619(a)(9) (West 2020). "Affirmative matter," in this context, "encompasses any defense other than a negation of the essential allegations of the plaintiff's cause of action." (Internal quotation marks omitted.) *Daniels v. Union Pacific R.R. Co.*, 388 Ill. App. 3d 850, 855 (2009). Our supreme court has found: "Immunity from tort liability is an

affirmative matter that may properly be raised in a section 2-619 motion." *Hernandez*, 2020 IL 124610, ¶ 14. Thus, this issue was properly raised by defendant in its section 2-619 motion.

¶ 23 The Tort Immunity Act limits the common-law duties of municipalities. *Marshall v. City of Centralia*, 143 Ill. 2d 1, 5 (1991); *Curatola v. Village of Niles*, 154 Ill. 2d 201, 208 (1993). Section 3–102(a) of the Act provides in pertinent part:

> "[A] local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used ***." 745 ILCS 10/3-102(a) (West 2018).

¶ 24 Thus, according to the statute, a municipality owes a duty of ordinary care only to those who are both intended and permitted users of municipal property. 745 ILCS 10/3-102(a) (West 2018). Because "the Act 'is in derogation of the common law,' " we must construe it strictly against the municipal defendant. *Vaughn v. City of West Frankfort*, 166 Ill. 2d 155, 158 (1995) (quoting *Curatola*, 154 Ill. 2d at 208). "[A]n intended user of property is, by definition, also a permitted user; a permitted user of property, however, is not necessarily an intended user." *Boub*, 183 Ill. 2d at 524.

¶ 25 "[T]he duty of a municipality depends on whether the use of the property was a permitted and intended use. [Citation.] Whether a particular use of property was permitted and intended is determined by looking to the nature of the property itself." (Emphasis omitted.) *Vaughn*, 166 Ill. 2d at 162-63. Therefore, the City's "[i]ntent must be inferred from the circumstances." *Sisk v. Williamson County*, 167 Ill. 2d 343, 351 (1995). In the case at bar, both parties agree that

plaintiff was a permitted user of the road; as a result, the only issue for us to decide is whether plaintiff was also an intended user.

¶ 26 In determining whether the City owes a duty of ordinary care to a user of municipal property, the relevant question is not whether the user was specifically intended but "whether the use *** was a permitted and intended use." (Emphasis omitted.) *Vaughn*, 166 Ill. 2d at 162. The intended use of property is determined by the City's intent, not the user's, and generally "we need look no further than the property itself." *Wojdyla v. City of Park Ridge*, 148 Ill. 2d 417, 425-426 (1992). The Illinois Supreme Court in *Boub* discussed its analysis in determining whether a bicyclist is an intended user of a roadway. *Boub*, 183 Ill. 2d at 525-526. The court stated:

> "[t]o resolve the plaintiff's status under section 3-102(a), it is appropriate to look at the property involved [in the accident] in determining whether the plaintiff may be considered an intended and permitted user ***. 'Whether a particular use of property was permitted and intended is determined by looking to the nature of the property itself.' " *Boub*, 183 Ill. 2d at 525 (quoting *Vaughn*, 166 Ill. 2d at 162-163).

¶ 27 While plaintiff's argument that the incident taking place in a crosswalk rendered him an intended user was not renewed on appeal, it is nonetheless easily dispensed with. The argument depends on plaintiff's assertion that bicyclists are pedestrians and crosswalks are intended for pedestrians. While crosswalks are intended for pedestrians (*Boub*, 183 Ill. 2d at 526 ("Pedestrian walkways are designated by painted crosswalks ***." (internal quotation marks omitted))), bicyclists are not pedestrians. The Chicago Municipal Code defines pedestrians as "any person afoot" and separately defines a bicyclist as "a person operating a bicycle." Chicago Municipal Code § 9-4-010 (amended July 21, 2021). Our case law also recognizes this

distinction. *Boub*, 183 Ill. 2d at 528 (referring to "[b]icyclists, *unlike pedestrians*" relying on some of the same signage as motorists (emphasis added)). Accordingly, even if the City owed a duty to pedestrians to maintain the crosswalk up to a standard befitting pedestrian use, bicyclists are not pedestrians, and there is no authority to support the proposition that that duty extends to bicyclists. Furthermore, Alave was not a user of the crosswalk, as he was crossing it perpendicular to its path while using the roadway as a bicyclist. There is no argument made by the City, nor is there anything in state statute or city ordinances, that indicates that when plaintiff hit the pothole in the crosswalk, the fact that he was passing through the crosswalk would affect his status in determining whether he was an intended user of the road where the incident occurred.

¶ 28 Plaintiff's argument that the Tort Immunity Act should be read to require a duty of the City toward those who are permitted users and those who are intended users, rather than those who are both permitted and intended users, was also not renewed on appeal, but it is similarly unavailing. Plaintiff cites no case for authority that the Tort Immunity Act has ever been read in this way, and this court is unaware of any such case. Accordingly, we will follow existing supreme court precedent in agreeing with the trial court that a user must be both permitted and intended for a duty on the part of the City to exist under the Tort Immunity Act. *Vaughn*, 166 Ill. 2d at 160; *Boub*, 183 Ill. 2d at 537.

¶ 29 Plaintiff's argument that municipal ordinances dictating how bicycles are to be ridden on municipal roadways convey intent that bicyclists use those roadways was also not renewed on appeal, but even if it were raised, it would be unsuccessful. *Latimer* makes clear that ordinances regulating how bicycles are to be ridden in a given area do not make bicycles intended users of those areas. *Latimer*, 323 Ill. App. 3d at 472. Accordingly, we agree with the trial court that

municipal ordinances dictating how bicyclists use municipal roadways do not convey intent that bicyclists use municipal roads in the case at bar.

¶ 30 Accordingly, the only arguments that remain before this court are that the illegality of riding on the sidewalk at the accident site, the city's response to one of plaintiff's special interrogatories, and the proximity of a Divvy station to the accident site, each individually or in combination, sufficiently indicate that bicyclists, like plaintiff, were intended users of the roadway to preclude the trial court's grant of the City's motion to dismiss under section 2-619.

¶ 31 In the *Boub* case, our supreme court concluded in a 4 to 3 decision that bicyclists as a whole are not intended users of the roads in Wayne Township. *Boub*, 183 Ill. 2d at 535-536. It should be noted that the *Boub* decision was decided long before Divvy bicycle stations were placed in municipalities. In the case at bar, plaintiff is not contending that bicyclists as a whole are intended users of the streets in Chicago. Plaintiff is only contending in a very narrow sense that in the area where this accident occurred, which was adjacent to the area where there was a Divvy station, the bicyclists who use the area of the street adjacent to the Divvy station must use the area where the accident occurred to come and go from the Divvy station and, thus, when the city council allowed the placement of the Divvy station at that location, it intended that, in the specific area where this accident occurred, bicyclists be permitted and intended users of that specific area. If the city council intended that bicyclists were to be only intended users of streets and roads that are designated as bicycle lanes, it would have said so. We look at the ordinances of the City of Chicago to construe the City's intent, and there is no showing that it intended that bicyclists can only be permitted and intended for bicycle lanes only. We further take judicial notice that many of the Divvy stations in Chicago have no bicycle lanes in close proximity to the Divvy stations, which further shows us that the City intended that

bicyclists are intended users of the streets used by bicyclists in going to and from the Divvy stations.

¶ 32 In the case at bar, plaintiff does not claim that the location where the accident occurred was marked in any way to indicate that it was intended for bicycle use, and no markings are evident in the photograph of the accident site provided by plaintiff. Accordingly, if intent on the part of the City for this roadway to be used by bicyclists exists in the case at bar, it was not conveyed by street markings or street signs, nor is there any ordinance of the City or state statute that says that bicyclists can only ride their bicycles in bicycle lanes.

¶ 33 The City cites *Latimer*, 323 Ill. App. 3d at 470, for the prosposition that this court has previously rejected an argument that "the absence of pavement markings or signs where the accident happened does not dispose of her claim." This is an inaccurate reading of *Latimer*. The plaintiff in *Latimer* levied arguments extending beyond the examination of the road itself and therefore asserted that a lack of markings alone was insufficient to dispose of her claim. The *Latimer* court disposed of these further claims individually and ultimately found for the municipal defendant, but at no point did it assert that Latimer was wrong in asserting that a lack of markings, alone, was insufficient to dispose of her claim. *Latimer*, 323 Ill. App. 3d at 470-473. The City inaptly cites *Berz v. City of Evanston*, 2013 IL App (1st) 123763 for the same proposition; that case similarly disposed of the other arguments rather than precluding them.

¶ 34 Previous cases have also looked to custom to determine intended use. *Wojdyla*, 148 Ill. 2d at 422-423 (enumerating customary use of intersections as unmarked crosswalks as an indication of intended use); *Marshall*, 143 Ill. 2d at 9-10 (finding a duty of ordinary care regarding a pedestrian walking on a parkway without reference to any indicator of intent

beyond customary use). It is customary that bicycles be ridden in the street or on the sidewalk, depending on what is permissible by local ordinance. However, custom alone is insufficient. *Boub*, 183 Ill. 2d at 531 (rejecting the proposition that "historical practice alone is sufficient to make a particular use of public property an intended one"); *Sisk*, 167 Ill. 2d at 349 (asserting that common use does not dictate intended use).

¶ 35 Previous cases have also found that the necessity of a piece of property for a given purpose does not render that use an intended use. *Wojdyla*, 148 Ill. 2d at 424 (the absence of a crosswalk within half a mile does not render crossing the street mid-block an intended use); *Vaughn*, 166 Ill. 2d 161-162 (similarly regarding the lack of a crosswalk); *Sisk*, 167 Ill. 2d at 347 (the necessity that pedestrians sometimes walk on country roads is not a manifestation of the local authority's intent that pedestrians do so). However, when a use of property is a necessary part of the intended use indicated by the City, that use is also intended. *Curatola*, 154 Ill. 2d at 216 (truck driver unloading a truck lawfully parked in the street was an intended user as a necessary extension of the municipality's intent that vehicles park there); *Di Domenico v. Village of Romeoville*, 171 Ill. App. 3d 293, 296 (1988) (plaintiff walking on the street to retrieve items from the trunk of his legally parked vehicle was an intended user).

¶ 36 Plaintiff cites a combination of three factors to assert that the City must have intended that the street in question be used by bicyclists. The first factor plaintiff cites is the municipal ordinance prohibiting adults from riding bicycles on the sidewalk. Chicago Municipal Code § 9-52-020(b) (amended Apr. 10, 2019). The court in *Latimer* established that such a prohibition, alone, does not render a bicyclist an intended user of a roadway, stating: "You are prohibited from riding on the sidewalk, and further, you are permitted to ride where we have not prohibited riding." *Latimer*, 323 Ill. App. 3d at 471. That is to say, the ordinance prohibiting

riding bicycles on the sidewalks merely narrows the areas in which bicyclists are permitted to ride without conveying intent that they ride in any particular other area.

¶ 37 The second factor cited by plaintiff is a response from the City to a special interrogatory submitted by plaintiff in discovery related to the motion to dismiss that is at bar in this case. The interrogatory asked: "[i]s it the expectation of the City of Chicago that persons using bicycles in the City of Chicago will walk their bicycles when not in a designated bicycle lane?" to which the City objected but answered without waiving objection: "it is not the City's expectation that persons using bicycles will walk their bicycles at all points when not in a designated bicycle lane." Plaintiff asserts that this admission conveys intent on the part of the City that bicycles be ridden in the street, since riding on the sidewalk is illegal and Divvy customers (renters) are not expected to push their bicycles. The City argues that its response "merely recognizes that it is foreseeable that bicyclists will not always walk their bicycles when they are outside of bicycle lanes." As "[f]oreseeability alone *** is not the standard for determining whether a duty of care exists here" (*Wojdyla*, 148 Ill. 2d at 428), the City's foresight, alone, is insufficient to establish intent on the part of the City.

¶ 38 The third factor that plaintiff argues conveys intent that the street in question be used for bicycle traffic is the existence of a Divvy bicycle rental station, from which the City derives revenue, close to the site of the accident. The relevance of bicycle rental stations to the question of intended use of nearby streets is a question of first impression. If we look to the "property itself," as directed by *Wojdyla*, we must necessarily look near to the street as well as to the street itself; otherwise, street signs immediately adjacent to the street would not be relevant indicators. *Wojdyla*, 148 Ill. 2d at 425-426. If, then, proximate signage can be a feature of a roadway relevant to the question of the City's intent, then so, too, can any other factor be a

proximate manifestation of intent. *Boub*, 183 Ill. 2d at 530 ("bicyclists are permitted, but not intended, users of the roads, in the absence of specific markings, signage, or further manifestation of the local entity's intent that would speak otherwise"). Neither party makes any mention of signage associated with the Divvy station, so the Divvy stations represent an indication of the intended use of the bicycles rented there, as do the streets nearby, and its location implies that bicycles will use the streets and sidewalks adjacent to the Divvy station.

¶ 39 None of these three factors alone would be sufficient to establish plaintiff as an intended user of the roadway on which his accident occurred. However, the combination of the three, plus the street itself, is sufficient to establish intent and thereby establishes a duty on the part of the City. All of the factors, together with the factor that the site of the accident is in an area where Divvy renters go to and from the Divvy station, show an implied intent by the city that the plaintiff was a permitted and intended user of the roadway on which he was traveling. Bicycle renters ride the bicycles they rent to the intended bicycle lane, and the City is well aware of this factor. In the case at bar, the City has approved and generates revenue from a series of bicycle rental stations throughout the city, including one within about 100 feet of where plaintiff's accident took place. As such, in this case, unlike prior precedents, the City certainly intends that bicycles be ridden on the roadway in close proximity to the area of the Divvy stations. It is apparent, in comparing the location of the accident to the map provided in the record, that there is a bicycle lane very close to the rental station cited by plaintiff, from which one must reasonably infer that the streets in close proximity to the Divvy station are intended paths for bicycle use. However the City admits in its brief, and it is apparent in the map provided by the City in the record, that "Divvy stations are located throughout the city, and sometimes not near a designated bicycle route." It defies common sense to suggest that the

City, when it approved rental stations at a distance from bicycle lanes, intended bicycles to be pushed a great distance before being ridden, the user's rental period ticking down all the while. It would be reasonable to conclude that the City intended that bicycles be ridden in the streets adjacent and in close proximity to the stations. The city expressed no intent prohibiting the riding of bicycles in the streets near Divvy stations. It is obviously the City's intent, from all of the factors, that bicycles be ridden in the street at or near the Divvy stations until the rider reaches a designated bicycle path.

¶ 40 The City cites *Olena v. City of Chicago*, 2022 IL App (1st) 210342-U, for persuasive precedent, as it is a very recent case decided by this court involving an accident in which our court upheld the trial court's grant of the City's motion to dismiss. While *Olena* stands only as persuasive precedent, as it is an unpublished order entered under Illinois Supreme Court Rule 23, it is worthwhile to articulate the ways in which it differs from the case at bar. The facts of *Olena* show that the plaintiff was a bicyclist who was injured as the result of alleged negligence on the part of the City in failing to maintain a municipal roadway in a safe condition and in that plaintiff was not riding on a street specifically designated for bicycle use. *Olena*, 2022 IL App (1st) 210342-U ¶¶ 4, 12. The key difference between these two cases is that, in the case at hand, plaintiff presented evidence of the City's intent derived from the specific relationship between where his accident occurred and the nearby Divvy station, whereas in *Olena* the plaintiff presented evidence only of general statements made by city officials about encouraging bicycling, which she claimed demonstrated intent for bicyclists to use all city streets. We agree with the findings in *Olena* but carve out a narrow exception to areas on streets where bicyclists go to and from Divvy stations; these areas are intended for bicycle traffic.

¶ 41 Much as stepping into the street to move to and from one's vehicle was a necessary intended use attendant to the marked intended use of parking vehicles in *Curatola*, riding a bicycle in the area used to get to and from a Divvy station is necessary to its intended use, so that area is intended to be used by all bicyclists. See *Curatola*, 154 Ill. 2d at 216; see also *Sisk*, 167 Ill. 2d at 351 ("The signs, meters and pavement markings which designate parking spaces are clear manifestations of intent that people park their vehicles as well as enter and exit their vehicles in such areas."). When the City approved the locations of Divvy stations far from bicycle lanes, it was aware that necessity would dictate such use, and it had knowledge that bicyclists would be riding their bicycles in the areas close to the station. Absent any signage directly indicating another intended use of bicycles rented from city-approved rental stations and for so long as an ordinance exists prohibiting adult use of bicycles on sidewalks, it is reasonable to conclude that the City intended the use that common sense, custom, and necessity all indicate: that they be ridden in the streets in close proximity to Divvy stations. It would further defy common sense to suggest that, while the City allows bicycle rentals, it does not intend for those bicycles to be ridden in close proximity to the Divvy stations. Since the City made no explicit pronouncement of intent with regard to Divvy renters in particular, we find no reason to conclude that the City's intent is limited to bicyclists renting from Divvy stations. If the City intended that areas in close proximity to Divvy stations are not areas intended for bicycle use, the city council could have passed an ordinance saying that. Accordingly, we find that plaintiff was a permitted and intended user of the roadway where his accident occurred and the City owed him a duty of reasonable care.

¶ 42 CONCLUSION

¶ 43 For the foregoing reasons, we reverse the dismissal of plaintiff's complaint and remand to the trial court for further proceedings.

¶ 44 Reversed and remanded.

No. 1-21-0812

Cite as:	*Alave v. City of Chicago*, 2022 IL App (1st) 210812
Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 2019-L-010879; the Hon. Gerald Cleary, Judge, presiding.
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