No. 128602

IN THE
SUPREME COURT OF ILLINOIS

CLARK ALAVE,

Plaintiff-Appellee,

v.

THE CITY OF CHICAGO,

Defendant-Appellant.

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

REPLY BRIEF OF DEFENDANT-APPELLANT

Corporation Counsel
of the City of Chicago
2 N. LaSalle Street, Suite 580
Chicago, Illinois 60602
(312) 742-0115
stephen.collins@cityofchicago.org
appeals@cityofchicago.org

MYRIAM ZRECZNY KASPER
Deputy Corporation Counsel
SUZANNE M. LOOSE
Chief Assistant Corporation Counsel
STEPHEN COLLINS
Assistant Corporation Counsel
Of Counsel

E-FILED
5/10/2023 10:58 AM
CYNTHIA A. GRANT
SUPREME COURT CLERK

TABLE OF CONTENTS AND POINTS AND AUTHORITIES

ARGUMENT

Municipalities owe a duty of care only to those who are intended and permitted users of municipal property. 745 ILCS 10/3-102(a). Under entrenched precedent, a property's intended use "is determined by looking to the nature of the property itself," Vaughn v. City of West Frankfort, 166 Ill. 2d 155, 162-63 (1995), with an eye toward "pavement markings, signs, and other physical manifestations of the intended use of the property," Boub v. Township of Wayne, 183 Ill. 2d 520, 528 (1998). At the location of Alave's accident, no signs, pavement markings, or other physical manifestations indicated that the City intended that the street be used for bicycle riding. Accordingly, Alave was not an intended user, and, under section 3-102(a), the City did not owe him a duty.

Alave, for his part, fails to establish that the City intended bicycle riding on the roadway where his accident took place. He relies mainly on the presence of a Divvy station in the vicinity of his accident, but the station does not support a conclusion that he was an intended user of the street. Alave also dwells at length on irrelevant issues, such as the revenue the City generates from the Divvy system, and whether other municipalities in the state intend bicycle riding in the vicinity of their bicycle sharing stations. Nothing he says shows that the City owed him a duty. The appellate court's judgment should be reversed.

I. A BICYCLE SHARING STATION DOES NOT SUPPORT A DETERMINATION THAT ALAVE WAS AN INTENDED USER OF THE ROADWAY.

As we explain in our opening brief, City Br. 13-14, the appellate court deemed a bicycle sharing station relevant to the City's intent for two different reasons. First, the court likened a bicycle sharing station to "proximate signage" that indicates an intended use of a roadway. Alave v. City of Chicago, 2022 IL App (1st) 210812, ¶ 38. Second, the court invoked Curatola v. Village of Niles, 154 Ill. 2d 201 (1993), and stated that it was creating "a narrow exception" to existing law, on the ground that bicycling near a Divvy station was a "necessary" use. Alave, 2022 IL App (1st) 210812, ¶¶ 40-41. Neither of these rationales has merit.

A. The Parties Agree That Curatola Does Not Help Alave.

Alave admits that "a Curatola-type exception does not translate to this case." Alave Br. 17 (heading) (internal quotation marks omitted). In Curatola, this court explained that "lawfully permitted curbside parking necessarily entails pedestrian use of the street immediately around the parked vehicle," 154 Ill. 2d at 210, and therefore, such use by a vehicle's "exiting and entering operators and occupants" is intended and permitted, id. at 213. The court thus carved out an exception to "the general principle that no duty is owed to pedestrians outside crosswalks," Curatola, 154 Ill. 2d at 212, and held that pedestrians immediately near their legally parked vehicles *are* intended and permitted users of the street, despite the absence of a

crosswalk.

The appellate court in this case said that it was similarly creating "a narrow exception." Alave, 2022 IL App (1st) 210812, ¶ 40. According to the appellate court, "[m]uch 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." Id. ¶ 41. That was error.

Our opening brief gave many reasons why a Curatola-like exception should not apply here. City Br. 20-25. The area of intended pedestrian use near a parked vehicle is "bounded by the parameters of parking lanes," Curatola, 154 Ill. 2d at 214, whereas the area of supposedly intended bicycle use near a Divvy station has no discernible boundary. It is physically "impossible" for a person to enter or exit his car without stepping on the street, Vaughn, 166 Ill. 2d at 161 (emphasis omitted), but it is not physically impossible for a person to access a Divvy station without riding a bicycle. And while the Curatola exception applies only to the use of "the street immediately around a legally parked vehicle by *its* exiting and entering operators and occupants," 154 Ill. 2d at 213 (emphasis added), Alave was not a Divvy user, and thus had no need to be near any Divvy station, let alone the one in the vicinity of his accident.

It is telling that Alave does not even defend, and even opposes, Alave

Br. 18-19, the appellate court's attempt to create a Curatola-like exception. The only part of the appellate court's rationale Alave seems to embrace is that a bicycle sharing station "necessitate[s]" bicycle use on nearby streets. Id. at 16 (heading) (internal quotation marks omitted). He says it is "ridiculous" to argue that a bicycle sharing station does not do so, and states that Divvy users "do not rent bicycles with the intent on [sic] walking them." Id. at 16-17. But, of course, it is the City's intent that must be discerned – not that of Divvy users. More fundamentally, as we explained in our opening brief, City Br. 21, "necessity" means that other options are "impossible." Vaughn, 166 Ill. 2d at 161 (emphasis omitted). And, while even a Divvy user would not find it impossible to avoid riding a bicycle near a Divvy station, Alave was not even using a Divvy bicycle. It defies all common sense to suggest that it was impossible for Alave not to ride his bicycle in the vicinity of this – or any – Divvy station. His rough proximity to a station, as he rode down the street on his own bicycle, was pure happenstance. Alave does not counter these points.

In any event, Alave acknowledges that "a Curatola exception is not appropriate in this case." Alave Br. 17. On that, the parties agree.

B. A Bicycle Sharing Station Is Not An Affirmative Physical Manifestation Of An Intended Use Of The Roadway.

As this court has long recognized, a court looks to "affirmative manifestations" of municipal intent, Boub, 183 Ill. 2d at 535, such as signs

and pavement markings, id. at 528, to determine whether municipal property is intended for a particular use. When it comes to the intended use of a roadway, signs and pavement markings serve the vital function of informing all users whether a specific location is intended for a particular use. Given the unique danger that moving vehicles pose to bicyclists, it is especially important that roadways intended for bicycle use provide clear visual indications of that intent to motorists and bicyclists alike.

A bicycle sharing station does not serve that function. Unlike signs and pavement markings, a bicycle sharing station does not identify any stretch of roadway – and certainly not the particular stretch of roadway Alave was using – as intended for a particular use. The station at issue here was situated in a plaza, separated from a roadway by a sidewalk, C. 108, and made no reference to the street where Alave fell. This Divvy station, like other stations in the City, is similar to a bicycle rack, in that it provides a convenience to people who want to ride a bicycle. These conveniences are consistent with the fact that bicycling is generally permitted on City streets, but they do not designate any roadway as intended for bicycle use.

Alave assumes that "a reasonable person" using the roadway where he fell would see the Divvy station that was in the area. Alave Br. 4. But tellingly, he does not even allege that *he* realized there was a Divvy station in the area as he rode down Leland on his own bicycle. See C. 36-40. Indeed, someone like Alave, who will not be returning his bicycle to a Divvy station at

the end of his ride, would have no reason to notice the presence of a Divvy station. And the City, knowing that a great number of bicyclists in Chicago do not use the Divvy program, does not attempt to convey its intent through Divvy stations. To achieve that vital purpose, the City uses signs and pavement markings, which communicate the City's intent to all users of the roadway.

Moreover, because a Divvy station does not identify any property as having an intended use, the appellate court could give only vague and varying descriptions of the area around a Divvy station that is supposedly intended for bicycle use: "the streets and sidewalks adjacent to the Divvy station," Alave, 2022 IL App (1st) 210812, ¶ 38; "the streets in close proximity to the Divvy station," id. ¶ 39; "the roadway in close proximity to the *area* of the Divvy stations," id. (emphasis added); "the street at or near the Divvy stations until the rider reaches a designated bicycle path," id.; "streets where bicyclists go to and from Divvy stations," id. ¶ 40; "the area used to get to and from a Divvy station," id. ¶ 41; and "the areas close to the station," id. None of these descriptions informs users of a roadway, or the City itself, specifically where the court believed bicycling is an intended use.

Alave attempts to salvage this aspect of the appellate court's opinion by claiming that the court "enunciated 5 factors to consider on the issue of intent," as well as two "subsets" of "primary" factors. Alave Br. 15. That is fanciful. The court did not treat these as factors bearing on the City's intent.

Nor, in any event, would it even make sense to try to weigh something like "the streets and sidewalks adjacent to the Divvy station" as a "factor" alongside an area such as "the street at or near the Divvy stations until the rider reaches a designated bicycle path." Such an exercise would shed no light on whether a particular roadway is intended for bicycle use.

What is more, any rule that would require a court to determine intended use by considering the factors Alave proposes would only add further uncertainty to the scope of a municipality's duty. As we explained in our opening brief, City Br. 18-19, the appellate court's decision already leaves the City guessing where, specifically, it owes a duty to bicyclists. The court's vague descriptions of areas "close," "near," or "adjacent" to Divvy stations do not specify how far, exactly, from a Divvy station the City's duty to bicyclists supposedly extends. More important, the plain language of section 3-102(a) lets *municipalities* control where they owe a duty by deciding what uses they intend, and where. Alave would lead a court even further astray, by requiring it to consider an array of supposed factors, none of which bears on the municipality's actual intent.

And here, the so-called "factors" cannot explain why the location of Alave's accident, specifically, would be intended for bicycle use. At least one of them – the "street at or near the Divvy stations until the rider reaches a designated bicycle path," Alave, 2022 IL App (1st) 210812, ¶ 39 – would exclude the place where Alave fell. At the time of Alave's accident, the

nearest bicycle lane (on Lincoln Avenue) and the Divvy station were both east of where Alave fell. C. 60, 108. Thus, a rider going between the Divvy station and the Lincoln Avenue bike lane would not pass the site of Alave's accident.

Elsewhere, Alave dwells on other matters that have no bearing on municipal intent. He repeatedly mentions that the City earns revenue from the Divvy system. E.g., Alave Br. 1, 2, 3, 5, 9, 10, 12, 16, 19. As the City acknowledged in an interrogatory answer, it "receives revenue from the entire Divvy system (including stations and bicycles) in the form of system sponsorship and advertising." C. 123. But Alave does not attempt to explain how this fact bears on the question before the court: whether the City intended bicycling at the location of Alave's accident. He cites no case in which municipal revenue informs municipal intent, nor are we aware of any. The factors that this court has acknowledged as relevant to municipal intent, such as signs and pavement markings, have nothing to do with generating revenue for a municipality. City revenue from the Divvy system is irrelevant.

Alave also argues about the City's intended uses of things other than municipal property, such as the "use of bicycles," Alave Br. 9 (heading), or the "use . . . for a Divvy station," id. at 16. Under section 3-102(a), municipal duty extends only to those who are intended "to use the property" in question. 745 ILCS 10/3-102(a). Thus, for purposes of the statute, the relevant "use" is the use of *municipal property*. The City's duty does not, therefore, turn on

the intended use of bicycles, bicycle sharing stations, or any other piece of equipment that might facilitate travel. The City's intent for its property controls. Signs and pavement markings indicate which streets the City intends to be used for bicycling. A Divvy station does not.

Alave attempts to liken Divvy stations to street signs by characterizing the stations as having "signs" or "signage." E.g., Alave Br. 1, 2, 3, 4. As an initial matter, we note that photographs of the Divvy station nearest to Alave's accident do not show any apparent signs, see C. 12; C. 30; C. 108, let alone the "large signage" that Alave now claims was there, Alave Br. 2. And in the appellate court, Alave acknowledged that "the City did not put up 'signs' at this location." Alave App. Ct. Br. 8. Regardless, even if Divvy stations could be characterized as having signage, that would not help Alave, for at least two reasons. First, unlike signs the City uses to designate bicycle routes, signage associated with Divvy stations does not designate any street as having an intended use. And second, Divvy signage is irrelevant to someone like Alave, who did not use any Divvy station, and thus had no reason to notice it was there. Simply put, the City would not – and does not – choose to communicate to the general public how it intends its streets to be used by installing a bicycle sharing station that serves only a fraction of street users.

And as we observed in our opening brief, City Br. 16, Chicago is not the only municipality in the state to provide bicycle sharing stations. We

identified four other municipalities simply as examples. Id. n.7. We made no representation about whether those municipalities intend bicycling on any of their streets, and if so, where. Alave, however, argues at length that those municipalities intend bicycle riding in the vicinity of their respective bicycle sharing stations. Alave Br. 11-15. He says that "these municipalities only place bicycle rental locations at a location intended for bicycling," id. at 13, then relies on the presence of things like signage, bicycle trails and trail maps, and proximity to parks as indicators of municipal intent, id. at 13-14. To the extent he relies on signage and marked bicycle trails, that only proves our point that those things reflect municipal intent. And this case concerns an accident at a location where the City had *not* indicated, with either signs or pavement markings, that bicycling was an intended use of the street. Beyond that, Alave offers nothing but pure conjecture that those municipalities intend bicycling in the vicinities of their bicycle sharing stations; moreover, even if they did, that would not speak to Chicago's intent.

Alave also complains that we cite to bicycle information on City websites, on the ground that judicially noticeable "facts must not be subject to reasonable dispute." Alave Br. 10. But he does not attempt to explain why the information we cited does not meet that standard. At any rate, we cited the City's plan to build a bicycle lane on Leland simply to illustrate what it looks like when the City affirmatively manifests its intent that people use a roadway for bicycling. City Br. 15-16. In particular, the planned

modification of Leland calls for a bicycle lane that is painted green and protected from vehicular traffic by a concrete curb.[1] To be sure, as Alave claims, the planned bicycle lane will "not change the nature of the area and physical manifestations of intent that were present when Mr. Alave used the roadway." Alave Br. 11. And, at that time, there were no signs or pavement markings on Leland when Alave had his accident.

Finally, despite claiming to "ask[ ] this Court to follow years of precedent," Alave Br. 2, Alave suggests that this court "decline to apply" Boub, just as it has declined to apply Molway v. City of Chicago, 239 Ill. 486 (1909), in recent years, Alave Br. 3. Amici similarly argue that Boub is outdated. Ride Illinois Br. 11; Active Transportation Alliance Br. 11. The court should not heed Alave's suggestion. Molway held that the City's duty of care extended to bicyclists who use the roadway. 239 Ill. at 494. The plaintiff in Boub cited Molway for the proposition that bicyclists are "intended and permitted users of Illinois streets and highways." 183 Ill. 2d at 533. This court readily distinguished Molway on the grounds that it was decided decades before the enactment of the Tort Immunity Act, and "long before motorized vehicles became the predominant users of Illinois streets and highways." Id.

The reasons Molway is no longer viable do not apply to Boub. The

[1] See https://40f4ba.a2cdn1.secureserver.net/wp-content/uploads/2022/01/Leland_Western-Design-Update.pdf

controlling provision of the Tort Immunity Act is the same now as it was when Boub was decided in 1998. And motor vehicles are still "the predominant users of Illinois streets and highways." Boub, 183 Ill. 2d at 533. Alave glibly asserts that the "use of bicycles and the expectation surrounding them is different and has evolved since this Court's previous decisions." Alave Br. 3. But nothing in that vague assertion justifies abandoning this court's approach in Boub. The danger that moving vehicles pose to bicyclists remains a significant concern. To the extent that more bicyclists are using roadways alongside motor vehicles now than when Boub was decided, that only underscores the need for unmistakably clear indicators, such as signs and pavement markings, to inform drivers and bicyclists precisely where bicycling is intended.

One of plaintiff's amici, Ride Illinois, argues that, if this court adheres to Boub, "municipalities . . . may lose the motivation to continue the state's path of increasing bicycle structure." Ride Illinois Br. 11. That is nonsense. Indeed, this court rejected a similar point in Boub, where a dissenting justice expressed the concern that "the principal effect of the majority decision will be to discourage municipalities from taking any measures to make roads safer and more hospitable for bicyclists." 183 Ill. 2d at 539 (Heiple, J., dissenting). The dissent's dire prediction has not come to pass. In fact, Chicago now has more roadways intended for bicycle use than ever before.

Chicago Cycling Strategy at 28-31.[2] As bicycle riding has expanded all over the City, so has the City's commitment to changing its streets in ways that truly protect bicyclists – by identifying and creating safer paths for those bicyclists. Boub allows municipalities to devote their limited resources to those specific places that they have affirmatively designated as intended for bicycling, because making *all* roadways safe for bicyclists would impose an impossible burden and enormous costs. See 183 Ill. 2d at 535 ("[I]t is appropriate to consider the potentially enormous costs both of imposing liability for road defects that might injure bicycle riders and of upgrading road conditions to meet the special requirements of bicyclists.").

II. THE OTHER FACTORS THAT THE APPELLATE COURT IDENTIFIED DID NOT MAKE THE LOCATION OF ALAVE'S ACCIDENT INTENDED FOR BICYCLE USE.

Even according to the appellate court, the Divvy station in the vicinity of Alave's accident was not alone sufficient to make Alave an intended user of the street. Alave, 2022 IL App (1st) 210812, ¶ 39. Rather, the court inferred the City's intent by "combin[ing]" the Divvy station with two other factors. Id. One was a City ordinance generally prohibiting adults from riding bicycles on sidewalks. Id. ¶ 36. The other was an interrogatory answer in which the City said it did not have an "expectation" that people walk their bicycles when they are not in a bicycle lane. Id. ¶ 37.

---

[2] Available at https://www.chicago.gov/content/dam/city/depts/cdot/bike/2023/2023_Chicago%20Cycling%20Update.pdf

As we explain in our opening brief, City Br. 25-30, neither of these additional factors supports a conclusion that the City intended bicycling on the street where Alave fell. A prohibition against bicycle use on the sidewalk means that bicycling is not permitted there. That has nothing to do with whether the City intends bicycle use on any given street. And the City lacks an "expectation" that people walk their bicycles while outside of bicycle lanes because bicyclists have the option of riding anywhere that bicycling is permitted. That does not show that the City intends bicycling on any particular roadway.

Alave, for his part, barely mentions either of these two factors. He references the ordinance only to announce that it, in combination with the City's interrogatory answer and the Divvy station, "demonstrate[s] intent." Alave Br. 10. But he offers no explanation why the ordinance is relevant at all. It has no bearing on whether Alave was an intended user of the street, for the reasons we have explained.

Alave pays marginally more attention to the City's interrogatory answer, but he uses it to refute an imagined argument that the City does not actually make. Alave apparently believes we represented in our opening brief that the City "'intends' Divvy or any other bicycles to be walked around Divvy stations." Alave Br. 18. That grossly misrepresents this part of our argument, which did not reference the City's intent at all. Rather, we argued that a Curatola-type exception should not apply here because Divvy users

have "options" other than riding a bicycle in the vicinity of a Divvy station, "including walking a bicycle on the sidewalk." City Br. 22-23. The fact that Divvy users have that option fully comports with the City's interrogatory answer that it does not expect people to walk their bicycles whenever they are not in a bicycle lane. People may choose to walk their bicycles, but the City has no particular reason to expect that they will choose that option at any given location. Regardless, the City's general expectation is irrelevant to whether Alave was an intended user at the specific location of his accident.

III. ALAVE'S NEW ARGUMENT ABOUT THE RIGHTS AND DUTIES OF BICYCLISTS IS FORFEITED AND MERITLESS BESIDES.

Alave argues that the City owes him a duty because a City ordinance grants bicyclists the rights and responsibilities of vehicle drivers. Alave Br. 20-21. The ordinance in question provides that bicyclists have "all of the rights and" are "subject to 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," unless an ordinance provides otherwise, "or as to those provisions of laws and ordinances which by their nature can have no application" to bicyclists. Municipal Code of Chicago, Ill. § 9-52-010(a). Alave cited this ordinance in his amended complaint, C. 38, but did not mention it the appellate court, where he was the appellant. "[W]here the appellant in the appellate court fails to raise an issue in that court, this court will not address it." Garza v.

Navistar International Transportation Corp., 172 Ill. 2d 373, 383 (1996) (internal quotation marks omitted). This court should deem Alave's reliance on the "rights and duties" ordinance forfeited.

Forfeiture aside, the ordinance does not help Alave. He asks "[w]hat metaphorical 'right' is the City of Chicago describing with 9-52-010," if not "the right to be 'intended' much like a vehicle is at" the location of his accident. Alave Br. 21. The ordinance itself provides a different answer. It states that bicyclists have the rights and duties of motor vehicle drivers, as provided in "the laws of this state declaring rules of the road," as well as the City's own traffic ordinances. Municipal Code of Chicago, Ill. § 9-52-010(a). It simply provides that bicyclists are subject to the same traffic regulations that apply to motor vehicle drivers. In Boub, this court addressed a statute almost identical to the City's ordinance – a provision of the Illinois Vehicle Code that provided: "[e]very person riding a bicycle upon a highway shall be granted all of the rights and shall be subject to all of the duties applicable to the driver of a vehicle by this Code." 183 Ill. 2d at 529 (internal quotation marks omitted). This court explained that the statute was "designed to ensure that bicyclists, for their own safety and the safety of others, obey traffic laws while they are on public streets and highways." Id. at 529-30.[3]

[3] Amicus Ride Illinois cites the current version of the statute at issue in Boub to argue that bicycles are "vehicles" under the Illinois Vehicle Code. Ride Illinois Br. 4-6. But under section 3-102(a), a municipality's intent controls, not the State's. The City's Municipal Code specifies that "vehicles" do not

That does not make a bicyclist an intended user of the roadway. Rather, as this court explained, the granting of those statutory "rights" is "entirely consistent with the conclusion that 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." Id. at 530. And consistent with Boub, the appellate court has rejected the argument that these statutory rights make bicyclists intended users of roadways that the municipality has not marked as intended for bicycle use. Latimer v. Chicago Park District, 323 Ill. App. 3d 466, 469, (1st Dist. 2001).

So too here. Bicyclists are generally permitted users of City streets, where they follow the same traffic laws that motor vehicles follow. That does not make a bicyclist an intended user of a City street where no signs or pavement markings indicate that the roadway is intended for bicycling.

---

include "devices moved solely by human power," Municipal Code of Chicago, Ill. § 9-4-010, such as bicycles. In any event, the amicus brief ignores that the Vehicle Code's definition of "vehicle" also excludes "devices moved by human power," 625 ILCS 5/1-217, and thus does not include bicycles.

CONCLUSION

For the foregoing reasons, the appellate court's judgment should be reversed.

Respectfully submitted,

Corporation Counsel
of the City of Chicago

BY: /s/ Stephen Collins
STEPHEN COLLINS
Assistant Corporation Counsel
2 North LaSalle Street, Suite 580
Chicago, Illinois 60602
(312) 742-0115
stephen.collins@cityofchicago.org
appeals@cityofchicago.org

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 18 pages.

/s/ Stephen Collins
STEPHEN COLLINS, 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 electronically filed with the office of the Clerk of the Court using the File and Serve Illinois system and served via email, to the person named below at the email address listed, on May 10, 2023.

Person served:

Erron H. Fisher
FISHER LAW GROUP, LLC.
100 S. Wacker Drive, Ste. 1160
Chicago, IL 60606
efisher@fish-law.com

/s/ Stephen Collins
STEPHEN COLLINS, Attorney