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

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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NATURE OF THE CASE

Plaintiff Clark Alave alleges that he rode his bicycle into a pothole on a street in the City of Chicago, which caused him to fall and sustain injuries. Under Illinois law, a municipality owes a duty to maintain its property only to those whom the municipality intends and permits to use the property in question. At the location where Alave's accident occurred, no signs or pavement markings indicated that the City intended bicycling. The circuit court determined that the City did not intend bicycling there, and dismissed Alave's complaint. The appellate court reversed, citing the presence of a Divvy bicycle sharing station in the vicinity of the accident site as evidence implying that the City intended bicycling where Alave fell. This court allowed the City's petition for leave to appeal. All questions are raised on the pleadings.

ISSUE PRESENTED

Whether the City had a duty to maintain its property in a condition that was reasonably safe for bicycling, at a location where neither signs nor pavement markings indicated that the City intended bicycling.

JURISDICTION

The circuit court entered an order dismissing Alave's complaint on July 6, 2021. C. 143-47. Alave filed a notice of appeal on July 12, 2021. C. 148. On May 18, 2022, the appellate court issued an opinion reversing the

dismissal of Alave's complaint. Alave v. City of Chicago, 2022 IL App (1st) 210812. On June 14, 2022, the City filed a motion to extend the time to file a petition for leave to appeal to July 27, 2022, and this court granted that motion on June 28, 2022. On July 27, 2022, the City filed a petition for leave to appeal, which this court allowed on September 28, 2022. This court has jurisdiction under Ill. Sup. Ct. R. 315.

STATUTE INVOLVED

Section 3-102(a) of the Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/3-102(a):

> Except as otherwise provided in this Article, 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, and shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition.

STATEMENT OF FACTS

According to his amended complaint, Alave was riding his bicycle around 9:00 p.m. on June 8, 2019, when he "enter[ed] the intersection in the area of Leland and Western" Avenues in Chicago. C. 36. The road was dark and "partially illuminated by artificial lighting." C. 36-37. Alave encountered "a pothole of significant depth" that allegedly formed as a result of roadwork the City had undertaken. C. 37. The front tire of Alave's bicycle

entered the pothole, causing him to fall and sustain injuries. C. 39. Alave claimed that the City acted negligently by, among other things, failing to maintain the roadway in a reasonably safe condition for bicycling. C. 38-39.

Alave further alleged that "there was a Divvy Bicycle Rental Station, approved by the City of Chicago, placed in the area of [his] accident." C. 38. According to Alave, "[b]y virtue of permitting a Divvy Bicycle Station in the area of the incident," the City "intended that bicycles are rented and operated on the roadway in and about the area of the Plaintiff's injury." C. 38. In relation to the pothole where Alave fell, the Divvy station was across the street, beyond a sidewalk, and in a plaza:

C. 108.

The City moved to dismiss the amended complaint pursuant to 735 ILCS 5/2-619(a)(9), C. 102, and included a sworn certification from David Smith, the Projects Administrator in the City's Department of Transportation, C. 58. Smith stated that on the day of Alave's accident, "there were no bicycle roadway markings or bicycle signs" on Leland or Western in the area where those roads intersected. C. 58. Thus, nothing "designat[ed] those areas of the roadway as ones that the City intended to be used by bicyclists." C. 58. Smith attached to his certification the portion of the City's 2019 bicycle map covering the intersection of Leland and Western. C. 60. The map shows that there was no bicycle lane at that intersection. C. 60.

Citing the Smith affidavit, the City argued that under section 3-102(a) of the Tort Immunity Act, the City did not owe Alave a duty to keep the roadway safe for bicycling. C. 104. Section 3-102(a) states that a municipality owes a duty only to those who are both intended and permitted users of its property. C. 103. No signs or roadway markings indicated that the City intended people to ride bicycles at the location where Alave fell, so bicyclists were not intended users there. C. 104.

In response, Alave argued among other things that a Divvy station "within throwing distance" of the location where he fell indicated that the City intended bicycling there. C. 108. Alave was not riding a Divvy bicycle.

He further argued, based on the City's answer to an interrogatory, C. 123, that the City derived "revenue from the entire Divvy System," C. 109. Alave also relied on another interrogatory answer, in which the City stated that "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. Additionally, Alave cited a provision of the City's municipal code that generally prohibits people over the age of 12 from riding bicycles on sidewalks. C. 112 (citing Municipal Code of Chicago, Ill. § 9-52-020).

The circuit court granted the City's motion to dismiss. C. 143. The court determined that the City did not intend bicycling at the location of Alave's accident. C. 147. There were no street markings or signs indicating that the City intended bicycle use, and the City's bicycle map did not designate the roadway as a bicycle route. C. 146-47. The court also concluded that the presence of a nearby Divvy station was irrelevant to the question whether the City intended bicycle use where Alave fell. C. 147.

The appellate court reversed the dismissal of Alave's complaint. Alave v. City of Chicago, 2022 IL App (1st) 210812, ¶ 43. The court cited three factors as bearing on the City's intent. Id. ¶¶ 36-38. First, a City "ordinance prohibit[s] adults from riding bicycles on the sidewalk." Id. ¶ 36. Second, the City stated in an interrogatory answer that it did not have an "expectation" that people would walk their bicycles while outside of designated bicycle lanes. Id. ¶ 37. Third, there was a Divvy "station, from which the City

derives revenue, close to the site of the accident." Id. ¶ 38. The court acknowledged that none of these factors alone established that the City intended bicycling at the location of Alave's accident. Id. ¶ 39. But "the combination of the three, plus the street itself," gave rise to "an implied intent by the city that the plaintiff was a permitted and intended user of the roadway on which he was traveling." Id.

The appellate court also stated that "when a use of property is a necessary part of the intended use indicated by the City, that use is also intended." Alave, 2022 IL App (1st) 210812, ¶ 35 (citing Curatola v. Village of Niles, 154 Ill. 2d 201, 216 (1993)). According to the 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.

The court further stated that the City did not post "signage directly indicating another intended use of bicycles rented from city-approved rental stations." Alave, 2022 IL App (1st) 210812, ¶ 41. "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." Id.

The appellate court described the area where the City intended bicycling as follows: "the streets and sidewalks adjacent to the Divvy

station," Alave, 2022 IL App (1st) 210812, ¶ 38; "the roadway in close proximity to the area of the Divvy stations," id. ¶ 39; "the street at or near the Divvy stations until the rider reaches a designated bicycle path," id. ¶ 39; "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.

This court allowed the City's petition for leave to appeal.

ARGUMENT

The City – like many other municipalities – erects signs and affixes pavement markings on particular roads to convey where bicycling is a use it intends on those roads. And it has invested its resources to mark hundreds of miles of roadway for such use in Chicago. Alave's bicycle accident did not occur on any of these marked roads. It took place on a roadway that bore no signs or pavement markings indicating that the City intended bicycling there. Because the City did not intend bicycling at that location, the City did not owe Alave a duty to maintain that roadway in a condition that was reasonably safe for bicycling. The circuit court therefore correctly dismissed Alave's amended complaint.

The appellate court, for its part, acknowledged that there were no signs or pavement markings that showed that the City affirmatively intended bicycling on the street where Alave fell. That should have been the end of the matter. But the court perceived an *implied* intent of the City based on a

combination of three other facts: there was a Divvy bicycle sharing station in the vicinity of Alave's accident; the City generally prohibits adults from riding bicycles on sidewalks; and the City acknowledged it does not expect people to walk their bicycles whenever they are outside a bicycle lane. None of these considerations, alone or in combination with the others, supports a conclusion that the City intended bicycling where Alave fell. The City expresses its intent with signs and pavement markings, and there were no such manifestations of intent at the site of Alave's accident.

The City moved to dismiss under section 2-619(a)(9), which "allows an involuntary dismissal where 'the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim.'" Strauss v. City of Chicago, 2022 IL 127149, ¶ 54 (quoting 735 ILCS 5/2-619(a)(9)). Here, the affirmative matter that defeats Alave's claims is that, as an unintended user of the street, he was not owed a duty of care. "Claims dismissed under section 2-619 of the Code are reviewed *de novo*." Id. ¶ 53. The appellate court's judgment runs counter to settled precedent and should be reversed.

THE CITY OWED ALAVE NO DUTY BECAUSE IT DID NOT INTEND BICYCLE USE OF THE ROADWAY WHERE ALAVE FELL.

Section 3-102(a) of the Tort Immunity Act provides that "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." 745 ILCS 10/3-

102(a). Accordingly, section 3-102(a) limits a municipality's duty to those who "qualify as both a permitted and an intended user of the property." Boub v. Township of Wayne, 183 Ill. 2d 520, 524 (1998). "[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." Id. Moreover, "it is the intent of the local public entity that is controlling." Id. at 525. This court long ago established that whether a municipality intends that its property be used a certain way "is determined by looking to the nature of the property itself." Vaughn v. City of West Frankfort, 166 Ill. 2d 155, 162-63 (1995). Critically, the court relies on "affirmative manifestations" to determine municipal intent. Boub, 183 Ill. 2d at 535.

Under these settled principles, it is clear that Alave was not an intended and permitted user to whom the City owed a duty of care. Alave's accident took place on a City street, C. 36, where it is undisputed that bicycling was permitted. But when it comes to intended use, "highways, streets, roads and bridges in Illinois are primarily designed and intended for use by vehicles." Boub, 183 Ill. 2d at 531. In cases involving claims that a municipality intended a roadway for some use other than driving a motor vehicle, this court has consistently refused to find municipal intent in the absence of affirmative manifestations specifically designating that part of the roadway for the use in question. For example, in Boub, the court considered whether a bicyclist was an intended user of a bridge where

his front tire became stuck, causing him to fall. Id. at 522. The court explained that to discern the municipal defendant's intent, it was "necessary to look at pavement markings, signs, and other physical manifestations of the intended use of the property." Id. at 528. "No special pavement markings or signs" designated the location of the accident as intended for bicycling. Id. Absent an affirmative indication by the municipality that the bridge where the plaintiff fell was intended for bicycle use, the plaintiff was not an intended user at that location. Id. at 535-36.

This court in Boub further cautioned against the harmful consequences of holding that a duty exists even though the municipality did not affirmatively indicate that it intended bicycle use. 183 Ill. 2d at 535. "[M]any road conditions that do not pose hazards to vehicles may represent special dangers to bicycles." Id. Imposing liability in that case would "open the door to liability for a broad range of pavement conditions, such as potholes, speed bumps, expansion joints, sewer grates, and rocks and gravel, to name but a few." Id. The "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" were "potentially enormous." Id. Because the municipality had not indicated with affirmative markings that it intended to assume the heavy burden of maintaining the roadway in a condition that was safe for bicycling, the court declined to impose liability. Id. at 535-36.

Until the decision below, appellate court cases involving bicycling on roadways have faithfully applied Boub and held that a municipality did not intend bicycle use at places that were not specifically designated for that purpose. For example, in Berz v. City of Evanston, 2013 IL App (1st) 123763, the plaintiff rode a bicycle in an alley, where "there were no pavement markings or signs indicating that bicyclists, like motorists, were intended to ride." Id. ¶ 14. Moreover, the municipality's bike map did not designate alleys as intended for bicycling. Id. ¶ 18. And the fact that the map prohibited bicycling on a different roadway did not indicate that it intended bicycling where the plaintiff fell. Id. Accordingly, the plaintiff was not an intended user of the alleyway. Id. ¶ 23.

The plaintiff in Latimer v. Chicago Park District, 323 Ill. App. 3d 466, (1st Dist. 2001), rode her bicycle on a "street where there were no bicycle lane markings," id. at 468. The court rejected her argument that other sources, such as an ordinance prohibiting adults from riding bicycles on sidewalks, indicated municipal intent that bicyclists ride on the street. Id. at 471-72. The fact that the "defendant regulates permitted uses does not transform the permitted uses into intended uses." Id. at 472.

And most recently, in Olena v. City of Chicago, 2022 IL App (1st) 210342-U, the plaintiff argued that the Divvy bicycle sharing program supported a conclusion that the City intended bicycling on all its roads. Id. ¶ 12. The appellate court explained that the City's "intent is inferred from

markings or signs," id. ¶ 25, and held that the plaintiff was not an intended user of the unmarked road on which she rode her bicycle, id. ¶ 27.

Indeed, the analysis of Boub and its progeny tracks decades of case law examining intended use under section 3-102(a) with respect to pedestrian use of roadways. In Sisk v. Williamson County, 167 Ill. 2d 343 (1995), the court considered whether the defendant intended walking on the rural country road where the plaintiff fell. Id. at 345. There were "no sidewalks or crosswalk[s]" in the area that the plaintiff could have used instead of the road. Id. at 349. Nevertheless, the court determined that the municipality did not intend people to walk on "the specific road and bridge complained of," because there were no manifestations affirmatively indicating that intent. Id. at 351. Thus, pedestrians were not intended users of the road. Id. at 352.

In Vaughn, the plaintiff was walking down a sidewalk until it ended mid-block, at which point she stepped onto the street and fell. 166 Ill. 2d at 157. There was no crosswalk where the plaintiff walked on the street, id., so she was not intended user, id. at 161. Similarly, in Wojdyla v. City of Park Ridge, 148 Ill. 2d 417 (1992), the decedent crossed a highway at a location that was half a mile away from the nearest crosswalk. Id. at 420. He was not an intended user because he walked in an area that the municipality had not designated for pedestrian use. Id. at 423.

All of these entrenched principles demonstrate that the City did not intend bicycling where Alave fell. It is undisputed that the City did not

indicate with pavement markings or signs that it intended bicycling there. C. 58. Consistent with that, the City's bicycling map showed that there was no bicycle lane there. Id. The circuit court thus decided, correctly, that the City did not intend people to ride bicycles on the street at that location. C. 147.

The appellate court departed from these fundamental principles to hold that Alave was an intended user of the street, even as it acknowledged that there were no signs or pavement markings affirmatively indicating the City's intent. It gleaned such an intent by relying principally on the presence of a Divvy station "close to the site of the accident." Alave, 2022 IL App (1st) 210812, ¶ 38. The court also cited a City ordinance generally prohibiting people over 12 years old from riding bicycles on sidewalks, id. ¶ 36, as well as a special interrogatory answer in which the City stated it did not expect people to walk their bicycles while outside of designated bicycle lanes, id. ¶ 37. As we explain in part A, the presence of the bicycle sharing station in the area does not support a determination that the City intended bicycle use on the roadway where Alave fell. And in part B, we explain that neither of the other factors the appellate court identified supports such a determination, either.

A. A Bicycle Sharing Station Does Not Make A Roadway Intended For Bicycle Use.

The appellate court relied on the Divvy station as an indication of the City's intent with respect to bicycling on the roadway where Alave fell, for

two discernable reasons. First, the court likened a Divvy station to a roadside sign that affirmatively indicates an intended use. Alave, 2022 IL App (1st) 210812, ¶ 38. Second, the court stated that it was creating an "exception" to existing precedent, on the ground that "necessity" required people to ride bicycles in the vicinity of Divvy stations. Id. ¶¶ 40-41. Neither rationale withstands scrutiny.

1. A bicycle sharing station is not an affirmative physical manifestation of an intended use of the roadway.

The touchstone of a court's analysis of the intended use of municipal property lies in the "physical manifestations" of municipally intended use, such as pavement markings and signs. Boub, 183 Ill. 2d at 528. What such manifestations have in common is that they affirmatively communicate information *about particular property*. They identify specific property as intended for a specific use and thus inform users what use is intended on that property.

When it comes to bicycling on roadways, the City uses pavement markings and signs to make it abundantly clear what areas, specifically, are intended for bicycling. Indeed, the City has used such markings to designate hundreds of miles of its property for bicycle use.[1] Chicago Community

[1] "[A] court may take judicial notice of the information on a government website." Edward Sims Jr. Trust v. Henry County Board of Review, 2020 IL App (3d) 190397, ¶ 27 n.6. Accordingly, this court may take judicial notice of the bicycling information the City makes publicly available on its website.

Cycling Network Update at 4.[2] And it has done so with careful, safety-focused planning, studying the particular needs of each community, and considering data about traffic, including where accidents tend to occur. Id. at 5. It also explores new infrastructure designs to improve safety at intersections and bus stops. Id. at 7. Most of the areas intended for bicycle use are bicycle lanes, see 2022 City of Chicago Bike Map,[3] which use pavement markings to indicate what portion of the roadway is intended for bicycling, see Safe Cycling in Chicago: A Guide for Cyclists at 14-15.[4] Bicycle lanes often include additional safety features, such as buffer zones or physical barriers, to separate bicyclists from vehicles moving on the roadway. Id. at 15. In fact, with safety as a priority, the City is actively planning to modify the street where Alave fell so that it will include a bicycle lane.[5] The plan calls for a two-way lane that is protected from vehicular traffic with a

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[2] Available at https://www.chicago.gov/content/dam/city/depts/cdot/bike/2021/Chicago%20Community%20Cycling_2021-09-21.pdf.

[3] Available at https://secureservercdn.net/198.71.233.46/40f.4ba.myftpupload.com/wp-content/uploads/2022/05/2022_Chicago-Bike-Map.pdf.

[4] Available at https://40f4ba.a2cdn1.secureserver.net/wp-content/uploads/2016/01/234680682-Safe-Cycling-2014.pdf.

[5] This plan has no bearing on the City's intended use for the area at any time before it is implemented. Subsequent remedial measures are not "indicative of the [municipality's] prior intent." Boub, 183 Ill. 2d at 529.

concrete curb.[6] The lane itself will be painted green and include bicycle symbols and arrows painted onto the pavement. Thus, the plan calls for affirmative manifestations that leave no doubt where, specifically, the City intends bicycle use. Of course, not every area intended for bicycle use in the City will have the same features; the amount of traffic, width of a street, and other factors influence the particular markings that are appropriate for each location. But these are examples of how the City undertakes its obligation to maintain roadways for bicycle use by using clear visual cues to specify its intent with respect to specific property. Affirmative steps like these evince the City's intent to take on the heavy burdens associated with maintaining property for bicycle use that this court emphasized in Boub, 183 Ill. 2d at 535.

Bicycle sharing stations, on the other hand, serve a unique function and bear no resemblance to pavement markings or signs. Like many other 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, including errands, commuting, exercise, and exploring.[7] In serving that function, bicycle sharing stations do not convey information

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

[7] Other municipalities in the state with bicycle sharing stations include Aurora, see https://www.aurora-il.org/1051/Bike-Share, Grayslake, see https://www.villageofgrayslake.com/686/Grayslake-Bike-Share-Program, Canton, see https://www.illinoisriverroad.org/places/united-states/illinois/canton/nature-outdoor-recreation/bike-share-program/, and

about how any particular roadway is intended to be used. Unlike markings and signs, a bicycle sharing station does not refer to any property at all, let alone specify that the City intends bicycling on a particular street. In fact, bicycle sharing stations are similar to bicycle racks, which likewise facilitate bicycling at various points throughout the City. Such conveniences are entirely consistent with the fact that bicyclists are generally permitted users of City streets. They do not, however, designate any portion of a roadway as intended for bicycle use. Because a bicycle sharing station does not express an intent that any road be used a certain way, the circuit court properly determined that the Divvy station at issue here "is not relevant to" the City's intended use of the roadway where Alave fell. C. 147.

Indeed, in reaching a contrary conclusion, the appellate court could not coherently describe what roadways the City supposedly intended for bicycling by virtue of the presence of a Divvy station. That inability to define the area of supposedly intended bicycle use shows that a bicycle sharing station, by its nature, does not affirmatively indicate the City's intent that bicyclists use any particular property. In fact, the court characterized the area of intended bicycle use differently almost every time it attempted to identify an area of intended use. The court described that area as:

- "the streets and sidewalks adjacent to the Divvy station," Alave, 2022 IL App (1st) 210812, ¶ 38;

Rock Falls, see https://visitrockfalls.com/bike-share/.

- "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.

Pavement markings and street signs, in contrast, are unambiguous because they clearly and affirmatively indicate intended use of particular property. Bicyclists, motorists, and pedestrians alike can look at pavement markings and street signs and understand where on the roadway bicycling is intended. All users therefore benefit from clear demarcations of a roadway's intended use. A person viewing a Divvy station, however, cannot discern that the City intends bicycling at any specific location.

Indeed, even the City itself cannot discern from the appellate court's opinion what roadways the City supposedly intends for bicycle use based on a Divvy station. Perversely, the decision leaves the City to guess where it owes a duty to bicyclists, when the point of section 3-102(a) is that a municipality controls the scope of its duty by deciding what uses are intended and where. As we explain above, that guiding principle has been the law for many decades, and it critically takes into account the enormous burden on

municipalities large and small to ensure that particular property is reasonably safe for particular uses. Any judicially selected, unmarked boundary for an area around a bicycle sharing station that is intended for bicycle use would contravene the required inquiry under section 3-102(a), which is to discern the *municipality's* intent.

Even a more precise judicially selected boundary would be improper, not only because the City did not select it but because it would be completely arbitrary. If, for example, a court declared that a roadway adjacent to a bicycle sharing station is intended for bicycle use for 50 feet in either direction, such an area would have a discernible limit, unlike the places the appellate court set forth in this case, but nothing about the presence of the station makes a 50-foot radius the correct choice over, say, 100 feet, the length of the block, or any other limit a court might select. This court should adhere to the settled law in this context and hold that a bicycle sharing station is not an affirmative manifestation that a roadway is intended for bicycle use.

2. A bicycle sharing station does not necessitate bicycle use.

As an additional basis for deciding that a bicycle sharing station supported a finding that Alave was an intended user of the street, the appellate court stated that "riding a bicycle in the area used to get to and from a Divvy station is necessary to its intended use." Alave, 2022 IL App (1st) 210812, ¶ 41; see also id. ¶ 31 ("[T]he 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."). The court likened this case to Curatola v. Village of Niles, 154 Ill. 2d 201 (1993), which involved a pedestrian who fell while accessing a vehicle that was lawfully parked on the street. Id. at 204. This court set forth a "narrow exception" to the general rule that a municipality does not intend pedestrian use on the street outside of crosswalks. Id. at 213. Pursuant to that exception, pedestrian "use of the street immediately around a legally parked vehicle by its exiting and entering operators and occupants" is intended and permitted. Id. The court based that rule on "dual considerations": the pedestrian use takes place "immediately around" the vehicle; and it is also "mandated by" the fact that the vehicle is parked on the street. Id. at 211. Thus, "lawfully permitted curbside parking necessarily entails pedestrian use of the street immediately around the parked vehicle." Id. at 210.

A Curatola-type exception does not translate to this case. Neither of the considerations underlying Curatola supports a conclusion that the City intended bicycle use where Alave fell. First, unlike a motorist stepping in or out of his vehicle, Alave did not ride his bicycle at a location "immediately around" a Divvy station. In Curatola, this court made clear that the area "immediately" surrounding a lawfully parked vehicle where pedestrian use is intended "will be bounded by the parameters of the parking lanes." 154 Ill. 2d at 214. Thus, the exception would not reach a person who legally parked

but was injured when he left the area immediately around his vehicle and walked into another part of the street, as in Wojdyla. See id. at 211-12. Likewise here, the distance between the roadway where Alave fell and the nearest Divvy station was well beyond anything resembling the space of a parking lane. See C. 108. So Alave cannot claim that he was in the immediate vicinity of a Divvy station in a way that Curatola requires for pedestrians and their vehicles.

The second consideration underlying Curatola, that parking one's vehicle made pedestrian use in the immediate area of the vehicle "necessary," 154 Ill. 2d at 213, does not apply here, either, for several reasons. In Vaughn, this court explained that when it said the pedestrian use in Curatola was "necessary," it meant that "it was *impossible* for the pedestrian to access the vehicle or the sidewalk without walking in the street." Vaughn, 166 Ill. 2d at 161. Accordingly, the pedestrian in Vaughn was not an intended user when she stepped onto the street merely because the sidewalk she had been using ended mid-block. Id. at 157. Despite the sidewalk's end, it was not physically impossible for the "plaintiff to reach her destination without stepping into the street outside of a crosswalk," and the Curatola exception therefore did not apply. Id. at 162. In this case, the exception could have applied only if it would have been impossible for Alave to ride or walk his bicycle anywhere else. Plainly, that is not so. At a minimum, a bicyclist may walk his bicycle virtually anywhere.

Relatedly, unlike a vehicle user or occupant who needs to access a legally parked vehicle, Alave did not need to access the Divvy station. Alave was riding his own bicycle, C. 36, and not one that he obtained from a Divvy station. This court made clear in Curatola that the exception covered only 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). Thus, as the appellate court has held on several occasions, a pedestrian who just happens to walk in an area where vehicles are parked, and who is not coming or going from his vehicle, cannot avail himself of the Curatola exception. 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 intended user of street); Greene v. City of Chicago, 209 Ill. App. 3d 311, 313-14 (1st Dist. 1991) (same). Likewise here, it was a mere coincidence that Alave rode his bicycle in the vicinity of a Divvy station. Because he was riding his own bicycle, he had no need to be near any Divvy station, including the one that happened to be in the area of his accident. This further undermines the appellate court's assessment that "necessity" supported the imposition of liability here.

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.[8] The City also permits Divvy users to ride on the sidewalk to access a Divvy station. Municipal Code of Chicago, Ill. § 9-52-020(b). Thus, even Divvy users are not akin to pedestrians who have no choice but to step on the street in the immediate vicinity of their legally parked vehicles as they enter or exit. The "necessity" consideration underlying Curatola has no application here.

In any event, this court made clear in Curatola that it was not "hold[ing] that necessity alone is the measure of whether" an allegedly necessary use is intended. 154 Ill. 2d at 213. The court reaffirmed that principle in subsequent cases. Vaughn, 166 Ill. 2d at 162; Sisk, 167 Ill. 2d at 349. Thus, to the extent that "necessity," in any sense of the word, calls for bicycling in vicinity of a Divvy station, that is not enough to render bicycling an intended use at the location of Alave's accident.

There are other important considerations this court relied on in Curatola that explain why no similar exception for bicycle use should be recognized here. This court made clear in Curatola that "ascertaining boundaries" of areas that are intended for pedestrian use near lawfully parked vehicles "should not prove difficult." 154 Ill. 2d at 214. Specifically, "[a]ny duty to maintain the street area immediately around lawfully parked vehicles for those exiting and entering them will be bounded by the

[8] Here, the nearest bicycle path was only a block away, on Lincoln Avenue. See C. 33.

parameters of parking lanes." Id. There is no distinct boundary akin to a parking lane that would apply to bicycle riding near a bicycle sharing station. The appellate court's inability to define with any precision the area of intended bicycle use near a Divvy station is evidence of this. Yet clearly defined areas for intended use are essential. Without them, the City cannot know which areas it must maintain in a reasonably safe condition for a particular purpose, and would face impossible burdens. Indeed, this is exactly why intended use is defined by a *municipality's* intent, not by a user's. Street signs and pavement markings, on the other hand, provide clarity about exactly where the City has chosen to maintain roads in a reasonably safe manner for bicycle use, and therefore intends for bicyclists to ride.

Another reason not to extend Curatola the way the appellate court did is that walking immediately next to a lawfully parked vehicle is not analogous to bicycling on a roadway. Stationary vehicles in parking lanes pose no threat to the people who access them, so pedestrians can safely be considered intended users in the immediate vicinity of their parked vehicles. By contrast, bicyclists share roadways with moving vehicles, and thus face a significantly greater risk of injury from them. Given that risk of harm, it is all the more important for areas of a roadway that are intended for bicycle use to be defined clearly and specifically, using pavement markings or signs. The appellate court's haphazard approach should be rejected. In sum,

Curatola does not support a finding that Alave was an intended user of the street where he fell.

B. The Other Factors That The Appellate Court Cited Did Not Make The Location Of Alave's Accident Intended For Bicycle Use.

According to the appellate court, two other factors combined with the Divvy station to make the area of Alave's accident intended for bicycle use, despite the lack of any signs or pavement markings affirmatively evincing the City's intent. The first was a "municipal ordinance prohibiting adults from riding bicycles on the sidewalk." Alave, 2022 IL App (1st) 210812, ¶ 36 (citing Municipal Code of Chicago, Ill. § 9-52-020(b)). The ordinance in question generally prohibits people who are 12 or older from riding a bicycle on the sidewalk, with limited exceptions. Municipal Code of Chicago, Ill. § 9-52-020(b).[9] According to the court, "such a prohibition, alone, does not render a bicyclist an intended user of a roadway." Alave, 2022 IL App (1st) 210812, ¶ 36. Nevertheless, the court determined that, combined with other factors, it supported a conclusion that the City intended bicycle use at the location of

[9] The ordinance states: "Unless the prohibition imposed by subsection (a), (c), or (d) applies, a person 12 or more years of age may ride a bicycle upon any sidewalk along any roadway only if such sidewalk has been officially designated and marked as a bicycle route, or such sidewalk is used to enter the nearest roadway, intersection, or designated bicycle path, or to access a bicycle share station." Municipal Code of Chicago, Ill. § 9-52-020(b). As we explain below, the ordinance is relevant only to permitted use, not intended use.

Alave's accident. Id. ¶ 39.[10]

That was error. A prohibition against bicycle use at one location (the sidewalk) is irrelevant to the City's intent at a different location (the street). And indeed, in Latimer, the appellate court correctly rejected "the proposition that a ban on use in one place implies that the use is intended elsewhere." 323 Ill. App. 3d at 471. As the court explained, a sidewalk ban means a person is "prohibited from riding on the sidewalk." Id. Where bicycling is not prohibited, it is permitted. Id. But bicycling is *intended* only where the City has affirmatively indicated its intent.

The appellate court in this case even acknowledged that "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." Alave, 2022 IL App (1st) 210812, ¶ 36. That is correct, and it should have ended the court's consideration of this factor. After all, if a prohibition at one location does not "convey[ ] intent" at another, then the prohibition cannot inform the court's assessment of the City's intent even in combination with other factors. The appellate court should not have given the ordinance any weight at all.

The second factor the appellate court deemed relevant to the City's

[10] At one point the court stated that the three factors it identified, "plus the street itself," established the City's intent. Alave, 2022 IL App (1st) 210812, ¶ 39. The court did not explain what, if anything, "the street itself" showed about the City's intent. And as we have noted, it is undisputed the street was

intent was a special interrogatory answer in which the City stated that "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." Alave, 2022 IL App (1st) 210812, ¶ 37 (internal quotation marks omitted). The City does not have this expectation because bicyclists have a choice whether to walk their bicycle on the sidewalk or ride it in the street. Even where the City has not "assumed a duty to provide safe passage" for bicycle riders, Latimer, 323 Ill. App. 3d at 472, bicyclists are still permitted to ride on the street at their own risk. The City has no reason to expect any particular person will choose walking over riding. The City's lack of expectations about which course bicyclists will choose does not support a conclusion that the City intends bicycling on any street not specifically marked for that purpose.

At most, the interrogatory answer suggests it is foreseeable that people will ride bicycles on the streets. Foreseeability is irrelevant to intended use. See, e.g., Harden v. City of Chicago, 2013 IL App (1st) 120846, ¶ 30. The appellate court seemed to believe that foreseeability of a use could be combined with other factors to establish intent, Alave, 2022 IL App (1st) 210812, ¶ 37, but no case supports that approach.

Instead, "foreseeability" is a separate, additional requirement for establishing a duty. Under the plain language of section 3-102(a), "intended and permitted" use is one requirement for when the City owes a duty; the

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not marked for bicycle use.

other is that the "manner" of the intended use be "reasonably foreseeable." 745 ILCS 10/3-102(a). Thus, foreseeability is an *additional* limitation on the City's duty, on top of the requirement of "intended and permitted" use – not a means of proving that a use was intended. See, e.g., Wojdyla, 148 Ill. 2d at 428. Boub supports this conclusion as well. There, this court acknowledged "that bicyclists have customarily and traditionally used" roads and bridges such as the one where the plaintiff's accident occurred. Boub, 183 Ill. 2d at 531. But the court rejected the proposition that such customary use showed that the defendant intended bicycling where the plaintiff fell. Id. "[H]istorical practice" is not "the touchstone by which intended use must be measured." Id. at 532. Likewise here, bicyclists customarily ride on City streets that are not designated for bicycling, which in turn makes such bicycle use foreseeable. But that custom – and that foreseeability – does not support a conclusion that the City intends bicycling at those locations. Here, as in Boub, a duty does not arise absent an affirmative indication that the municipality intends bicycling.[11] The appellate court therefore erred by

[11] The appellate court also relied on Marshall v. City of Centralia, 143 Ill. 2d 1 (1991), in which this court cited the historical use of parkways as a basis for holding that the parkway in that case was intended for pedestrian use, id. at 10. But in Wojdyla, this court made clear that the parkway in Marshall was unlike a roadway in that it "presented no conflict to the court between contrary purposes." Wojdyla, 148 Ill. 2d at 422. That is, "there were no other purposes for the parkway which would preclude the intended [pedestrian] use by the plaintiff." Id. at 423. The road at issue in Wojdyla was different because "the purpose of the highway is clearly for the use of automobiles," which conflicted with the plaintiff's pedestrian use. Id. Here too, the

deeming foreseeability relevant to the City's intended use of the roadway. Allowing foreseeability to bear on municipal intent – even only as a "factor," as the appellate court concluded here – would make permitted uses intended simply because they are foreseeable. That is not the law, and it undermines the ability of municipalities to decide specifically which areas they intend for bicycling.

Finally, the appellate court mentioned in passing that "[i]f 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." Alave, 2022 IL App (1st) 210812, ¶ 41. To the extent that the lack of such an ordinance bore on the court's decision that the City did intend bicycle use here, that was wrong. Again, courts determine intended use by looking to "affirmative manifestations" of municipal intent. Boub, 183 Ill. 2d at 535. An approach that infers intent from the absence of an indicator of intent – such as the fact that the City does not have an ordinance saying that bicycle use on roadways near Divvy stations is unintended – cannot be squared with this court's precedents. Indeed, it defies all common sense to suggest that non-expression of a non-intended use is relevant to show what use is intended. Section 3-102(a) has never been – and should not now be – read to impose an onerous and impractical burden on municipalities to enact

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roadway where Alave fell was intended for vehicular use, which conflicts with bicycle use.

ordinances enumerating myriad uses that are unintended.

* * * *

In sum, neither the presence of the Divvy station nor any other factor the appellate court considered justifies its deviation from settled precedent that signs and pavement markings determine whether a municipality intends bicycle use on any particular portion of a roadway. And under that precedent, Alave was not an intended and permitted user to whom the City owed a duty.

CONCLUSION

This court should reverse the appellate court's judgment.

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 30 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 served on all counsel of record via File & Serve Illinois on February 15, 2023.

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APPENDIX

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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,	)	Appeal from the Circuit Court
	)	of Cook County.
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 2019 L 010879
	)	
THE CITY OF CHICAGO,	)	The Honorable
	)	Gerald Cleary,
Defendant-Appellee.	)	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.
Attorneys for Appellant:	Erron H. Fisher, of Fisher Law Group, LLC, of Chicago, for appellant.
Attorneys for Appellee:	Celia Meza, Corporation Counsel, of Chicago (Myriam Zreczny Kasper, Suzanne M. Loose, and Julian N. Henriques Jr., Assistant Corporation Counsel, of counsel), for appellee.

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

CLARK ALAVE,

Plaintiff,

v.

CITY OF CHICAGO,

Defendant.

No. 19 L 10879

ORDER

This matter is before the Court on defendant's motion to dismiss plaintiff's complaint pursuant to 735 ILCS 5/2-619 (a) (9), due notice given and the Court fully advised in the premises;

IT IS HEREBY ORDERED THAT the motion is granted and the plaintiff's complaint is dismissed with prejudice. The Court finds that while the plaintiff established he was a permitted user of the public roadway, the plaintiff failed to create a question of fact that he was an intended user of the public roadway such that the defendant is immune from liability pursuant to 745 ILCS 10/3-102 (a). 4020

I.

On 06/08/19, the plaintiff was riding his bicycle on the right side of the public roadway at the intersection of Leland and Western in the city of Chicago. As he was riding his bicycle through a painted crosswalk, he struck a pothole causing him to fall and sustain injuries. As a result of the accident, the plaintiff filed this complaint against the defendant alleging that the defendant was negligent in the maintenance and repair of the public roadway.

In the area of the accident there was a Divvy bicycle rental station. The defendant derives significant income for allowing Divvy to rent bicycles in the city of Chicago. The defendant submitted the affidavit of David Smith, the Projects Manager in the City of Chicago's Department of Transportation. Smith attested there were no bicycle roadway markings or bicycle signs at or near the intersection of Leland and Western like the bicycle roadway markings and bicycle signs used on public roadways the defendant intended to be used by bicyclists. Smith attests that the defendant designated certain public roadways to be intended to be used by bicyclists as shown in the 2019 Chicago Bicycling Map. According to Smith and the 2019 Chicago Bicycling Map neither Leland nor Western was a designated bicycle route. The defendant admitted that it expected that persons using bicycles would not walk their bicycles at all points not designated as a bicycle lane. The plaintiff

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did not contest the validity of the Smith affidavit or submit a counter affidavit that disputed the statements of Smith.

II.

A section 2-619 motion to dismiss admits the legal sufficiency of a complaint, but raises defects, defenses, or some other affirmative matter appearing on the face or by external submissions, which defeat the plaintiff's claim. 735 ILCS 5/2-619. The purpose of a section 2-619 motion to dismiss is to dispose of easily proven factual issues. *Kedzie & 103rd Currency Exch. v. Hodge*, 156 Ill. 2d 112, 115 (1993). When considering a section 2-619 motion, a court must construe all pleadings and supporting matter in the light most favorable to the non-movant. *Doe v. Univ. of Chi. Med. Ctr.*, 2015 IL App (1st) 133735, ¶ 35. Dismissal is appropriate only if no set of provable facts support a cause of action. *Id.*

Section 2-619(a) (9) permits dismissal when an affirmative matter outside the pleading bars the claim asserted by avoiding the legal effect or defeating the claim. *Doe*, 2015 IL App (1st) 133735 ¶ 37. An "affirmative matter" encompasses any type of defense that either negates an alleged cause of action completely or refutes crucial conclusions of law or conclusion of material fact unsupported by allegations of fact contained or inferred from the complaint. *Id.*, ¶ 38. The affirmative matter must do more than contest or refute a well-pleaded fact and be apparent on the face of the complaint or supported by affidavits or certain other evidentiary materials. *Id.*, ¶¶ 37, 39. Immunity under the Tort Immunity Act is affirmative matter properly raised in a section 2-619(a) (9) motion to dismiss. *Bowler v. City of Chicago*, 376 Ill. App. 3d 208, 212 (1st Dist. 2007).

The defendant argues that because the plaintiff who was riding his bicycle was not an intended user of the public roadway it is immune from liability pursuant to 745 ILCS 10/3-102 (a) which provides:

> **(a)** Except as otherwise provided in this Article, 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, and shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition.
>
> 745 ILCS 10/3-102 (a).

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In support, the defendant argues that it was only those roadways identified in the 2019 Chicago Bicycling Map and those roadways with bicycle roadway markings and bicycling signs that were intended by the defendant to be used by bicyclists. Conversely, those public roadways that were not identified in the 2019 Chicago Bicycling Map and those public roadways without bicycle roadway markings and bicycling signs were not intended by the defendant to be used by bicyclists. The defendant further argues that it is undisputed that Leland and Western were not identified in the 2019 Chicago Bicycling Map as an intended bicycle routes and that neither Leland nor Western roadways were marked with bicycle roadway marking or bicycling signs such that the defendant did not intend those roadways for use by bicyclists. The defendant concludes that it is immune from liability pursuant to 745 ILCS 10/3-102 (a).

In response, the plaintiff argues that there is circumstantial evidence that the public roadway he was riding his bicycle was intended by the defendant to be used by bicyclists. The circumstantial evidence is the general increase in the use of bicycles on public roadways, the location of a Divvy bicycle rental station in close proximity to the scene of the accident and that the defendant profited from the rental of bicycles by Divvy. The plaintiff further argues that the location of the defect was in a marked crosswalk where the defendant permitted and intended use by pedestrians. Finally, the plaintiff argues that the duty of care to maintain its property should be expended to include all permitted users and not the current law limiting the duty to permitted and intended users.

First, the Court rejects the plaintiff's invitation to expand the scope of the duty of care to include all permitted users rather than permitted and intended users. The duty of a municipality to maintain property is limited by section 3-102 of the Tort Immunity Act. *Vaughn v. City of West Frankfort*, 166 Ill. 2d 155, 158 (1995). Under section 3-102(a), a municipality must "exercise ordinary care to maintain its property in a reasonably safe condition for the use ... of people whom the entity intended and permitted to use the property." 745 ILCS 10/3-102(a). The duty extends only to uses that are both permitted and intended. *Vaughn*, 166 Ill. 2d at 160. As such, the Court rejects the plaintiff's argument and it will leave it to the legislature to expand the duty.

The next issue is whether the defendant intended the public roadways in the area of the accident for use by bicyclists like the plaintiff. The duty of care is determined by the municipality's intended use of a property, not the intent of the user. *Wojdyla v. City of Park Ridge*, 148 Ill. 2d 417, 425-26 (1992). To hold otherwise would negate section 3-102(a), as the use intended by the municipality would not control. *Wojdyla,* 148 Ill. 2d at 425, 170. The intended use of the property may be determined by looking to the nature of the property. *Wojdyla*, 148 Ill. 2d at 426.

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The Court finds that *Boub v. Twp. of Wayne*, 183 Ill. 2d 520 (1998) and *Latimer v. Chicago Park District,* 323 Ill. App. 3d 466 (1st Dist. 2001) are controlling in the determination of this motion. In *Boub* and *Latimer,* the public roadways where the respective plaintiffs were injured were not marked or signed to establish the intent of the respective defendants that the plaintiffs could ride their bicycles on the public roadway where the accidents happened. In determining that the municipality in *Boub* did not intend for the roadway to be used by bicyclists, the Illinois Supreme Court held:

> Bicyclists, unlike pedestrians, are guided by some of the same signs and pavement markings that motorists observe. Still, we believe that the same considerations present in our decisions in those cases are also relevant here in determining whether the plaintiff was an intended user-rather than simply a permitted user-of the road and bridge. In determining Wayne Township's intent, it is necessary to look at pavement markings, signs, and other physical manifestations of the intended use of the property. Just as the presence or absence of special pavement markings and signs is relevant in determining whether pedestrians are intended users of streets and highways, so too do we believe that the presence or absence of pavement markings and signs is relevant here in determining whether the plaintiff was an intended user of the road and bridge where the accident occurred. In the present case, there is nothing in the roadway or bridge that would suggest that it was intended for use by bicycles. No special pavement markings or signs indicated that bicyclists, like motorists, were intended to ride on the road or bridge, or that bicycles, rather than vehicles, were the intended users of the route. *Cf. Cole v. City of East Peoria*, 201 Ill. App. 3d 756 (1990) (municipality liable for injury caused when bicyclist's tire became stuck in sewer grate; applying section 3-102(a) of Tort Immunity Act, appellate court concluded that special pavement markings showed that city intended and permitted bicyclists to travel where accident occurred).
>
> *Boub v. Twp. of Wayne*, 183 Ill. 2d 520, 528-529.

In *Latimer,* the plaintiff was injured on a Chicago street while riding her bicycle where there were no lane markings or signs that established the intent of the city for bicyclists to ride on that roadway. Following *Boub,* the *Latimer* court found that the lack of street markings and signs established that the roadway was not intended for bicyclists and entered judgment in favor of the defendant. *Latimer v. Chicago Park District,* 323 Ill. App. 3d 466, 473.

Here, like *Boub* and *Latimer,* the uncontroverted evidence is that there were no bicycle street markings or bicycle signs where the accident happened to establish the intent of the defendant that public roadway was to be used by bicyclists. Moreover, the 2018 Chicago Bicycling Map does not designate that the public

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roadway involved in the accident as a designated bicycle route which further shows the lack of the defendant's intent that bicycles were to be used on the roadway at that location. Consequently, applying the holdings in *Boub* and *Latimer*, the Court finds that there is no question of fact to preclude the dismissal of the complaint that the defendant did not intend the public roadway where the accident happened to be used by bicyclists like the plaintiff. As such, the defendant is immune from liability pursuant to 745 ILCS 10/3-102 (a).

The plaintiff's argument that the general increase usage of bicycles is not compelling. To accept this argument it would mean that all public roadways would be intended for use by bicycles which would render the immunity meaningless and be contrary the legislature's intent. Likewise, the plaintiff's argument regarding the location of a Divvy rental station and the profits earned by the defendant is not relevant to determining the defendant's intended use of the roadway. Finally, the fact that the accident happened in a painted crosswalk does not create a question of fact that the area of road was intended for bicycles. At best, it establishes that the defendant intended the area within the marked crosswalk was for use by pedestrians, not bicyclists.

Judge Gerald Cleary

JUL 06 2021

ENTERED, Circuit Court - 2147

Judge Gerald Cleary 2147

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Atty No.: 48935

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

CLARK ALAVE,	)	
	)	
Plaintiffs,	)	
	)	No. 2019 L 010879
vs.	)	
	)	
CITY OF CHICAGO, a municipal entity,	)	
	)	
Defendant.	)	

AMENDED COMPLAINT AT LAW

NOW COMES the Plaintiff, CLARK ALAVE, by and through his attorneys, FISHER & LAMONICA, P.C., and for his Amended Complaint at Law, complaining against the Defendant, THE CITY OF CHICAGO (hereinafter, "CITY OF CHICAGO"), states as follows:

COUNT I
(Negligence)

1. On or about June 8, 2019, and at all times relevant herein, the Plaintiff, CLARK ALAVE, was a resident of the CITY OF CHICAGO, COUNTY OF COOK, STATE OF ILLINOIS.

2. On or about June 8, 2019, and at all times relevant herein, the Defendant, CITY OF CHICAGO, was and is an Illinois municipal corporation.

3. On and prior to June 8, 2019, Defendant, CITY OF CHICAGO, owned and maintained various roadways and crosswalks, in the City of Chicago, County of Cook, State of Illinois.

4. On June 8, 2019, at approximately 9:00 pm, the Plaintiff, CLARK ALAVE was riding his bicycle on the right side of the roadway, entering the intersection in the area of Leland and Western, in a crosswalk, in the City of Chicago, County of Cook, State of Illinois.

5. On June 8, 2019, at approximately 9:00pm, the sun had set, and the area of the roadway that the Plaintiff was riding his bicycle on the roadway, tthrough the crosswalk, in the

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City of Chicago, State of Illinois, was dark, partially illuminated by artificial lighting. (A photograph of the exact area and defect is attached and incorporated to this complaint).

6. Prior to June 8, 2019, the City of Chicago, and/or one of its contracted companies, made cuts into the street at and around the location of the right side of the roadway, in the crosswalk, that the Plaintiff was lawfully riding his bicycle through.

7. On June 8, 2019, the Plaintiff, CLARK ALAVE, while riding a bicycle, was an intended and permitted user of the area of roadway he was on and crosswalk he was riding through.

8. On June 8, 2019, and at all times relevant herein, the prior cuts made into the roadway permitted the infiltration of water, which caused the surface of the roadway to deteriorate forming a pothole of significant depth and width, directly in the right side of the roadway in the crosswalk, where bicycles are required to ride by statute.

9. Prior to June 8, 2019, Defendant, CITY OF CHICAGO, had actual knowledge of the aforementioned condition, either directly through report, and due to its creation of the conditions causing the pothole.

10. On and prior to June 8, 2019, Defendant, THE CITY OF CHICAGO, knew or through the exercise of reasonable diligence should have known and repaired the aforementioned pothole in and about the roadway, where pedestrians and bicycles are known and intended to travel.

CITY OF CHICAGO'S BICYCLE REGULATIONS AND BICYCLE ENCOURAGEMENT

11. On or about June 8, 2019, and at all times relevant herein, the City of Chicago maintained city programs, wherein it encouraged people in City of Chicago to ride their bikes, or rent Divvy Bicycles, as an alternative to motor-vehicles transportation.

12. On or about June 8, 2019, and at all times relevant herein, the City of Chicago maintained a series of municipal ordinances, applicable to bicycles, including 9-52-010 (Rights and Duties), 9-52-020 (Riding bicycles on sidewalks and certain roadways), et seq.

13. Specifically, on June 8, 2019, the City of Chicago, had in place, an ordinance, 9-52-020 (b), that prohibited bicyclists, such as the Plaintiff, whom are over 12 years of age,

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from riding bicycles upon any sidewalk.

14. On June 8, 2019, the City of Chicago, had in place, an ordinance, 9-52-010, Rights and Duties, that provided:

> (a) Every person riding a bicycle upon a roadway shall be granted all of the rights and shall be 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, except as to those provisions of laws and ordinances which by their nature can have no application.

15. On June 8, 2019, there was a Divvy Bicycle Rental Station, approved by the City of Chicago, placed in the area of the Plaintiff's incident.

16. On June 8, 2019, the City of Chicago either directly or knowingly permitted signage to be erected advertising bicycle rental at or around the area of this incident.

17. By virtue of permitting a Divvy Bicycle Station in the area of the incident as aforestated, the City of Chicago intended that bicycles are rented and operated on the roadway in and about the area of the Plaintiff's injury.

18. On and about June 8, 2019, and at all times relevant herein, the Defendant, THE CITY OF CHICAGO, was under a duty to exercise reasonable care for the safety of intended and permitted users of the roadway, including the Plaintiff, CLARK ALAVE.

19. Despite said duty, Defendant, THE CITY OF CHICAGO, directly and through the acts of its various agents, servants and employees, was then and there guilty of one or more of the following negligent acts or omissions:

a. Carelessly and negligently failed to maintain said roadway in a reasonably safe state of repair;

b. Carelessly and negligently failed to repair defects in the roadway surface creating a dangerous condition on an area of roadway that bicycles are known and intended to travel;

c. Carelessly and negligently failed to warn bicyclists of the known crater pothole in the area of the roadway that they are instructed to travel upon;

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d. Carelessly and negligently failed to light the pothole/crater in the area of the roadway that bicycles are instructed to do, as it entered a crosswalk;

e. Carelessly and negligently created a situation that posed an unreasonable risk of injury to bicycles using said roadway for its intended purpose, including the Plaintiff, CLARK ALAVE.

f. Carelessly and negligently permitted a dangerous crater/pothole to exist for an unreasonable amount of time, given its location and the fact that bicyclists were to use that area of roadway.

14. As a direct and proximate result of one or more of the aforementioned wrongful acts or omissions of the Defendant, THE CITY OF CHICAGO, the front wheel of the bicycle being operated by the Plaintiff, CLARK ALAVE, went into the aforementioned pothole, causing him to be thrown off the bicycle resulting in permanent injuries, including fractured teeth, facial cuts and scarring, injury to his left hip, right shoulder and other injuries resulting in past and future medical care and treatment, causing disability, loss of normal life, pain and suffering, disfigurement, and causing him to spend significant sums of money on care and become liable for substantial future monies in his efforts at returning to his pre-injury condition.

15. The Plaintiff's damages are valued in excess of fifty-thousand dollars ($50,000.00), the minimum jurisdictional amount required for the law division.

WHEREFORE, the Plaintiff CLARK ALAVE, prays for judgment in his favor and against the Defendant, THE CITY OF CHICAGO, for past and future pain and suffering, past and future loss of normal life, past and future disfigurement, past and future disability, past and future medical, surgical and therapeutic expenses, wage loss, and for any other relief this Court deems just.

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Respectfully submitted,

FISHER & LAMONICA, P.C.

One of the Plaintiff's attorneys

Erron H. Fisher
FISHER & LAMONICA, P.C.
100 South Wacker Drive, Suite 1160
Chicago, IL 60606
312/345-0500
Atty No. 48935

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Atty No.: 48935

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

CLARK ALAVE,	)	
	)	
Plaintiffs,	)	
	)	No. 2019 L 010879
vs.	)	
	)	
CITY OF CHICAGO, a municipal entity,	)	
	)	
Defendant.	)	

222 AFFIDAVIT

I, Erron H. Fisher, state under oath:

1. I am an attorney with FISHER & LAMONICA, P.C., and am responsible for filing of the Complaint at Law in this matter.

2. The total of money damages sought by plaintiff does exceed $50,000.00, exclusive of interest and costs.

By:

Fisher & LaMonica, P.C.

One of the Plaintiff's Attorney's

Erron H. Fisher
FISHER & LAMONICA, P.C.
100 S. Wacker Drive, Ste. 1160
Chicago, IL 60606
312/345-0500
Atty No.: 48935

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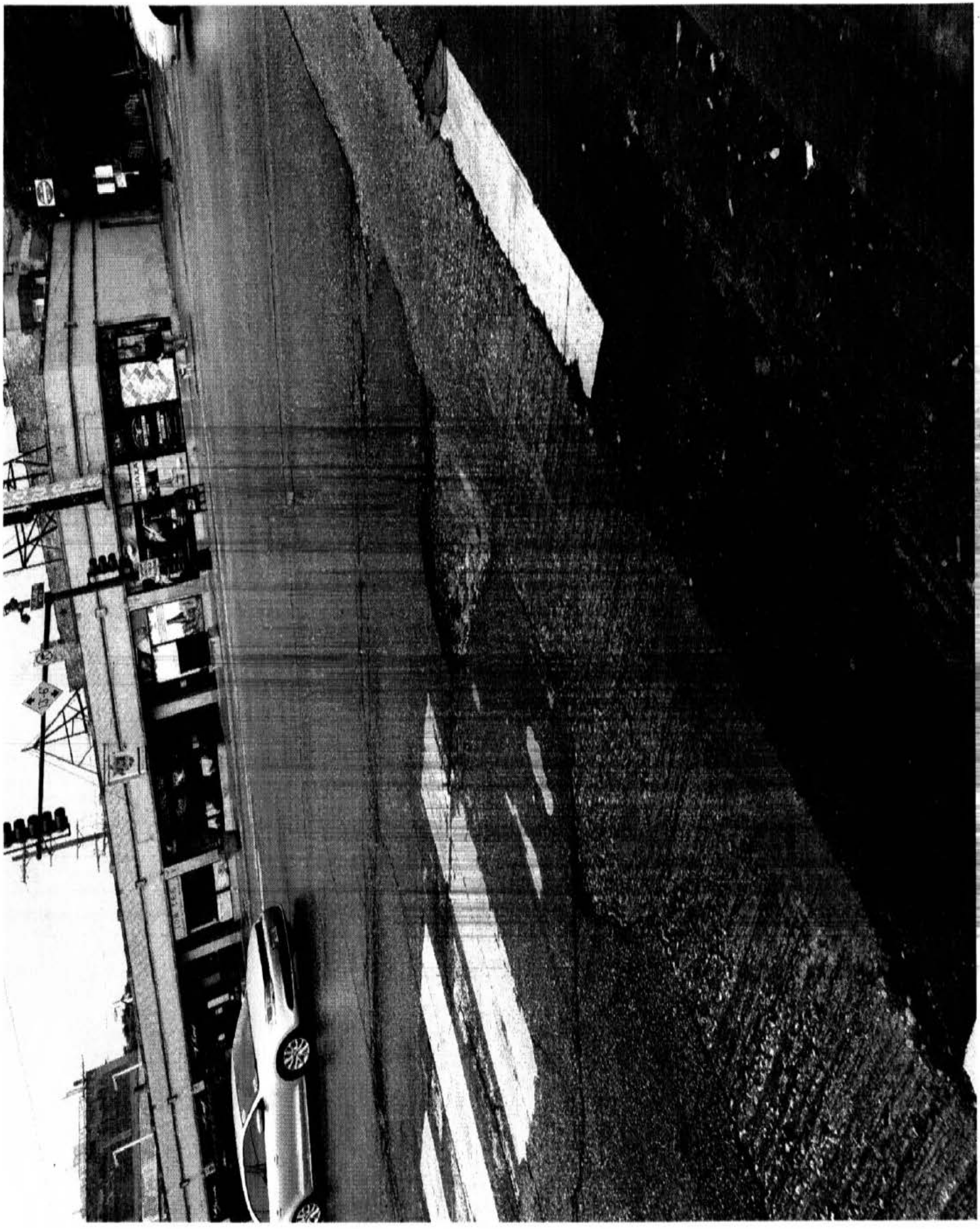

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Notice of Appeal (12/01/20) CCA 0256 A

☐ **THIS APPEAL INVOLVES A MATTER SUBJECT TO EXPEDITED DISPOSITION UNDER RULE 311(a).**

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY **DEPARTMENT,** LAW **DIVISION/DISTRICT**

CLARK ALAVE

Plaintiff/ ◉ Appellant ○ Appellee

v.

CITY OF CHICAGO

Defendant/ ○ Appellant ◉ Appellee

Reviewing Court No.: _____

Circuit Court No.: 2019 L 10879

CLARK ALAVE'S **NOTICE OF APPEAL**

(Check if applicable. See IL Sup. Ct. Rule 303(a))(3).

☐ Joining Prior Appeal ☐ Separate Appeal ☐ Cross Appeal

Appellant's Name: CLARK ALAVE

◉ Atty. No.: 48935
○ Pro Se 99500

Name: EHF/FISHER LAW GROUP, LLC

Address: 100 S. Wacker Drive, Ste. 1160

City: Chicago

State: IL Zip: 60606

Telephone: 312/345-8500

Primary Email: efisher@fish-law.com

Appellee's Name: CITY OF CHICAGO

◉ Atty. No.: 90909
○ Pro Se 99500

Name: Mark D. Harrison, City of Chicago Corp

Address: 30 N. LaSalle Street, Suite 800

City: Chicago

State: IL Zip: 60602

Telephone: (312) 744-6962

Primary Email: mark.harrison@cityofchicago.or

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Notice of Appeal **(12/01/20) CCA 0256 B**

An appeal is taken from the order or judgment described below:

Date of the judgment/order being appealed: 7/6/20

Name of judge who entered the judgment/order being appealed: Honorable Gerald Cleary

Relief sought from Reviewing Court:

Reversal of the granting of the City of Chicago's Motion to Dismiss on the basis of tort immunity holding that the area of roadway the Plaintiff's bicycle was on is a location where the Plaintiff-appella was an intended and permitted user.

I understand that a *"Request for Preparation of Record on Appeal"* form (CCA 0025) must be completed and the initial payment of $70 made prior to the preparation of the Record on Appeal. The Clerk's Office will not begin preparation of the ROA until the Request form and payment are received. Failure to request preparation of the ROA in a timely manner, i.e., at least 30 days before the ROA is due to the Appellate Court, may require the Appellant to file a request for extension of time with the Appellate Court. A *"Request for Preparation of Supplemental Record on Appeal"* form (CCA 0023) must be completed prior to the preparation of the Supplemental ROA.

/s/

To be signed by Appellant or
Appellant's Attorney

2022 IL App (1st) 210342-U

FIFTH DIVISION
March 25, 2022

No. 1-21-0342

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

EDEN OLENA,	)	Appeal from the Circuit Court of
	)	Cook County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 20 L 2072
	)	
CITY OF CHICAGO,	)	Honorable
	)	Brendan A. O'Brien,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Hoffman and Cunningham concurred in the judgment.

ORDER

¶ 1 ***Held:*** The circuit court properly dismissed plaintiff's complaint alleging personal injury and property damage stemming from a bicycle accident, upon finding the defendant city owed plaintiff no duty of care under the Illinois Tort Immunity Act. Affirmed.

¶ 2 BACKGROUND

¶ 3 On April 6, 2019, plaintiff Eden Olena was riding her bicycle on the roadway near 1600 North Marcey Street in Chicago when she hit a pothole, causing her to fall and sustain injuries. She filed a complaint against defendant City of Chicago (City), alleging that the City failed to provide and maintain a safe and proper roadway for her to travel, and that its acts and omissions

in permitting a defect to form and remain on that roadway caused her to sustain injury. She also alleged that the City had knowledge of the pothole prior to her accident and failed to repair the roadway.

¶ 4 The City moved to dismiss Olena's complaint under section 2-619(9) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2018)), arguing that she was not an intended and permitted user of the City's roadway at the location where the accident occurred. Thus, the City claimed that it owed her no duty to maintain the property under section 3-102 of the Illinois Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/3-102 (West 2018)). The City attached the certification of David Smith, a City Department of Transportation projects administrator to its motion. Smith's certification included a copy of the City's 2019 Chicago bicycling map, which designates the locations of bicycle lanes throughout Chicago. Smith certified that on the date of the accident, "the roadway at 1600 N. Marc[e]y Street was *not* a bicycle route or other bikeway." (Emphasis in original.) He also stated that "there were no bicycle roadway markings or bicycle signs at or near 1600 N. Marc[e]y Street, designating that section of Marc[e]y Street as one that the City intended to be used by bicyclists." Finally, Smith stated that although there is no bicycle lane at 1600 North Marcey Street, "one block North on Clybourn[ ] Avenue there is a bicycle lane designated by signs and roadway markings for bicyclists who want to ride northbound and southbound."

¶ 5 In her response to the City's motion to dismiss, Olena argued that she was an intended user of the roadway at issue as expressed in the City's municipal code and direct statements from the mayor's office and the Department of Transportation. She also contended that bicyclists must use unmarked roads to get to and from marked bicycle lanes within Chicago.

¶ 6 On March 4, 2021, the circuit court granted the City's motion to dismiss, finding it owed no duty to Olena as a matter of law because the accident occurred on a street where bicyclists are permitted, but not intended users. This appeal followed.

¶ 7 ANALYSIS

¶ 8 At the outset, we must address deficiencies with Olena's briefs filed with this court. Illinois Supreme Court Rule 341(d) requires the cover of the brief to include "the individual names and addresses of the attorneys and their law firm." Ill. S. Ct. R. 341(d) (eff. Jan. 20, 1993). Olena's reply brief did not include the address of the attorney who filed the brief.

¶ 9 Further, Supreme Court Rule 341(h)(6) provides that the statement of facts in the brief "shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, and with appropriate reference to the pages of the record on appeal." Ill. S. Ct. R. 341(h)(6) (eff. Oct. 1, 2020). Olena's one-paragraph statement of "facts" merely sets forth the allegations of the complaint which were not proven facts, without labeling them as such, and provides no mention of the facts harmful to her case contained in Smith's certification. Olena's brief fails to provide this court with a fair statement of facts necessary to an understanding of this case.

¶ 10 As we stated in *North Community Bank v. 17011 South Park Avenue, LLC*, 2015 IL App (1st) 133672, ¶ 14:

> "Supreme court rules are not mere suggestions; they are rules that must be followed. Where an appellant's brief fails to comply with supreme court rules, this court has the inherent authority to dismiss the appeal. In addition, this court may strike an appellant's brief for noncompliance with Rule 341." (Internal citations and quotation marks omitted.)

¶ 11 We recognize, however, that striking a brief or dismissing an appeal is a particularly harsh sanction. See *In re Detention of Powell*, 217 Ill. 2d 123, 132 (2005). Although this deficient brief complicates, but does not completely frustrate our review, we will consider the merits of the appeal.

¶ 12 Olena argues on appeal that the dismissal of her complaint was improper because the City owed her a duty to maintain the roadway adequately. She contends that she was a permitted and intended user of that roadway as a bicyclist and that section 3-102(a) of the Tort Immunity Act does not shield the City from its duty of reasonable care to bicyclists. Olena argues that physical manifestations of intent existed on Marcey Street on the date of her accident under the City's municipal code, regardless of whether the roadway included a marked bicycle lane. She also contends that evidence of the City's intent outside of physical manifestations on the street itself should be assessed in this case to determine whether she was an intended user of the roadway as a bicyclist. She points to historical use of the roadway in addition to customary use of municipal property as relevant factors in determining municipal intent, which the circuit court failed to consider prior to dismissing her complaint. Manifestations of intent were included in the City's municipal code, notably, the adoption of the 2013 Bicycle Safety Ordinance proposal, otherwise known as the Chicago "dooring law," under section 9-80-035 of the municipal code, as well as elsewhere in the municipal code, wherein bicyclists have been granted all the rights and duties given to motorists. Chicago Municipal Code §§ 9-80-035 (adopted Mar. 12, 2008), 9-52-010 (amended June 5, 2013). Finally, she argues that the statement of the City's former mayor, Rahm Emanuel, "to make Chicago the most bike friendly city in the United States," the addition of the City's Divvy bicycle sharing program, and the Department of Transportation's "Streets for Cycling

Plan for 2020," demonstrated the City's intention that bicyclists use all roads, including streets with unmarked bicycle lanes.

¶ 13 A motion to dismiss pursuant to section 2-619 admits the legal sufficiency of the complaint, but raises defects or other matters either internal or external from the complaint that would defeat the cause of action. *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 85 (1995). The circuit court should not grant a section 2-619 motion unless it is clear that no set of facts could ever be proved that would entitle the plaintiff to recover. *Ostendorf v. International Harvester Co.*, 89 Ill. 2d 273, 280 (1982). Dismissing a cause of action under section 2-619 efficiently allows for the disposal of issues of law or easily proved facts early in the litigation process. *Coles Moultrie Electric Cooperative v. City of Sullivan*, 304 Ill. App. 3d 153, 158 (1999). We review *de novo* the dismissal of a cause of action pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2018)).

¶ 14 To state a claim for negligence, a plaintiff must plead and prove that "the defendant owed a duty to the plaintiff, that the defendant breached that duty, and that the breach was a proximate cause of the plaintiff's injury." *Jane Doe 3 v. McLean County Unit District No. 5 Board of Directors*, 2012 IL 112479, ¶ 19. In this case, Olena argues that the City was negligent, among other things, in how it permitted a roadway defect to form and/or remain on the roadway after having knowledge of the defect for a period of time prior to April 6, 2019. The City responds that it owed no duty to Olena because she was not a permitted *and* intended user of the roadway on the date of the incident.

¶ 15 Local public entities have a common law duty to exercise ordinary care to maintain public property in a reasonably safe condition. See *Monson v. City of Danville*, 2018 IL 122486, ¶ 24. This duty has been codified under section 3-102(a) of the Tort Immunity Act (745 ILCS 10/3-

102(a) (West 2018)), which limits the duty of a local government entity to maintain its property. *Id.* Section 3-102(a) 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).

¶ 16 Under section 3-102(a), a local government entity is immune from liability for the failure to maintain its property in a reasonably safe condition unless the plaintiff was engaged in a use of the property that was both intended and permitted by the local government entity. See *Boub v. Township of Wayne*, 183 Ill. 2d 520, 524-26 (1998). "Thus, according to the [Tort Immunity] Act, a municipality owes a duty of care only to those who are both intended and permitted users of municipal property." *Bowman v. Chicago Park District*, 2014 IL App (1st) 132122, ¶ 49. Our supreme court has found that "[t]he Illinois legislature has expressly limited the duty of a municipality with regard to maintaining its property to a duty of ordinary care to permitted and intended users of the property." *Vaughn v. City of West Frankfort*, 166 Ill. 2d 155, 163 (1995). Further, "the duty of a municipality depends on whether the *use* of the property was a permitted and intended use." (Emphasis added.) *Boub*, 183 Ill. 2d at 526.

¶ 17 Olena, both relying upon and distinguishing *Boub*, argues that to determine the City's intended use of property, this court should look to the nature of the area, the historical use of the area, and any laws governing the area. Considering those factors, she contends that traffic signals, stop signs, lane markings, and other physical manifestations of intent existed on the roadway, each of which are applicable to bicyclists under the municipal code, whether a marked bicycle lane

exists on a particular street or not. She argues that such a sweeping application of physical road markings to bicyclists by a local government was not present in *Boub*, as nothing in the supreme court's decision indicated that the government entity's municipal code contained any specific regulations. In contrast, the City's municipal code demonstrates examples of "physical manifestations of intention by the local governing entity for cyclists to use all roads within the city, since the [City] has explicitly made such physical manifestations as applicable to bicycles as they are to vehicles." Olena argues that, while the *Boub* court concluded that site specific physical evidence was relevant in determining the intent of a municipal defendant regarding use of roadway, it did not hold that such on-site physical evidence is the *only* kind of evidence that can or should be considered in determining municipal intent.

¶ 18 In *Boub*, the plaintiff sustained injuries in a bicycle accident while riding on a Wayne Township bridge. At the time of the accident, the bridge was undergoing a renovation and some wooden planks had been removed in preparation for the installation of a different bridge deck. The plaintiff claimed he was thrown from his bicycle when the front tire became stuck between two of the planks on the bridge. The circuit court granted the defendants' motion for summary judgment and the appellate court affirmed.

¶ 19 The supreme court considered whether the plaintiff was an intended and permitted user of the road and bridge where the accident occurred. Citing *Wojdyla v. City of Park Ridge*, 148 Ill. 2d 417, 426 (1992), the *Boub* court explained that to determine the intended use of the property, " 'we need look no further than the property itself' " as an indication of intended use. *Boub*, 183 Ill. 2d at 526 (quoting *Wojdyla*, 148 Ill. 2d at 426). The *Boub* court also considered similar reasoning in *Vaughn*, which rejected the notion that the manner in which a particular injury occurs is relevant in determining the scope of a municipality's duty under section 3-102(a) of the Tort Immunity Act.

The *Vaughn* court held that "the question of whether a municipality owes a duty does not depend on whether the plaintiff-pedestrian was struck by a moving vehicle or tripped over a pothole, but rather depends on whether the municipality intended that the plaintiff-pedestrian walk in that part of the street where the injury occurred and permitted the plaintiff-pedestrian to do so." 166 Ill. 2d at 162-63. Finally, the *Boub* court considered the reasoning in *Sisk v. Williamson County*, 167 Ill. 2d 343, 351-52 (1995), in which the plaintiff struck a bridge with the car he was driving, got out to investigate the damage to his vehicle, and fell into a creek bed below when he stepped off the edge of the pavement obscured by weeds. The *Sisk* court found distinguishable cases allowing recovery when persons are injured by conditions of the pavement in areas where cars are intended to park. The *Sisk* court found "no such manifestations to indicate that Williamson County intended pedestrians to walk on its country roads, much less the specific road and bridge" from which the plaintiff complained. 167 Ill. 2d at 351-52. No walkways or crosswalks existed on the rural country road upon which the accident occurred. The *Sisk* court concluded that "the inference to be drawn from these facts, if any, is that municipalities do not intend that pedestrians walk on rural country roads. Although it may become necessary at times for pedestrians to walk on country roads, such use is not a manifestation of the local municipality's intent that pedestrians walk on its country roads or an undertaking by the municipality to make country roads free from defects that might injure pedestrians." *Id.*

¶ 20 Guided by the reasoning in *Wojdyla*, *Vaughn*, and *Sisk*, the *Boub* court recognized the factual differences between cases involving pedestrians and bicyclists. The court stated, "[b]icyclists, unlike pedestrians, are guided by some of the same signs and pavement markings that motorists observe. Still, we believe that the same considerations present in our decisions in those cases are also relevant here in determining whether the plaintiff was an intended user rather

than simply a permitted user of the road and bridge." 183 Ill. 2d at 528. The *Boub* court found no affirmative manifestations that Wayne Township intended, rather than simply permitted, bicyclists to use the road and bridge where the accident occurred. *Id.* at 535-36. "No special pavement markings or signs indicated that bicyclists, like motorists, were intended to ride on the road or bridge, or that bicycles, rather than vehicles, were the intended users of the route." *Id.* at 528. The court concluded that it had "no quarrel with the proposition that bicycle riders are permitted users of the road and bridge involved in this case," but specifically held that bicyclists were not "considered intended users of those facilities, within the scope of section 3-102(a) of the Tort Immunity Act." *Id.* At 536.

¶ 21 The plaintiff in *Boub* also argued that certain state statutes applicable to bicyclists were relevant in determining that the defendants' intent regarding the use of the road and bridge. *Id.* At 529. The court found that those statutes were irrelevant because they reflected the intent of another public body and failed to support the plaintiff's position. The court stated that the "provision cited by the plaintiff 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.

¶ 22 In its holding that the defendants were immune under section 3-102(a) of the Tort Immunity Act, our supreme court reasoned that the legislature did not intend to impose liability under the factual circumstances presented, and explained the potential policy implications of finding bicyclists to be intended users under such a broad scope:

> "Simply put, many road conditions that do not pose hazards to vehicles may represent special dangers to bicycles, and imposition of liability in this case would, we believe, open the door to liability for a broad range of pavement conditions,

> such as potholes, speed bumps, expansion joints, sewer grates, and rocks and gravel, to name but a few. By the same token, we believe that imposition of municipal liability in the circumstances shown here is more appropriate for the legislature to initiate, if it is to be done at all. In this regard, it 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." *Boub*, 183 Ill. 2d at 535.

¶ 23 We are compelled to follow our supreme court's ruling in *Boub*, as we cannot distinguish the facts of this case from *Boub*, despite Olena's argument that we should depart from its findings. As stated in *Boub*, it is the province of the legislature to expand the scope of liability and we decline to do so here.

¶ 24 Plaintiff in this case also argues that, while physical markings on roadways are relevant in determining the intent of the governing body and, thus, whether a duty exists, they are not dispositive of the issue, and other factors can and should be considered when determining the intent of a municipal defendant. Plaintiff concedes there were no marked bicycle lanes on Marcey Street on the date of the accident, but statements from the mayor's office and the City's municipal code demonstrated evidence of intent that the circuit court failed to consider.

¶ 25 In *Latimer v. Chicago Park District*, 323 Ill. App. 3d 466, 470 (2001), the street where the plaintiff was injured was not marked or signed to reveal an intent on the part of the city that she ride her bicycle there. The plaintiff argued, however, that the absence of pavement markings or signs where the accident occurred did not dispose of her claim and that certain parts of the City's municipal code demonstrated that the defendant intended bicyclists to use city streets. The plaintiff in *Latimer* cited section 9-52-020 of the City's municipal code, which states that adults are

prohibited from riding bicycles on sidewalks, as evidence of intent that adults are supposed to ride bicycles on the streets. Here, Olena cites in support of her case sections 9-52-020 and 9-80-035 of the municipal code, known as the "dooring law," which makes it a violation for a passenger or driver in a vehicle to open a car door directly into moving traffic, as evidence indicating an intent by the City for bicyclists to use all roads within city limits safely and not merely within marked bicycle lanes. Chicago Municipal Code §§ 9-80-035 (adopted Mar. 12, 2008). Similar to *Latimer*, however, sections 9-80-035 and 9-52-020 of the municipal code never announce that bicyclists are intended users of city streets. See *Latimer*, 323 Ill. App. 3d at 471. Indeed, *Latimer* specifically noted the intent expressed in the City's municipal code as to bicyclists under section 9-52-020(d): "[i]t is our intent that when riding a bicycle, you use marked bicycle lanes, where we have assumed a duty to provide safe passage." *Id.* At 471-71 (citing Chicago Municipal Code §§ 9-52-020(d) (1990), 9-52-010 (amended June 5, 2013)). The court in *Latimer* held that, "[b]ecause the street where plaintiff was injured was not marked or signed to suggest that it was intended for use by bicycles, and because the [municipal code] contains no provisions that suggest that defendant intends, rather than permits, bicyclists to use the city streets, plaintiff is not entitled to damages under the Tort Immunity Act." *Id.* At 473. We find *Latimer* to be well reasoned, and we follow it here. Contrary to Olena's claims, nothing in the City's municipal code suggests the City had a duty to maintain its streets in a condition reasonably safe for bicyclists. Furthermore, Olena's assertion that direct statements from the Mayor's office and the City's Department of Transportation that encourage cycling establish that bicyclists are intended users is also unpersuasive. The municipality's intent is inferred from markings or signs; moreover, the language used by the legislature in drafting the City's Municipal Code is usually the best indication of the drafter's intent. *Id.* at 471.

¶ 26 Finally, Olena claims that even if Marcey Street was not intended for bicyclists' use in the manner the City intended, use by a bicyclist of a non-designated roadway was necessary to get to and from a marked bicycle route and, therefore, use of the unmarked roadway must have necessarily been intended by the City, citing *Curatola v. Village of Niles*, 154 Ill. 2d 201, 215 (1993) (pedestrian use of the street was mandated to enter and exit a legally parked vehicle). However, the narrow exception enumerated in *Curatola* applies only in the limited situation where a pedestrian is in the immediate area surrounding a legally parked vehicle from which the pedestrian entered or exited. *Curatola*, 154 Ill. 2d at 215. Under the facts of this case, we find no basis to apply or extend this exception.

¶ 27 In sum, the duty of care is determined by the municipality's intended use of a property, not the intent of the user. *Id.* at 468. "To hold otherwise would negate section 3-102(a), as the use intended by the municipality would not control." *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. We find that Olena was not an intended user of the roadway in question on the date of the accident and, therefore, the City did not owe her a duty of care under 3-102(a) of the Tort Immunity Act.

¶ 28 CONCLUSION

¶ 29 We affirm the judgment of the circuit court of Cook County dismissing Olena's complaint under section 2-619(a)(9) of the Code.

¶ 30 Affirmed.

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