NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule23(e)(1).

SECOND DIVISION
AUGUST 9, 2011

2011 IL App (1st) 101747-U
1-10-1747

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ELAINE ROUNDS,	)	
	)	Appeal from the
Plaintiff-Appellant,	)	Circuit Court of
	)	Cook County.
v.	)	
	)	No. 07 L 6137
CHICAGO PARK DISTRICT, a Municipal	)	
Corporation,	)	Honorable
	)	Diane Larsen,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

Held: The circuit court properly granted summary judgment in favor of the defendant, Chicago Park District, where the plaintiff failed to provide sufficient evidence to support her claim of willful and wanton conduct. Further, the plaintiff has procedurally defaulted on any challenge to the dismissal of her negligence claim against the defendant.

¶1 This appeal arises from the following orders entered by the circuit court of Cook County: the October 15, 2008 order dismissing certain portions of a negligence claim in the cause of action; the December 10, 2008 order dismissing all allegations of negligence in the cause of action; the January 5, 2009 order denying a motion for reconsideration; and the May 20, 2010 order granting summary judgment in favor of the defendant, Chicago Park District (CPD). On appeal, the plaintiff, Elaine Rounds, argues that: (1) governmental tort immunity does not apply to bar her allegations of negligence; and (2) the circuit court erred in granting summary judgment in favor of CPD. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶2 BACKGROUND

¶3 On June 19, 2006, the plaintiff, Elaine Rounds, sustained an ankle injury when she stepped into a hole on a pathway at Union Park in Chicago, Illinois, which was under the control and responsibility of CPD.

¶4 On June 14, 2007, the plaintiff filed a negligence lawsuit against CPD,[1] arguing that it failed to properly inspect and maintain the sidewalk, that it allowed the hole to remain on the sidewalk, and that it failed to properly warn people of the hole or to provide adequate lighting conditions. On May 1, 2008, the plaintiff filed a first amended complaint, which stated with more specificity, the location of the plaintiff's accident, and included photographs of the accident site. The first amended complaint alleged that CPD was negligent for the following reasons:

---

[1]The original complaint also named the City of Chicago as a defendant. However, on September 1, 2008, the circuit court dismissed City of Chicago with prejudice from the lawsuit based on CPD's admission during discovery that the park property at issue was maintained, controlled and held in trust by CPD.

"a. Failed to properly inspect the sidewalk or path or discover the hole as set forth in 745 ILCS 10/3-102(a) and (b);

b. Failed to properly maintain the sidewalk or path free of unreasonably dangerous conditions set forth in 745 ILCS 10/3-102(a) and (b);

c. Failed to repair the hole in the sidewalk as required by 10/3-102(a) and (b) after it knew or should have known of the presence of the hole;

d. Allowed the hole to remain on the sidewalk or path after it knew or should have known of the presence of the hole in violation of 745 ILCS 10/3-102(a) and (b);

e. Failed to properly warn people of the hole as set forth in 745 ILCS 10/3-102(a) after it knew or should have known of the presence of the hole;

f. Failed to provide adequate lighting conditions so that users of the sidewalk or path could see the hole after it knew or should have known of the presence of the hole."

¶5 On June 6, 2008, CPD filed a section 2-619 motion to dismiss (735 ILCS 5/2-619 (West 2008)), arguing that it was immune from allegations of negligence for "defective conditions of

recreation property" under the Local Governmental and Governmental Employees Tort Immunity Act (Act) (745 ILCS 10/101 *et seq.* (West 2008)), and that it could only be liable if CPD were found to have engaged in willful and wanton conduct that proximately caused the plaintiff's injury.

¶6 On October 15, 2008, the circuit court dismissed allegations "a" to "e" of the first amended complaint with prejudice, and reserved ruling on whether allegation "f" was covered by section 3-106 of the Act until further briefing on the issue. The circuit court also found that the sidewalk at issue was a "condition of the property" under section 3-106 of the Act.

¶7 On October 16, 2008, the plaintiff filed a second amended complaint, which alleged the following counts in negligence (count I) and willful and wanton conduct (count II):

"Count I - Negligence

* * *

a. Failed to provide adequate lighting conditions after it knew or should have known of the presence of the hole so that users of the sidewalk or path could see the hole;

b. Negligently removed the lighting; and

c. Negligently caused the hole.

* * *

Count II - Willful and Wanton Conduct

a. Willfully and wantonly failed to properly inspect the sidewalk or path or discover the hole;

b. Willfully and wantonly failed to properly maintain the

sidewalk or path free of unreasonably dangerous conditions;

c. Willfully and wantonly failed to repair the hole in the sidewalk;

d. Willfully and wantonly allowed the hole to remain on the sidewalk or path after it knew or should have known of the presence of the hole;

e. Willfully and wantonly failed to properly warn people of the hole;

f. Willfully and wantonly failed to provide adequate lighting conditions after it knew or should have known of the presence of the hole so that users of the sidewalk or path could see the hole;

g. Willfully and wantonly removed the lighting; and

h. Willfully and wantonly caused the hole."

¶8 On October 30, 2008, CPD filed a section 2-619.1 motion to dismiss all of count I (negligence) and portions of count II (willful and wanton conduct) of the second amended complaint. See 735 ILCS 5/2-619.1 (West 2008).

¶9 On December 10, 2008, the circuit court dismissed, pursuant to the Act, the allegations of negligence (count I) with prejudice, but denied CPD's motion to dismiss portions of the allegations in willful and wanton conduct (count II) in the second amended complaint.

¶10 On December 17, 2008, the plaintiff filed a motion for reconsideration of the circuit court's

December 10, 2008 order. On January 5, 2009, the circuit court denied the plaintiff's motion for reconsideration.

¶11 In the plaintiff's discovery deposition, she testified that on June 19, 2006, at approximately 11:45p.m., she walked across Union Park on her way home. She stated that she jaywalked across a street and "crawled through" a fence before stepping her right foot into a round hole on the park property. The plaintiff noted that after she stepped into the hole, she "heard a pop" and screamed for help. She testified that she was then unable to stand on her own and that it was later determined that she had broken three bones in her right ankle. The plaintiff further noted that the round hole was approximately 15 inches in diameter and one foot deep, and that it had "a cord" or "wire" inside it. Shortly thereafter, a man sitting on a nearby park bench called the paramedics, who then transported the plaintiff to a hospital in an ambulance. The plaintiff further testified that about a month prior to her accident, she had walked past the accident site and observed the presence of a "long and black" light pole at that location and that the hole did not exist at that time. The plaintiff did not know how long the hole had been in existence prior to her accident, nor did she have any knowledge of any complaints by anyone to CPD regarding the hole. She testified that on the night of the accident, she observed streetlights located on the boulevard where she had jaywalked, but did not see any streetlights near the fence or accident site at issue. The plaintiff noted that in July 2006, she returned to Union Park in order to take some pictures of the accident site and noticed that CPD had not done anything about the hole. However, she acknowledged that she had never reported her accident to CPD. During the plaintiff's July 2006 return trip to Union Park, she also observed that there were wire and "a piece of iron or something" at the bottom of the hole.

¶12 Tony Fitzgerald, Jr. (Fitzgerald), CPD's park supervisor for Union Park, testified in an affidavit and deposition that his job required that he assess the park grounds and report any noticeable problems. He testified that Union Park was divided into a larger and smaller section, and that the plaintiff's accident occurred in the smaller section of the park. Fitzgerald noted that the accident site was in the vicinity of two concrete pathways which converged to form a "Y" shape, and denied that a light pole was ever located in the hole at issue. Fitzgerald testified that since 2005, it was his custom and practice as park supervisor to walk around and assess the entirety of the park "once to twice a week," and that the park spanned 13.5 acres. Although he could not recall the exact date, he estimated that he first saw a "sinkhole" at the accident site around the time of the plaintiff's accident, and that he had reported it to his area manager, Elizabeth Garza. Fitzgerald testified that it was necessary to repair the hole "because you don't want anybody to get hurt." He stated that a warning "cone" was placed at the site of the hole within hours after he discovered it in order to prevent people from walking into it, and that the hole was repaired within several days after he reported it to his area manager. Fitzgerald testified that he did not know how or when the hole at issue was created. According to his affidavit, Fitzgerald noted that sometime after the hole had been repaired, he reported that "this site had sunk[en] again," but that CPD's landscape maintenance crew repaired it again. He averred that prior to June 19, 2006, no one had ever reported to him the occurrence of an accident due to any condition at the accident site, nor had anyone made complaints about any hole at the accident site. Further, he averred in his affidavit that there had never been any light poles at the accident site during his tenure as park supervisor.

¶13 Edmund O'Connell (O'Connell), plumbing foreman for CPD, testified in an affidavit that

he was responsible for "most water and drainage fixtures" on CPD property. Based on his examination of a "plot plan" of the park property and a plumbing diagram of Union Park, he testified that "at one time a water shutoff valve, usually called a 'V-box,' was located at the accident site," that "this iron-casing, circular *** V-box would have had a valve at its bottom that could be turned off and on with a special valve key," that all V-boxes at Union Park had a "round metal cover," which was not unusual for people to steal and "sell for scrap." In his deposition, O'Connell testified that there was a 4-inch "water main" located at the accident site which serviced the "lawn hydrants" that were operated by the park's landscaping crew. He further noted that he had never seen a hole at or near the water valve located at the accident site, but acknowledged that there would be a 5-foot deep hole if the metal cover were removed, which he estimated to be 7.5 inches in diameter. O'Connell testified that, in his capacity as an employee for CPD, he had physically retrieved several stolen V-box metal covers from a junkyard at 58th and State Streets, by threatening the owner or employee of the junkyard with a police report of the stolen items. O'Connell stated that although the V-box metal covers were stolen "all the time," the last time he had physically retrieved these metal coverings from the junkyard at 58th and State Streets was in 2005 because he did not know if "[the owner or employee of the junkyard] had them, and that he had not identified any V-box metal covers at any other junkyards.

¶14 On August 17, 2009, CPD filed a motion for summary judgment on the remaining count (count II) of the second amended complaint, which attached, *inter alia*, certain affidavits, the plaintiff's deposition, and photographs relating to the accident site as exhibits.

¶15 On February 17, 2010, the plaintiff filed a third amended complaint, alleging only one count

of willful and wanton conduct against CPD:

"Count I - Willful and Wanton Conduct

* * *

a. Willfully and wantonly failed to properly inspect the sidewalk or path or discover the hole;

b. Willfully and wantonly failed to properly maintain the sidewalk or path free of unreasonably dangerous conditions;

c. Willfully and wantonly failed to repair the hole in the sidewalk after it knew or should have known of the presence of the hole;

d. Willfully and wantonly failed to properly warn people of the hole;

e. Willfully and wantonly failed to provide adequate lighting conditions after it knew or should have known of the presence of the hole so that users of the sidewalk or path could see the hole;

f. Willfully and wantonly caused the hole by removing the lighting; and

g. Willfully and wantonly caused the hole by allowing the iron covers over the water shut off valve to be stolen continuously without taking appropriate action to prevent stealing of said

iron covers."

¶16 On March 8, 2010, CPD filed a new motion for summary judgment, with attached exhibits, on the third amended complaint.

¶17 On May 20, 2010, the circuit court granted CPD's motion for summary judgment.

¶18 On June 18, 2010, the plaintiff filed a notice of appeal before this court.

¶19 ANALYSIS

¶20 We determine the following issues: (1) whether the circuit court erred in granting summary judgment in favor of CPD; and (2) whether CPD was immune from the plaintiff's allegations of negligence under the Act.

¶21 Initially, we note that the statement of facts in CPD's brief before this court contains numerous argumentative statements, in violation of Supreme Court Rule 341(h)(6). See Ill. S. Ct. R. 341(h)(6) (eff. Sept. 1, 2006). We take this opportunity to caution the parties that rules set forth by our supreme court are not merely suggestive, but are mandatory and those who disregard the rules risk sanctions. However, instead of striking the entirety of CPD's brief in this case, we disregard the portions of CPD's statement of facts which violate Rule 341(h)(6).

¶22 Turning to the merits of the appeal, we first determine whether the circuit court erred in granting summary judgment in favor of CPD, which we review *de novo*. *Hahn v. Union Pacific Railroad Co.*, 352 Ill. App. 3d 922, 929, 816 N.E.2d 834, 840 (2004).

¶23 Summary judgment is proper where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2008).

"In considering a motion for summary judgment, the court must view the record in the light most favorable to the nonmoving party." *Pielet v. Pielet*, 474 Ill. App. 3d 407, 419, 942 N.E.2d 606, 622 (2010). "The purpose of summary judgment is not to try a question of fact, but to determine whether one exists" that would preclude the entry of judgment as a matter of law. *Land v. Board of Education of the City of Chicago*, 202 Ill. 2d 414, 421, 432, 781 N.E.2d 249, 254, 260 (2002). "Thus, although the nonmoving party is not required to prove his case in response to a motion for summary judgment, he must present a factual basis that would arguably entitle him to judgment." *Id.* at 432, 781 N.E.2d at 260.

¶24 The plaintiff argues[2] that the circuit court erred in granting summary judgment in favor of CPD because there were disputed issues of fact and sufficient evidence to sustain a verdict. Specifically, she contends that there was evidence to show that CPD removed a light pole and caused the hole at issue, that even if CPD did not remove a light pole from that area, there was sufficient evidence to establish that CPD knew or should have known about the hole prior to the plaintiff's accident. The plaintiff further argues that summary judgment should have been precluded because there was a "strong inference that [CPD] failed to take any remedial measures," but for which her accident would not have occurred. Thus, the plaintiff argues, there was sufficient factual evidence for the jury to conclude that CPD acted willfully and wantonly in failing to take remedial measures and to sustain a verdict in favor of the plaintiff.

---

[2] We note that the majority of the plaintiff's opening brief before this court focused on her dismissed allegations of negligence against CPD under the Act, rather than on the allegations of willful and wanton conduct by CPD.

¶25 CPD counters that summary judgment was proper in this case because the plaintiff's evidence remained legally insufficient to create an inference that CPD engaged in willful and wanton conduct. CPD maintains that there was no evidence to create an inference that CPD had actual or constructive notice of the hole in a "reasonably adequate time in order to have done anything about it." CPD argues that even accepting the plaintiff's testimony regarding the removal of a light pole at the accident site as true, there was no evidence showing that CPD removed the light pole, when the removal of the light pole occurred, or that CPD failed to fill the hole immediately after removal of the light pole. CPD further argues that nothing in the evidence shows that CPD demonstrated "utter indifference or conscious disregard by not discovering or ignoring an impending danger."

¶26 Section 3-106 of the Act provides that:

> "[n]either a local public entity nor a public employee is liable for an injury where the liability is *based on the existence of a condition of any public property* intended or permitted to be used for recreational purposes, including but not limited to parks, playgrounds, open areas, buildings or other enclosed recreational facilities, *unless such local entity or public employee is guilty of willful and wanton conduct proximately causing such injury*." (Emphases added.) 745 ILCS 10/3-106 (West 2008).

¶27 In reviewing a statute, we must ascertain and give effect to the intent of the legislature, the best indication of which is "the statutory language given its plain and ordinary meaning." *Abruzzo v. City of Park Ridge*, 231 Ill. 2d 324, 332, 898 N.E.2d 631, 636 (2008). "When the language of a

statute is clear and unambiguous, it must be applied without resort to other aids of construction." *Id.*

¶28 The hole at issue in the instant case is a "condition of any public property" within the meaning of section 3-106 because it relates to the characteristic of the property, and the pathway on which it was located increased the usefulness of the park for recreational purposes. See 745 ILCS 10/3-106 (West 2008); see also *Sylvester v. Chicago Park District*, 179 Ill. 2d 500, 508, 689 N.E.2d 1119, 1124 (1997) (section 3-106 applies if public property is intended or permitted to be used for recreational purposes, regardless of the primary purpose of the property); but *cf. McCuen v. Peoria Park District*, 163 Ill. 2d 125, 129, 643 N.E.2d 778, 780 (1994) (section 3-106 does not apply to immune the park district because the mishandling of the mule team by a park employee during a mule-drawn hayride did not "relate to the condition of the hayrack itself"); *Stein v. Chicago Park District*, 323 Ill. App. 3d 574, 577, 752 N.E.2d 631, 634 (2001) (watering hose stretched across a sidewalk by employees of the park district, which was moved from place to place within the park and returned to storage at the end of the day, did not constitute a "condition" of public property). Thus, under the plain language of section 3-106 of the Act, CPD could not be liable for the plaintiff's ankle injury, sustained as a result of a condition of its property, unless CPD had engaged in willful and wanton conduct which proximately caused that injury.

¶29 Willful and wanton conduct is defined under section 1-210 of the Act as:

> "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their

> property. This definition shall apply in any case where a 'willful and wanton' exception is incorporated into any immunity under this Act." 745 ILCS 10/1-210 (West 2008); *Tagliere v. Western Springs Park District*, 408 Ill. App. 3d 235, 944 N.E.2d 884 (2011) (legislature clearly indicated that the definition of "willful and wanton" under section 1-210 of the Act is the only one to be used, at the exclusion of common law definitions, when evaluating the alleged willful and wanton conduct of public entities under the Act).

¶30 In the case at bar, the plaintiff alleged in the February 17, 2010 third amended complaint that CPD engaged in willful and wanton conduct that proximately caused her injury, which were set forth in allegations "a" through "g." Allegations "a" and "b" stated that CPD was willful and wanton for "fail[ing] to properly inspect the sidewalk or path or discover the hole," and for "fail[ing] to properly maintain the sidewalk or path free of unreasonably dangerous conditions."

¶31 In *Tagliere*, the plaintiff sought damages for injuries his minor daughter sustained while playing on a seesaw owned by the defendant, a park district. *Id.* at ___, 944 N.E.2d at 885. In granting summary judgment in favor of the park district, the circuit court determined that the failure of the park district to discover a defect in the seesaw during regularly scheduled inspections failed to constitute willful and wanton conduct. *Id.* On appeal, the *Tagliere* court held that the failure to discover the defect, after repeated inspections by the park district, did not constitute "actual or deliberate intention to cause harm or [show] an utter indifference to or conscious disregard for the safety of others." *Id.* at ___, 944 N.E.2d at 891. While the park district's failure "to discover the

defect despite repeated inspections may have been negligent," the *Tagliere* court held that it did not rise to the level of willful and wanton conduct as defined by section 1-210 of the Act. *Id.* at ___, 944 N.E.2d at 892.

¶32 Like *Tagliere*, in the instant case, CPD's failure to discover the hole at issue, despite weekly inspections of the park, did not constitute willful and wanton conduct by CPD within the meaning of section 1-210 of the Act. The record shows that the plaintiff testified in her deposition that the hole into which she allegedly fell was approximately 15 inches in diameter. Fitzgerald's affidavit and deposition stated that his job as park supervisor for Union Park required that he assess the park grounds and report any noticeable problems. He testified that since 2005, prior to the plaintiff's accident in 2006, it was his custom and practice to walk around and assess the entirety of the park "once to twice a week," and that the park spanned 13.5 acres. Based on the record before us, and viewing the evidence in a light most favorable to the plaintiff, we cannot say that CPD's failure to discover the 15-inch hole at issue within a 13.5-acre park, despite Fitzgerald's weekly inspections of the park grounds, amounted to a willful and wanton failure to properly inspect the park property or to discover the hole at issue. While CPD's conduct could arguably be negligent, there was no evidence to support the allegation that CPD's failure to discover the hole showed an actual or deliberate intention to cause harm or that it showed an utter indifference to or conscious disregard for the safety of park patrons. Likewise, the plaintiff had failed to present any evidence in the record to suggest that CPD willfully and wantonly failed to maintain the sidewalk free of unreasonably dangerous conditions. Rather, the evidence in the record shows that CPD's landscape maintenance crew had repaired "sinkholes" which were discovered by Fitzgerald during his routine assessment

of the park property, and that the existence of the hole at issue did not *per se* demonstrate an actual or deliberate intention by CPD to harm, nor an utter indifference to or conscious disregard for the safety of others. Thus, we find that the circuit court properly granted summary judgment in favor of CPD on allegations "a" and "b."

¶33 Allegation "c" of the plaintiff's third amended complaint alleged that CPD willfully and wantonly "failed to repair the hole in the sidewalk after it knew or should have known of the presence of the hole." We find that allegation "c" could not survive summary judgment because the plaintiff has not alleged any facts to show that CPD knew or should have known of the presence of the hole. Here, Fitzgerald testified that he had reported the existence of a "sinkhole"–which he stated was subsequently repaired by CPD's landscape maintenance crew on two occasions–at the accident site around the time of the plaintiff's accident, but that he could not recall exactly when this occurred. Moreover, the plaintiff acknowledged in her deposition that she never reported her accident to CPD. Evidence in the record also suggests that no prior complaints had been made to CPD prior to June 19, 2006 regarding the hole at issue, nor had anyone reported any accident to CPD due to a condition of the property at the accident site.

¶34 We find that the plaintiff had not provided sufficient evidence to create an inference that CPD willfully and wantonly failed to repair the hole in the sidewalk after it knew of the presence of the hole because there was simply a lack of evidence from the plaintiff to show that CPD knew of the defect. Rather, the jury would have to speculate as to whether the "sinkhole" that Fitzgerald discovered was in fact the same hole the plaintiff fell into, and whether Fitzgerald discovered the "sinkhole" prior to or after the plaintiff's accident. Likewise, we find that there was insufficient facts

to support the allegation that CPD willfully and wantonly failed to repair the hole after it should have known of the presence of the hole. As discussed, the record is devoid of facts to show that CPD's failure to discover the hole, despite his weekly inspections, rose to the level of willful and wanton conduct on the part of CPD. Moreover, there was undisputed testimony in the record to show that the "sinkhole" discovered by Fitzgerald had been repaired on multiple occasions by CPD's landscaping crew. Thus, viewing the record in a light most favorable to the plaintiff, we find that there was no genuine issue of material fact regarding whether CPD willfully and wantonly failed to repair the hole at issue after it knew or should have known of the hole.

¶35 Allegation "d" of the third amended complaint alleged that CPD willfully and wantonly "failed to properly warn people of the hole." We find that the plaintiff had not provided any facts to show that CPD knew or should have known about the hole at issue in time to take remedial measures, including warning others of the hole. In the plaintiff's deposition, she testified that she had observed the presence of a light pole, but did not see a hole, at the accident site a month prior to her accident. However, she testified that she did not know how long the hole had been in existence prior to her accident, did not have any knowledge of any complaints by anyone to CPD regarding the hole, nor had any idea who removed the light pole. The record also contains affidavits by Fitzgerald and CPD's electrical foreman, Ernesto Garza (Garza), which averred that no light pole had ever existed at the accident site. Garza's affidavit statement determining that there was never a light pole at the accident site was based on his examination of Union Park's electrical diagram, which was attached as exhibit G-1 to Garza's affidavit. Viewing the evidence in a light most favorable to the plaintiff–that a light pole was removed from the accident site prior to her

accident–the plaintiff had not presented any evidence to support her allegation that CPD was willful and wanton in failing to warn people about the hole. Rather, the record shows that Fitzgerald testified that within hours after discovering the "sinkhole" at the accident site, a warning "cone" was placed at the site of the hole, and that the hole was repaired within several days of its discovery "because you don't want anybody to get hurt." The record also shows that photographs of the accident site, which were attached to the plaintiff's third amended complaint, depict the presence of a warning cone. Thus, we find that no evidence was presented to allow the jury to conclude that CPD intentionally refused to warn people of the hole at the accident site or that it acted with utter indifference to or conscious disregard for the safety of others by not warning others of the hole. Therefore, summary judgment was properly granted in favor of CPD on allegation "d."

¶36 Allegation "e" of the third amended complaint alleged that CPD willfully and wantonly "failed to provide adequate lighting conditions after it knew or should have known of the presence of the hole so that users of the sidewalk or path could see the hole." Generally, in order for a plaintiff to recover for allegations of willful and wanton conduct against a public entity, he must first establish a *duty* owed to him by the public entity, as well as willful and wanton conduct on the part of the public entity. *Bialek v. Moraine Valley Community College School District 524*, 267 Ill. App. 3d 857, 860, 642 N.E.2d 825, 828 (1994); *Barrett v. Forest Preserve District of Cook County*, 228 Ill. App. 3d 975, 978, 593 N.E.2d 990, 992 (1992). Whether duty exists is a question of law for this court to decide. *Bialek*, 267 Ill. App. 3d at 860, 642 N.E.2d at 828.

¶37 Section 3-104 of the Act provides that a public entity shall not be liable "for an injury caused by the failure to *initially* provide regulatory traffic control devices, stop signs, yield right-of-way

signs, speed restriction signs, distinctive roadway markings or any other traffic regulating or warning sign, device or marking, signs, *overhead lights*, traffic separating or restraining devices or barriers." (Emphases added.) 745 ILCS 10/3-104 (West 2008). The term "traffic" within the meaning of section 3-104 of the Act includes pedestrians on public walkways. See *Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 91, 811 N.E.2d 364, 372-73 (2004). Thus, we find that CPD owed no duty to provide any initial lighting at the accident site and thus, could not be liable for not doing so. Therefore, the plaintiff could not sustain, as a matter of law, an allegation of willful and wanton against CPD for failing to "provide adequate lighting conditions." See *e.g.*, *West v. Kirkham*, 147 Ill. 2d 1, 14, 588 N.E.2d 1104, 1110 (1992) (municipality had no duty to create or erect public improvements, and no liability could be imposed for the failure to undertake the improvement in the first place).

¶38 Nonetheless, the plaintiff argues–without supporting evidence aside from her own testimony–that a light pole existed at the accident site, and that it was removed sometime within the month prior to her accident. The existence and subsequent removal of a light pole at the accident site would exclude CPD from the immunity protection under section 3-104, because in that instance, the issue would no longer relate to CPD's failure to provide an *initial* overhead light at the accident site, but rather would relate to its failure to replace or otherwise provide alternative lighting to the accident site after removing the original light pole. See *e.g.*, *Krampert v. Village of Mount Prospect*, 323 Ill. App. 3d 41, 46, 751 N.E.2d 160, 164 (2001) (municipality may be liable if a public improvement, once undertaken, creates an unreasonably dangerous condition). We find that, however, viewing the evidence in a light most favorable to the plaintiff that a light pole had indeed

been removed from the accident site, the record contains insufficient evidence for the jury to conclude that CPD acted willfully and wantonly in failing to provide adequate lighting to the accident site. Thus, summary judgment was properly granted in favor of CPD on allegation "e."

¶39 Allegations "f" and "g" of the plaintiff's third amended complaint alleged that CPD willfully and wantonly "caused the hole by removing the lighting," and "caused the hole by allowing the iron covers over the water shut off valve to be stolen continuously without taking appropriate action to prevent stealing of said iron covers," respectively. We find no sufficient evidence to support either of these allegations, which would enable them to survive summary judgment. As discussed, the plaintiff's contention that a light pole existed at the accident site prior to her accident was unsupported by any evidence, aside from the plaintiff's own deposition testimony that such a light pole existed. Rather, the evidence in the record suggests that no light pole had ever existed at that location. Nevertheless, even assuming that a light pole had existed at the accident and had been removed by CPD prior to the plaintiff's accident, there was insufficient evidence to show that the existence of the hole was the result of willful and wanton conduct by CPD, in light of the undisputed evidence in the record that "sinkholes" at the accident site had been repeatedly repaired and that it was unclear from the record when the hole at issue came into existence. Thus, the evidence was insufficient to allow the jury to find in favor of the plaintiff that CPD willfully and wantonly caused the hole by removing the light pole.

¶40 Likewise, the record was devoid of sufficient evidence for the jury to conclude that CPD willfully and wantonly "caused the hole by allowing the iron covers over the water shut off valve to be stolen continuously without taking appropriate action to prevent stealing of said iron covers," as

set forth in allegation "g" of the third amended complaint. In his affidavit and deposition, O'Connell, the plumbing foreman for CPD, testified that a "V-box" was located at the accident site, that all V-boxes at Union Park had a "round metal cover," and that it was not unusual for people to steal the metal covers "for scrap." O'Connell further noted that, in his capacity as an employee for CPD, he had physically retrieved several stolen V-box metal covers from a local junkyard, and that the last time he had done so was in 2005 because he was unsure if "[the owner or employee of the junkyard] had them]," nor did he recover any V-box metal covers at any other junkyards. Similarly, Philip Gavin (Gavin), the general plumbing foreman for CPD, attested in his affidavit that based on his examination of a plumbing diagram for Union Park, a V-box was located at the accident site "at one time," that Union Park had several V-boxes throughout its premises, and that it was not unusual for people to steal the V-box metal covers "to sell for scrap."

¶41 First, as CPD correctly argues, we find that the plaintiff's opening brief before this court is devoid of any argument, with reference to legal authorities or the record on appeal, which would have supported allegation "g" of her third amended complaint, and as such, this point of contention has been forfeited on appeal under Supreme Court Rule 341(h)(7). See Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006) (the appellant's brief shall contain an argument portion which "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on. *** Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing"). Second, even assuming this point has not been forfeited on appeal, we find that, based on our examination of the record, the plaintiff has not presented sufficient evidence for a jury to conclude that CPD willfully and wantonly allowed the V-

box metal covers to be stolen without taking appropriate action to prevent them from being stolen. Thus, we find that no genuine issues of material fact exists to support the plaintiff's allegations "f" and "g." Therefore, the circuit court properly granted summary judgment in favor of CPD on the plaintiff's willful and wanton claims against CPD.

¶42 We next determine whether CPD was immune from the plaintiff's allegations of negligence under the Act. The plaintiff argues that the circuit court, in its orders dated October 15, 2008 and December 10, 2008, erred in dismissing her negligence claims against CPD with prejudice under the Act. Further, she argues that, on January 5, 2009, the circuit court erred in denying her motion for reconsideration of the December 10, 2008 order. We find that the plaintiff has procedurally defaulted any challenge to the dismissal of her negligence claim against the CPD. See *Vilardo v. Barrington Community School District 220*, 406 Ill. App. 3d 713, 941 N.E.2d 257 (2010).

¶43 In order to avoid forfeiture on appeal, "a party wishing to preserve a challenge to an order dismissing with prejudice fewer than all of the counts in his complaint has several options." *Id.* at 719, 941 N.E.2d at 263. "First, the plaintiff may stand on the dismissed counts and argue the matter at the appellate level." *Id.* "Second, the plaintiff may file an amended complaint realleging, incorporating by reference, or referring to the claims set forth in the prior complaint." *Id.* Under this second option, a simple paragraph or footnote in the amended pleadings notifying the defendant and the court of the plaintiff's intention to preserve the dismissed portions of his former complaints for appeal is sufficient. *Id.*, citing *Tabora v. Gottlieb Memorial Hospital*, 279 Ill. App. 3d 108, 114, 664 N.E.2d 267, 271 (1996). "Third, a party may perfect an appeal from the order dismissing fewer than all of the counts of his or her complaint prior to filing an amended pleading that does not include

reference to the dismissed counts." *Vilardo*, 406 Ill. App. 3d at 719, 941 N.E.2d at 263. In the case at bar, we find that the plaintiff has not pursued any one of these options, and thus, has forfeited review on appeal of the dismissed negligence claims against CPD.

¶44 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶45 Affirmed.