2012 IL App (2d) 120558-U
No. 2-12-0558
Order filed December 21, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MIRIAM SATINOFF Plaintiff-Appellant, v. HIGHLAND PARK PUBLIC LIBRARY and THE CITY OF HIGHLAND PARK, Defendants-Appellees.	))))))))))	Appeal from the Circuit Court of Lake County. No. 11-L-373 Honorable Christopher C. Starck, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed as legally deficient plaintiff's complaint alleging willful and wanton conduct, where plaintiff alleged no facts that would permit the inference that defendants knew or should have known that their conduct posed a high probability of injury; plaintiff's conclusory allegations of willful and wanton conduct were insufficient.

¶ 2 Plaintiff, Miriam Satinoff, appeals from the dismissal with prejudice of her second amended complaint against defendants, the Highland Park Public Library (Library) and the City of Highland Park (City). Plaintiff's one-count second amended complaint alleged that defendants engaged in willful and wanton conduct when they caused plaintiff to trip and fall over a "bunched-up" rug near

the entrance to the library. The trial court dismissed plaintiff's second amended complaint with prejudice pursuant to section 2-615 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2010)), and plaintiff appeals. We affirm.

¶ 3 BACKGROUND

¶ 4 Plaintiff filed her original complaint against defendants on April 26, 2011, alleging that defendants were negligent in allowing a rug near the library's lower-level entrance to remain in a "bunched-up" condition, which caused plaintiff to trip and fall. The City filed a motion to dismiss pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2010)) contending that it was immune from liability for negligence under section 3-106 of the Local Governmental and Governmental Employees Tort Immunity Act (Act) (745 ILCS 10/3-106 (West 2010)) because the library was public property intended or permitted to be used for recreational purposes.

¶ 5 Rather than respond to the City's motion, plaintiff requested and was granted leave to file a first amended complaint, which plaintiff did. In the new complaint, plaintiff alleged, *inter alia*, that defendants "[c]arelessly and negligently with a conscious indifference to surrounding circumstances and conditions willfully and wantonly caused and allowed [the] rug to be in a bunched-up condition." Both defendants filed motions to dismiss pursuant to section 2-615 of the Code, contending that plaintiff's complaint failed to allege sufficient facts to state a cause of action based on willful and wanton conduct as section 1-210 of the Act (745 ILCS 10/1-210 (West 2010)) defines that phrase. The trial court granted defendants' motions and granted plaintiff leave to amend her complaint.

¶ 6 Plaintiff's second amended complaint alleged the following. Plaintiff entered the library "following right behind" a library employee, "who was pushing a cart laden with boos [*sic*]."

Plaintiff, "following directly in the wake of [the employee], was caused to trip and fall by a bunched-up rug in the area just vacated by [the employee] pushing his book cart." The library employee "either bunched-up [the] rug as he pushed his cart over it, or, alternatively, failed to flatten the rug either before or after he pushed his cart over [it]." Defendants, through the acts of the employee, and "[w]ith a conscious disregard and indifference to the surrounding circumstances and conditions," did the following:

> "(a) *** caused and allowed [the] rug to be and remain in a dangerous, bunched-up condition;
>
> (b) *** failed to repair [the] rug, even though [d]efendant's [*sic*] agent and servant knew, or should have known[,] that the [p]laintiff was walking right behind him in imminent danger of tripping over [the] bunched-up rug;
>
> (c) *** failed to warn the [p]laintiff of [the] imminent danger of tripping over [the] bunched-up rug, although [d]efendant's [*sic*] agent and servant knew, or should have known, of [the] imminent danger to the [p]laintiff."

Plaintiff alleged that defendants' willful and wanton conduct caused her to trip over the rug and be injured.

¶ 7 Once again, defendants filed motions to dismiss pursuant to section 2-615 of the Code, contending that plaintiff's complaint failed to allege sufficient facts to state a cause of action based on willful and wanton conduct as section 1-210 of the Act defines that phrase. In response to defendants' motions, plaintiff cited the common-law definition of willful and wanton conduct from *Schneiderman v. Interstate Transit Lines, Inc.*, 394 Ill. 569, 583 (1946), and *Ziarko v. Soo Line R.R. Co.*, 161 Ill. 2d 267 (1994), and argued that her allegations were sufficient under the common-law

definition. In their replies, both defendants cited *Thurman v. Champaign Park District*, 2011 IL App (4th) 101024, and *Tagliere v. Western Springs Park District*, 408 Ill. App. 3d 235 (2011), for the proposition that the legislature intended the statutory definition of willful and wanton conduct to apply to the exclusion of any inconsistent common-law definitions in all cases brought under the Act. The trial court granted defendants' motions and dismissed plaintiff's second amended complaint with prejudice. Plaintiff timely appeals.

¶ 8 ANALYSIS

¶ 9 On appeal, plaintiff argues that the trial court erroneously relied on *Thurman* and *Tagliere* for the proposition that the common-law definition of willful and wanton conduct from *Schneiderman* and *Ziarko* is inapplicable to determining whether a defendant's conduct was willful and wanton under section 1-210 of the Act. As she did in the trial court, plaintiff contends that her allegations were sufficient to state a cause of action under the common-law definition.

¶ 10 A motion to dismiss brought pursuant to section 2-615 of the Code challenges the legal sufficiency of a complaint. *Callaghan v. Village of Clarendon Hills*, 401 Ill. App. 3d 287, 300 (2010). A court ruling on a section 2-615 motion to dismiss must accept as true all well-pleaded facts and all reasonable inferences to be drawn therefrom. *Callaghan*, 401 Ill. App. 3d at 300. The court must also view all allegations and inferences in the light most favorable to the plaintiff. *Callaghan*, 401 Ill. App. 3d at 300. "Since Illinois is a fact-pleading jurisdiction, 'a plaintiff must allege facts sufficient to bring his or her claim within the scope of the cause of action asserted.' " *Callaghan*, 401 Ill. App. 3d at 300 (quoting *Turner v. Memorial Medical Center*, 233 Ill. 2d 949, 499 (2009)). " 'The bare characterization of certain acts as wilful and wanton misconduct is not sufficient to withstand a motion to dismiss because such misconduct must be manifested by facts

alleged in the complaint.' " *Callaghan*, 401 Ill. App. 3d at 300 (quoting *Oravek v. Community School District 146*, 264 Ill. App. 3d 895, 989 (1994)). "While the issue of whether conduct rises to the level of willful and wanton is usually a question for the trier of fact, the court may decide as a matter of law whether a plaintiff stated a cause of action." *Callaghan*, 401 Ill. App. 3d at 300-01. A court should not dismiss a cause of action on the pleadings unless it "clearly appears that no set of facts can be proven under the pleadings that will entitle the plaintiff to recover." *American National Bank & Trust Co. v. City of Chicago*, 192 Ill. 2d 274, 279 (2000). Our review of a section 2-615 dismissal is *de novo*. *Callaghan*, 401 Ill. App. 3d at 301.

¶ 11 Section 1-210 of the Act defines "willful and wanton conduct" as follows:

> " 'Willful and wanton conduct' as used in this Act means 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 2010).

In *Ziarko*, a case which involved a common-law claim of willful and wanton conduct, a plurality of our supreme court, quoting *Schneiderman*, offered the following definition: " 'A wilful or wanton injury must have been intentional or the act must have been committed under circumstances exhibiting a reckless disregard for the safety of others, such as a failure, after knowledge of impending danger, to exercise ordinary care to prevent it or a failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care.' " *Ziarko*, 161 Ill. 2d at 273 (quoting *Schneiderman*, 394 Ill. at 583). The *Ziarko* plurality noted that "the label 'willful and wanton conduct' has developed in this State as a hybrid between acts

considered negligent and behavior found to be intentionally tortious." *Ziarko*, 161 Ill. 2d at 275. It further stated, "Under the facts of one case, willful and wanton misconduct may be only degrees more than ordinary negligence, while under the facts of another case, willful and wanton acts may be only degrees less than intentional wrongdoing." *Ziarko*, 161 Ill. 2d at 275-76.

¶ 12 Plaintiff contends that the common-law definition of willful and wanton conduct from *Schneiderman* and *Ziarko*[1] simply articulates in greater detail the standard for "conscious disregard" and is not inconsistent with the statutory definition of willful and wanton conduct contained in section 1-210 of the Act. Defendants disagree, arguing that the common-law definition of willful and wanton conduct differs in key respects from the statutory definition. Specifically, defendants contend that the statutory definition requires a "course of action," while the common-law definition does not, and that the terms "reckless disregard," "recklessness," and "carelessness," all of which appear in the common-law definition, are absent from the statutory definition. The City maintains that interpreting the common-law definition from *Schneiderman* and *Ziarko* as merely articulating the standard for "conscious disregard" would "graft a century of common law baggage onto the Tort

[1]Although we quote the definition from *Schneiderman* and *Ziarko*, our supreme court has used virtually the same definition in numerous cases for well over a century. See *American National Bank & Trust Co.*, 192 Ill. 2d at 285; *Pfister v. Shusta*, 167 Ill. 2d 417, 421 (1995); *Poole v. City of Rolling Meadows*, 167 Ill. 2d 41, 48 (1995); *Lynch v. Board of Education of Collinsville Community Unit School District No. 10*, 82 Ill. 2d 415, 429 (1980); *Klatt v. Commonwealth Edicson Co.*, 33 Ill. 2d 481, 488 (1965); *Hearing v. Hilton*, 12 Ill. 2d 559, 562 (1958); *Myers v. Krajefska*, 8 Ill. 2d 322 (1956); *Brown v. Illinois Terminal Co.*, 319 Ill. 326, 331 (1925); *Illinois Cent. R. Co. v. Leiner*, 202 Ill. 624, 629-31 (1903); *Lake Shore & M.S. Ry. Co. v. Bodemer*, 139 Ill. 596, 606-07 (1892).

Immunity Act's definition of willful and wanton that was explicitly rejected by the General Assembly."

¶ 13 Our supreme court addressed the issue before us in *Murray v. Chicago Youth Center*, 224 Ill. 2d 213 (2007), in which the court held that "the plain meaning of section 1-210 is entirely consistent with this court's long-standing common law precedents," including *Schneiderman* and *Ziarko*. *Murray*, 224 Ill. 2d at 235. However, *Murray* involved injuries that occurred prior to 1998, the year that the legislature amended section 1-210 of the Act. The 1998 amendment left the statutory definition of willful and wanton conduct unchanged, but added what is now the last sentence of section 1-210: "This definition shall apply in any case where a 'willful and wanton' exception is incorporated into any immunity under this Act." See P.A. 90-805, § 5 (eff. Dec. 2, 1998). The *Murray* court, reasoning that it would be improper to consider the legislative intent in passing legislation that was not in effect at the time of the plaintiff's injury, expressed "no opinion on the effect, if any, of the 1998 amendment on willful and wanton liability governed by the Tort Immunity Act." *Murray*, 224 Ill. 2d at 242-43.

¶ 14 Following *Murray*, two courts addressed the issue again in cases that involved the post-amendment version of section 1-210. In *Tagliere*, the First District held that, while the legislature did not change the statutory definition of willful and wanton conduct, it "clearly indicated" in the 1998 amendment that "it requires the use of the statutory definition of willful and wanton to evaluate the conduct of public entities in Tort Immunity cases to the exclusion of common law definitions." *Tagliere*, 408 Ill. App. 3d at 243. In *Thurman*, the Fourth District agreed with *Tagliere* and held that the Act's "statutory definition applies to the exclusion of inconsistent common-law definitions." *Thurman*, 2011 IL App (4th) 101024, ¶ 13.

¶ 15 Although defendants urge us to follow *Tagliere* and *Thurman*, we note that at least two districts of the appellate court have continued to rely, at least in part, on the common-law definition of willful and wanton conduct from *Schneiderman* and *Ziarko* in cases brought under the Act. In *Vilardo v. Barrington Community School Dist. 220*, 406 Ill. App. 3d 713 (2010), which was decided shortly before *Tagliere* and *Thurman*, but which involved the post-amendment version of section 1-210, the Second District cited with approval the common-law definition of willful and wanton conduct. *Villardo*, 406 Ill. App. 3d at 724. It did so again in *Bezanis v. Fox Waterway Agency*, 2012 IL App (2d) 100948, which was decided after *Tagliere* and *Thurman*. *Bezanis*, 2012 IL App (2d) 100948, ¶ 36. In *Hatteberg v. Cundiff*, 2012 IL App (4th) 110417, the Fourth District did the same. *Hatteberg*, 2012 IL App (4th) 110417, ¶ 31. Notably, Justice McCullough, who authored *Thurman*, concurred in the *Hatteberg* opinion.

¶ 16 Perhaps even more significantly, in *Harris v. Thompson*, 2012 IL 112525, another case involving the post-amendment version of section 1-210, our supreme court, citing *Murray*, stated that the statutory definition of willful and wanton conduct was "entirely consistent with this court's long-standing case law." *Harris*, 2012 IL 112525, ¶ 41.

¶ 17 While we are cognizant of the apparent discrepancies among cases involving section 1-210 of the Act, and the confusion they undoubtedly generate, ultimately, we need not resolve the issue to decide the case before us. Even under the common-law definition of willful and wanton conduct from *Schneiderman* and *Ziarko*, and as urged by plaintiff, plaintiff's complaint fails to state a cause of action.

¶ 18 Cases applying the common-law definition of willful and wanton conduct establish that it is not to be confused with simple negligence and requires more than mere inadvertence or

inattentiveness. In *Myers*, a case decided a decade after *Schneiderman*, the defendant argued that *Schneiderman*'s definition of willful and wanton conduct was erroneous because it confused the concept of willful and wanton conduct with negligence and the last clear chance doctrine. *Myers*, 8 Ill. 2d at 328. The supreme court rejected the defendant's argument, reasoning that, while the cases discussing willful and wanton conduct may use "different wording, language and terminology," the "basic general concept" of the definitions are the same and require an act "done with actual intention or with a conscious disregard or indifference for the consequences when the known safety of other persons was involved." *Myers*, 8 Ill. 2d at 328-29. In *Brown*, our supreme court noted that conduct meeting the common-law definition of willful and wanton conduct "imports consciousness that an injury may probably result from the act done and a reckless disregard of the consequences." *Brown*, 319 Ill. at 331. In other words, to be guilty of willful and wanton conduct, a defendant " 'must be conscious of his conduct, and, though having no intent to injure, must be conscious, from his knowledge of the surrounding circumstances and existing conditions, that his conduct will naturally and probably result in injury.' " *Oelze v. Score Sports Venture, LLC*, 401 Ill.App.3d 110, 122-23, 339 Ill.Dec. 596, 927 N.E.2d 137 (2010) (quoting *Bartolucci v. Falleti*, 382 Ill. 168, 174, 46 N.E.2d 980 (1943)). It is this consciousness of probable injury that distinguishes willful and wanton conduct from mere negligence, which, by contrast, may result from inadvertence or inattentiveness. See *Bezanis*, 2012 IL App (2d) 100948, ¶ 36 (" 'More than mere inadvertence or momentary inattentiveness which may constitute ordinary negligence is necessary for an act to be classified as wilful and wanton misconduct.' " (quoting *Oelze* , 401 Ill. App. 3d at 122)). Thus, while, in a given case, willful and wanton conduct may be "only degrees more than ordinary negligence" (*Ziarko*, 161 Ill. 2d at 275-76), willful and wanton conduct—even under the common-law definition—is an

"aggravated form of negligence" (*Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 235 (2010)), requiring more than momentary carelessness.

¶ 19 A defendant's consciousness of impending danger may be actual or constructive. *Myers*, 8 Ill. 2d at 328; see also *Palmer v. Chicago Park District*, 277 Ill. App. 3d 282, 288-89 (1995) (holding that the "[p]laintiff's third amended complaint sufficiently state[d] a cause of action for willful and wanton misconduct by pleading that [the] defendant knew or should have known of the dangers posed by [a] fallen fence and yet failed to implement remedial measures," where the complaint alleged that the defendant had inspected the area daily and "simply could not have missed seeing a fence 3 feet high and 30 feet long that had been lying on its side *** for a three-month period"). Put another way, " 'It is essential that plaintiff allege and establish that when the defendant acted, or failed to act, he had knowledge, or should have had the knowledge under the circumstances, that his conduct posed a high probability of serious physical harm to others." ' *Choice v. YMCA of McHenry County*, 2012 IL App (1st) 102877, ¶ 72 (quoting *Pomrehn v. Crete-Monee High School District*, 101 Ill. App. 3d 331, 335 (1981)).

¶ 20 Here, plaintiff alleged no facts that, if proven, could permit the inference that defendants' conduct was willful and wanton, as opposed to merely (possibly) negligent. Plaintiff alleged that the library employee "either bunched-up [the] rug as he pushed his cart over it, or, alternatively, failed to flatten the rug either before or after he pushed his cart over [it]." In order for plaintiff's allegation to permit an inference of willful and wanton conduct, she would have had to allege facts showing that the library employee (or some other agent of defendants) either knew, or should have known under the circumstances, that the employee's conduct posed a high probability of injury. However, plaintiff offered only the allegations that defendants' employee "knew, or should have

known[,] that the [p]laintiff was walking right behind him in imminent danger of tripping over [the] bunched-up rug" and "knew, or should have known, of [the] imminent danger to the [p]laintiff." Plaintiff offered no facts to support these conclusory allegations, such as allegations of a history of similar rug-related incidents or other facts supporting the claim that defendants knew or should have known that the rug posed a serious danger. See *Villardo*, 406 Ill. App. 3d at 726 ("[P]laintiff has failed to allege that defendant had any knowledge, constructive or actual, that would have alerted it to the risk of a ball passing through the protective screen and injuring plaintiff."). Merely alleging in a conclusory fashion that defendants acted "[w]ith a conscious disregard and indifference to the surrounding circumstances and conditions" is insufficient. See *Oravek*, 264 Ill. App. 3d at 989 ("The bare characterization of certain acts as wilful and wanton misconduct is not sufficient to withstand a motion to dismiss because such misconduct must be manifested by facts alleged in the complaint.").

¶ 21 Plaintiff's reliance on *Straub v. City of Mt. Olive*, 240 Ill. App. 3d 967 (1993), *Oeleze*, and *Thomas v. Consolidated School District No. 429*, 7 Ill. App. 3d 45 (1972), is misplaced. In *Straub*, the plaintiff was injured after she tripped over a wire used to support a tree in a city-owned park. *Straub*, 240 Ill. App. 3d at 970. The appellate court reversed the dismissal of the plaintiff's willful and wanton count against the city, reasoning that the plaintiff had alleged in detail the dangers the wire posed and had alleged that the city knew of the dangers because other individuals had tripped over the wire and had informed the city of the incidents. *Straub*, 240 Ill. App. 3d at 980. Here, plaintiff's complaint did not contain similar factual allegations showing that defendants knew, or should have known, of an alleged danger posed by the rug.

¶ 22 *Oeleze* was an appeal from a grant of summary judgment, so we do not know what the plaintiff alleged in her complaint. Nevertheless, the facts of *Oeleze* support our conclusion that plaintiff's complaint is insufficient. In *Oeleze*, the plaintiff was injured while playing tennis when she tripped over a rope ladder that was concealed beneath a curtain at the edge of the tennis court. *Oeleze*, 401 Ill. App. 3d at 112-13. The evidence was that the defendant's employee, who taught a cardio-fitness class using the rope ladder and other equipment, knew that the equipment posed a tripping hazard to tennis players and ordinarily stored the rope ladder well behind the curtain in a storage box. *Oeleze*, 401 Ill. App. 3d at 114. Furthermore, because of the known danger posed, the tennis club's employees would regularly clean the floor of tripping hazards. *Oeleze*, 401 Ill. App. 3d at 113-14. The appellate court reversed the grant of summary judgment in favor of the defendant, reasoning that there was "no question that the club and its employees knew that placing an object on the floor closely behind a court curtain, hidden from the view of tennis players using the court, create[d] a dangerous hidden tripping hazard." Here, none of the allegations of plaintiff's complaint suggest a similar awareness among defendants' employees of a known danger posed by the rug.

¶ 23 *Thomas* was an appeal from a judgment entered in favor of the plaintiff following a jury trial on her willful and wanton claim against a defendant school district and its employee bus driver. *Thomas*, 7 Ill. App. 3d at 47-48. The evidence at trial was that, during a heavy fog, the school bus driver, while traveling eastbound, attempted to cross a north-south four-lane highway by pulling the bus into the street, blocking the southbound lanes. *Thomas*, 7 Ill. App. 3d at 48. While the bus driver was watching the northbound lanes for approaching cars, the plaintiff, driving southbound, crashed into the side of the bus. *Thomas*, 7 Ill. App. 3d at 49. The appellate court affirmed the judgment, noting that the bus driver had testified that she had been aware of the possibility of traffic

which she could not see because of the fog. *Thomas*, 7 Ill. App. 3d at 49. While plaintiff contends that the present case involves the "same scenario" as *Thomas*—*i.e.*, knowledge of impending danger and a failure to exercise ordinary care to prevent it—we fail to see how pushing a book cart over a bunched up rug permits an inference of imminent danger in the same manner that stopping a bus half way across a four-lane highway during a dense fog permits such an inference.

¶ 24 CONCLUSION

¶ 25 For the reasons stated, we affirm the judgment of the circuit court of Lake county.

¶ 26 Affirmed.