

NOTICE
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2014 IL App (4th) 130648-U

NO. 4-13-0648

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
July 8, 2014
Carla Bender
4th District Appellate
Court, IL

RICHARD E. MILLER,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
and)	Champaign County
LISA MILLER,)	No. 09L177
Plaintiff,)	
v.)	
THE TOWNSHIP OF PHILO, ILLINOIS; and BRIAN)	
MEHARRY,)	
Defendants-Appellees,)	
and)	
LEO V. MELTON,)	
Defendant,)	
and)	
VICTOR R. MISNER and MARVIDA MISNER,)	
Plaintiffs,)	
v.)	
RICHARD E. MILLER; LEO V. MELTON; THE)	
TOWNSHIP OF PHILO, ILLINOIS; and BRIAN)	Honorable
MEHARRY,)	Michael Q. Jones,
Defendants.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Pope and Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Plaintiff's complaint failed to allege sufficient facts to state a cause of action against defendants for failing to maintain a bridge railing, and the trial court's dismissal of his complaint pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2008)) was appropriate.

(2) The trial court abused its discretion in dismissing *with prejudice* plaintiff's claim alleging defendants failed to maintain a bridge railing, and remand to give

plaintiff the opportunity to replead his claim is warranted.

¶ 2 Plaintiff, Richard E. Miller, filed a complaint against defendants, the Township of Philo, Illinois (Township), and Brian Meharry, the Township's road commissioner, seeking to recover damages for injuries he sustained during a motor vehicle accident. The trial court dismissed plaintiff's claims against defendants with prejudice and plaintiff appeals. We affirm in part, reverse in part, and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 On August 1, 2009, plaintiff was injured in a motor vehicle accident at an unmarked intersection in rural Champaign County. The record reflects the pickup truck plaintiff was driving was struck by a pickup truck driven by Leo V. Melton. The impact of the collision forced plaintiff's truck onto a bridge located immediately west of the intersection where it struck the bridge's railing. The railing gave way and plaintiff's truck fell off the bridge. Victor R. Misner was a passenger in plaintiff's vehicle.

¶ 5 On August 18, 2009, Victor and his wife, Marvida, filed a complaint against plaintiff and Melton, seeking damages for injuries Victor sustained during the accident and for loss of consortium suffered by Marvida due to Victor's injuries. On February 18, 2010, plaintiff and his wife, Lisa, filed a motion for leave to file a cross-complaint against Melton and a complaint against the Township and Meharry. They attached a "cross complaint and complaint" to their motion. On March 19, 2010, the trial court granted the motion and ordered the pleadings filed *instanter*.

¶ 6 In their "cross complaint and complaint," plaintiff raised negligence claims against both the Township and Meharry, and Lisa raised a claim for loss of consortium against

the Township. They alleged plaintiff was driving his truck, headed westbound on the roadway, passing through the intersection, and about to drive over the bridge at issue when he was struck on the driver's side of his vehicle by Melton's vehicle. Plaintiff and Lisa asserted Melton was "traveling at a high rate of speed" and failed "to yield to traffic coming from the right, including [plaintiff's] vehicle." Further, they alleged the force of the collision diverted the direction of plaintiff's vehicle "proximately causing the [bridge] railing to give way and permit [plaintiff's] vehicle to plunge down into the ravine and into the stream at its base."

¶ 7 Plaintiff and Lisa alleged the bridge was owned and maintained by the Township and under Meharry's maintenance authority and jurisdiction. They asserted the Township and Meharry each had a duty to "construct and maintain safely the intersection and bridge." Plaintiff and Lisa further alleged the Township had the additional duties of providing "visibility of the intersection from encroaching crops, and to properly establish signage to warn and establish yielding of the right of way." They asserted the Township and Meharry breached those duties by (1) "permitting the bridge on the roadway to exist with inadequate bracing for the safety rail system sufficient to prevent a vehicle from being nudged into it and breaking the safety rail system so as to permit the vehicle to plunge over the bridge into the ravine and flowing water"; (2) failing to maintain the bridge to prevent it from failing, crumbling, and "destroying the structural integrity of the safety rail"; (3) "failing to shore up the bridge rail with adequate bracing to keep it in place and survive a collision while keeping the colliding vehicle on the road and preventing it from falling into the ravine and the flowing water"; (4) "failing to erect adequate signage for the bridge"; (5) "failing to erect adequate stop or yield signs" at the intersection; and (6) failing to remove crops growing around the intersection, which inhibited

visibility. Plaintiff and his wife alleged the Township's and Meharry's negligent acts or omissions proximately resulted in the collision or in the severity of the damages they suffered.

¶ 8 The Misners were also granted leave to add the Township and Meharry as defendants to their cause of action. On April 1, 2010, they filed four additional counts to their complaint raising claims against defendants.

¶ 9 On July 9, 2010, the Township and Meharry (hereinafter, defendants) filed a combined motion to dismiss all counts against them (735 ILCS 5/2-619.1 (West 2008)) and a memorandum of law in support of their motion. They alleged dismissal was warranted because (1) all claims related to the design or construction of the bridge and its railing were time-barred under the 10-year limitation period set forth in section 13-214(b) of the Code of Civil Procedure (Code) (735 ILCS 5/13-214(b) (West 2008)), (2) they owed no duty to maintain the bridge railing so as to prevent it from giving way when struck by plaintiff's vehicle under the facts alleged as that was not the intended use of the railing, (3) the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/3-104 (West 2008)) provided them with immunity for failing to initially provide traffic control devices or signs at an intersection, (4) they had no duty to clear foliage at the intersection, and (5) neither their acts nor omissions were the proximate cause of the accident or any of the injuries suffered.

¶ 10 Defendants attached the affidavits of three individuals to their motion. Mike Wilson stated he became employed by the Township in April 1996, worked for Meharry in connection with maintaining roads within the Township, was familiar with the intersection and bridge at issue, and traveled through the intersection approximately six to seven times per week while employed by the Township. Wilson further asserted he knew "no work was done in

connection with the design or construction of the bridge and bridge railings west of the intersection during the 10[-]year period prior to August 1, 2009."

¶ 11 John Cooper stated he was the assistant engineer of Champaign County and "familiar with the records of the county relating to the construction of bridges in the unincorporated areas of the county," including the bridge at issue. Cooper asserted the bridge and bridge railings were constructed in 1982 and had not been reconstructed since that date.

¶ 12 Finally, Meharry's own affidavit was attached to defendants' motion. He stated, at all times relevant, he was the Township's road commissioner and was familiar with the intersection, bridge, and bridge railings at issue. Meharry attached photographs to his affidavit, which he asserted were taken both prior to and after the accident. He asserted photographs taken prior to the accident showed "object markers on the bridge railings for" westbound traffic.

¶ 13 On August 2, 2010, plaintiff and Lisa filed a response to defendants' motion to dismiss. They characterized defendants' motion as an "ambush," and complained that defendants "ask[ed] for termination of th[e] litigation before discovery ha[d] furnished any answers." Plaintiff and Lisa argued "acts like inspecting bridges and fixing broken concrete were not "within the ambit of tort immunity." They also attached affidavits to their response, which they asserted "at least raise[d] a disputed issue of fact against the conclusions of the township that the bridge and intersection were safely maintained."

¶ 14 Plaintiff and Lisa attached the affidavit of Alan Smith to their response. Smith asserted he was plaintiff's father and arrived at the accident site before plaintiff's truck was removed from the scene. He stated he had the opportunity to observe the bridge railing, intersection, and crops. Smith asserted the signs depicted in a photograph attached to Meharry's

affidavit, which he described as "vertical, rectangular cross-hatched black and yellow signs at the four corners of the bridge," were not present after the accident. Moreover, Smith stated he observed an individual arrive at the scene of the accident and erect the signs depicted in Meharry's photograph. Further, he asserted he saw no signs at the intersection.

¶ 15 Smith also asserted he spent over 19 years in the contracting business, operated a salvage yard, and was experienced in concrete and metal. He stated he observed that "the [bridge] railing was fatigued and the concrete at its base was badly crumbled, consistent with erosion of the integrity of the concrete and metal due to weather, age, and the application of chemicals to thaw the bridge surface." Several photographs were attached to Smith's affidavit.

¶ 16 Plaintiff and Lisa also attached the affidavit of Cindy Ziegler to their response. Ziegler asserted she was plaintiff's sister and arrived at the accident scene less than an hour after it occurred. She recalled that there were no signs of any kind next to the corners of the bridge and no traffic signs at any of the four corners of the intersection.

¶ 17 Finally, plaintiff and Lisa attached the affidavit of Dean Kibler to their response. Kibler asserted, at the time of the accident, he worked for Smith (plaintiff's father) scrapping steel. He "immediately" went to the site of the accident. Kibler asserted he observed a Township employee installing signs at the corners of the bridge. He stated he also heard a police officer ask the employee "why there were no signs" and the employee responded that "the township didn't have money to put up signs at every location."

¶ 18 On August 6, 2010, plaintiff and Lisa filed a supplement to their response. They asserted discovery documents revealed "that at several different inspection times in at least 2003 and 2007, pieces of the bridge in question *** were missing." They attached inspection

documents to their response, stating the bridge at issue was missing "bridge rail end sections" in 2003 and 2007. Plaintiff and Lisa asserted there was a genuine issue of material fact as to defendants' failure to exercise due care in the maintenance of the bridge and no tort immunity exists for failure to do proper maintenance.

¶ 19 On August 23, 2010, the trial court conducted a hearing on defendants' combined motion to dismiss and granted the motion. It dismissed all claims against defendants with prejudice.

¶ 20 Ultimately, the remaining parties in the case settled and this appeal followed. (We note that, although both of the Millers were named as plaintiffs in the complaint against defendants which is at issue on appeal, the notice of appeal identifies only Richard Miller as appealing from the trial court's decision to grant defendants' motion to dismiss. Thus, we refer only to Richard as plaintiff in addressing the merits of his appeal.)

¶ 21 **II. ANALYSIS**

¶ 22 On appeal, plaintiff argues the trial court erred in granting defendants' motion to dismiss the claims against them. He argues (1) defendants' combined motion to dismiss was not properly segmented and failed to identify under what section of the Code, section 2-615 or 2-619, defendants' claims were being brought; (2) he was prejudiced by defendants' failure to provide full discovery and the short time period available for preparing a response to defendants' motion to dismiss; and (3) his claims against defendants alleging they failed to maintain the bridge and its railing were sufficient to withstand the motion to dismiss.

¶ 23 **A. Deficiencies in Appellant's Brief**

¶ 24 Initially, we are compelled to note deficiencies in both the form and content of

plaintiff's appellant brief. Illinois Supreme Court Rule 341 (eff. Feb. 6, 2013) sets forth the requirements for briefs on appeal, and plaintiff's brief fails to comply with that rule in several respects. Specifically, plaintiff's brief is not paginated, does not have proper margins, and does not appear to be in the required typeface. Ill. S. Ct. R. 341(a) (eff. Feb. 6, 2013). His brief does not contain a certificate of compliance. Ill. S. Ct. R. 341(c) (eff. Feb. 6, 2013). The "Points and Authorities" section of his brief does not provide references "to the page of the brief on which each heading and each authority appear." Ill. S. Ct. R. 341(h)(1) (eff. Feb. 6, 2013). Plaintiff's "Statement of Facts" consists of a single paragraph, does not "contain the facts necessary to an understanding of the case" given the points raised by plaintiff on appeal, and does not reference any pages of the appellate record upon which he relied. Ill. S. Ct. R. 341(h)(6) (eff. Feb. 6, 2013). In the "Argument" portion of his brief, plaintiff failed to cite relevant legal authority for each point raised. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013).

¶ 25 Further, plaintiff improperly raised matters in his brief that were outside of the appellate record. *Kildeer-Countryside School District No. 96 v. Board of Trustees of the Teachers' Retirement System*, 2012 IL App (4th) 110843, ¶ 21, 972 N.E.2d 1286 ("[G]enerally, a party may not rely on matters outside the appellate record to support his or her position on appeal."). He also failed to include a sufficient appendix with his brief. Ill. S. Ct. R. 342(a) (eff. Jan. 1, 2005) ("The appellant's brief shall include, as an appendix, a table of contents to the appendix, a copy of the judgment appealed from, any opinion, memorandum, or findings of fact filed or entered by the trial judge or by any administrative agency or its officers, any pleadings or other materials from the record which are the basis of the appeal or pertinent to it, the notice of appeal, and a complete table of contents, with page references, of the record on appeal.").

¶ 26 "The rules of procedure concerning appellate briefs are not mere suggestions, and it is within this court's discretion to strike the plaintiff's brief for failing to comply with Supreme Court Rule 341." *Crull v. Sriratana*, 388 Ill. App. 3d 1036, 1045, 904 N.E.2d 1183, 1190 (2009). Here, we decline to take such action but take the opportunity to note that the deficiencies in plaintiff's brief unnecessarily frustrated review. We caution the plaintiff and his attorney regarding the importance of complying with the rules pertaining to appeals.

¶ 27 B. Section 2-619.1 Combined Motion

¶ 28 Plaintiff first argues defendants' motion to dismiss failed to meet statutory requirements. Section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2008)) provides as follows:

"Motions with respect to pleadings under Section 2-615, motions for involuntary dismissal or other relief under Section 2-619, and motions for summary judgment under Section 2-1005 may be filed together as a single motion in any combination. A combined motion, however, shall be in parts. Each part shall be limited to and shall specify that it is made under one of Sections 2-615, 2-619, or 2-1005. Each part shall also clearly show the points or grounds relied upon under the Section upon which it is based."

¶ 29 "Although section 2-619.1 *** permits a movant to combine separate claims brought under section 2-615, 2-619, or 2-1005 into one filing, it prohibits the commingling of those distinctive claims." *Howle v. Aqua Illinois, Inc.*, 2012 IL App (4th) 120207, ¶ 72, 978 N.E.2d 1132. Rather, "a motion combining both sections 2-615 and 2-619 (1) *must* be in parts,

(2) *must* 'be limited to and shall specify that it is made under' either section 2-615 or 2-619, and
(3) *must* 'clearly show the points or grounds relied upon under the [s]ection upon which it is based.' " (Emphasis in original.) *Howle*, 2012 IL App (4th) 120207, ¶ 73, 978 N.E.2d 1132.

¶ 30 Where a section 2-619.1 combined motion does not meet statutory requirements, a trial court need not accept it for consideration and "should *sua sponte* reject such motions and give the defendants who filed them the opportunity (if they wish) to file a *** motion that meets the statutory requirements." *Howle*, 2012 IL App (4th) 120207, ¶ 73, 978 N.E.2d 1132. The failure to properly label a combined motion to dismiss is not an encouraged pleading practice; however, reversal for such a deficiency is only appropriate when the nonmovant has been prejudiced. *Burton v. Airborne Express, Inc.*, 367 Ill. App. 3d 1026, 1029, 857 N.E.2d 707, 711 (2006); *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484, 639 N.E.2d 1282, 1289 (1994) (The failure to designate whether a motion to dismiss is brought pursuant to section 2-615 or section 2-619 is not always fatal but reversal is required where prejudice results to the nonmovant.).

¶ 31 In this case, defendants' motion to dismiss failed to meet statutory requirements. Their combined motion was not segregated into parts, failed to specify under which statutory section their claims were being brought, and failed to clearly set forth the points or grounds relied upon under appropriate sections. Defendants' memorandum of law in support of their combined motion further failed to identify the applicable statutory section for each claim. However, despite the deficiencies in defendants' motion, reversal is not required.

¶ 32 The record shows plaintiff failed to voice any objection to defendants' motion before the trial court and, although the court could have rejected defendants' filing, it instead

considered defendants' claims and granted their motion. Moreover, on appeal, plaintiff fails to identify any way in which he was prejudiced by defendants' failure to comply with the Code. Additionally, we note defendants filed a reply to plaintiff's response to their motion to dismiss and specified the statutory section under which they were bringing their claims. Given plaintiff's failure to raise any objection with the trial court and his failure to assert prejudice on appeal, reversal based upon defendants' failure to comply with the requirements of section 2-619.1 is unwarranted.

¶ 33 C. Prejudice From Lack of Full Discovery and the Time Frame for Preparing a Response to Defendants' Motion To Dismiss.

¶ 34 On appeal, plaintiff next argues he was prejudiced because there had not been full discovery before the trial court considered defendants' motion to dismiss and due to "the short time for preparation" of a response to defendants' motion. However, plaintiff has failed to cite any legal authority to support his position as to this issue. Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013) provides that an appellant's brief must contain an argument section that sets forth the appellant's contentions "and the reasons therefor, with citation of the authorities and the pages of the record relied on." "Both argument and citation to relevant authority are required." *Vancura v. Katris*, 238 Ill. 2d 352, 370, 939 N.E.2d 328, 340 (2010). "Failure to comply with the rule's requirements results in forfeiture." *People ex rel. Illinois Department of Labor v. E.R.H. Enterprises*, 2013 IL 115106, ¶ 56, 4 N.E.3d 1.

¶ 35 In his brief, plaintiff failed to cite to any case law, statutory provision, or court rule to support either his contention that he was entitled to full discovery before the trial court ruled on defendants' motion to dismiss or that he was given an inadequate amount of time in which to respond to that motion. Plaintiff has forfeited this issue on review.

¶ 36 Despite plaintiff's forfeiture, however, we note "[a] discovery request may properly be quashed where the trial court has before it sufficient information upon which to decide defendant's motion to dismiss." *Yuretich v. Sole*, 259 Ill. App. 3d 311, 317, 631 N.E.2d 767, 772 (1994). Further, "[o]n good cause shown, in the discretion of the court and on just terms, additional time may be granted for the doing of any act or the taking of any step or proceeding prior to judgment." 735 ILCS 5/2-1007 (West 2008). Here, plaintiff did not make any specific discovery requests nor did he move to continue the matter for additional time to review the discovery materials he had received and respond to defendants' motion.

¶ 37 Also, as noted by both defendants and the trial court, plaintiff did not submit an affidavit pursuant to Illinois Supreme Court Rule 191(b) (eff. July 1, 2002), which "sets forth the procedure to be followed when a party believes that additional discovery is needed to properly respond to a section 2-619 motion to dismiss" (*Kensington's Wine Auctioneers & Brokers, Inc. v. John Hart Fine Wine, Ltd.*, 392 Ill. App. 3d 1, 11, 909 N.E.2d 848, 859 (2009)). Pursuant to that rule, "the court may make any order that may be just, either granting or refusing the motion, or granting a continuance to permit affidavits to be obtained, or for submitting interrogatories to or taking the depositions of any of the persons so named, or for producing documents in the possession of those persons or furnishing sworn copies thereof." Ill. S. Ct. R. 191(b) (eff. Jan. 4, 2013).

¶ 38 Here, plaintiff made no specific discovery requests, did not move to continue the proceedings at issue, and made no attempts to obtain the relief provided for by Rule 191(b) (eff. July 1, 2002). Thus, even absent plaintiff's forfeiture of the issue on appeal, we would find no reversible error.

¶ 39 D. Dismissal of Plaintiff's Claims Against Defendants

¶ 40 Finally, on appeal, plaintiff argues the trial court erred in dismissing his claim against defendants for failing to maintain the bridge and its railing. Initially, we note plaintiff also alleged defendants were negligent in several other respects, including failing to erect adequate signage at the accident site; failing to remove crops growing around the intersection; and in the design, construction, or installation of the bridge and its railing. However, on appeal, plaintiff does not challenge (or make arguments in his brief sufficient to challenge) the trial court's dismissal of each of his other claims. During oral argument, he conceded that he was not challenging the dismissal of those claims on appeal, and we do not address them.

¶ 41 As stated, plaintiff does challenge the trial court's dismissal of claims related to defendants' alleged failure to maintain the bridge and its railing. He contends (1) his pleadings raised questions of fact as to this issue, warranting denial of defendants' section 2-619 motion to dismiss; (2) the court erred in finding as fact that bridge railings were not intended to keep vehicles on the bridge (an issue he contends had not been part of the pleadings and was raised for the first time at the hearing on defendants' motion to dismiss); (3) case law supports a finding that duties exist with respect to maintaining bridges and their guardrails; and (4) the cases cited by defendants in support of their motion to dismiss are not on point with the facts presented by this case.

¶ 42 The record shows defendants' combined motion to dismiss sought dismissal pursuant to sections 2-615 and 2-619 of the Code. "A section 2-615 motion to dismiss attacks the legal sufficiency of the complaint." *Illinois Ass'n of Realtors v. Stermer*, 2014 IL App (4th) 130079, ¶ 16, 5 N.E.3d 267. Such a motion "presents the question of whether the facts alleged in

the complaint, viewed in the light most favorable to the plaintiff, and taking all well-pleaded facts and all reasonable inferences that may be drawn from those facts as true, are sufficient to state a cause of action upon which relief may be granted." *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 25, 988 N.E.2d 984. "In ruling on a section 2-615 motion, the court only considers (1) those facts apparent from the face of the pleadings, (2) matters subject to judicial notice, and (3) judicial admissions in the record." *Reynolds*, 2013 IL App (4th) 120139, ¶ 25, 988 N.E.2d 984. "A cause of action should be dismissed under section 2-615 only where it is clearly apparent that the plaintiff can prove no set of facts which would entitle him or her to recover." *McFatridge v. Madigan*, 2013 IL 113676, ¶ 16, 989 N.E.2d 165. "[T]he plaintiff must allege facts sufficient to bring a claim within a legally recognized cause of action." *Tedrick v. Community Resource Center, Inc.*, 235 Ill. 2d 155, 161, 920 N.E.2d 220, 223 (2009).

¶ 43 "A section 2-619 motion to dismiss admits the sufficiency of the complaint but asserts an affirmative defense or other matter that avoids or defeats the claim." *Stermer*, 2014 IL App (4th) 130079, ¶ 16, 5 N.E.3d 267. "Section 2-619(a)'s purpose is to provide litigants with a method of disposing of issues of law and easily proved issues of fact relating to the affirmative matter early in the litigation." *Hascall v. Williams*, 2013 IL App (4th) 121131, ¶ 16, 996 N.E.2d 1168. "A section 2-619 motion admits as true all well-pleaded facts, as well as all reasonable inferences that may arise therefrom" and "when ruling on a section 2-619 motion, a court must interpret all pleadings and supporting documents in favor of the nonmoving party." *Bjork v. O'Meara*, 2013 IL 114044, ¶ 21, 986 N.E.2d 626. "The question on appeal from an order granting dismissal under section 2-619 is 'whether the existence of a genuine issue of material

fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law.' [Citation.]" *Doyle v. Holy Cross Hospital*, 186 Ill. 2d 104, 109-10, 708 N.E.2d 1140, 1144 (1999).

¶ 44 A trial court's grant of a motion to dismiss under either section 2-615 or 2-619 is subject to *de novo* review. *Stermer*, 2014 IL App (4th) 130079, ¶ 16, 5 N.E.3d 267. On review, "this court may affirm the trial court's judgment on any basis that is supported by the record." *Stoll v. United Way of Champaign County, Illinois, Inc.*, 378 Ill. App. 3d 1048, 1051, 883 N.E.2d 575, 578 (2008).

¶ 45 "A complaint based upon negligence must set forth the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately resulting from that breach." *DiBenedetto v. Flora Township*, 153 Ill. 2d 66, 70, 605 N.E.2d 571, 573 (1992). "Whether or not a duty exists is a question of law which will be determined by the courts." *DiBenedetto*, 153 Ill. 2d at 70, 605 N.E.2d at 573.

¶ 46 The Tort Immunity Act confers no new duties and only delineates certain immunities; however, it does codify "the common law duty of local public entities to maintain their property in reasonably safe condition." *Corning v. East Oakland Township*, 283 Ill. App. 3d 765, 767, 670 N.E.2d 350, 352 (1996). Specifically, section 3-102 of the Tort Immunity Act (745 ILCS 10/3-102 (West 2008)) 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 in a manner in which and at such times as it was reasonably foreseeable that it would be used." However, "[n]either a township nor a municipality is an insurer against all accidents occurring on the

public way." *DiBenedetto*, 153 Ill. 2d at 71, 605 N.E.2d at 574. "Just as a municipality is only required to maintain its streets and sidewalks for their normal and intended uses, a township is only required to maintain the traveled way, shoulders, and drainage ditches according to their normal and intended uses." *DiBenedetto*, 153 Ill. 2d at 71-72, 605 N.E.2d at 574.

¶ 47 Here, the trial court determined defendants did not "have a duty to provide a bridge to safeguard" against the type of collision that occurred under the facts alleged. The court stated as follows:

"We have to *** address what the purpose of [the bridge] railing is, and what duty should be imposed on defendants. Is the intended and permitted use which is reasonably foreseeable *** that this railing would withstand the impact of two crashing trucks, and thereby prevent one truck from going over the bridge, and perhaps exacerbating the effect of the initial collision? ***

[I]s this the intended and permitted use of the railing? And it is my judgment that there is no issue of fact that that's not what the railing is intended for, and not the permitted use of it, to be the bumper against two crashing trucks, so as to guarantee that one of the vehicles doesn't go over the edge of the bridge into the creek below."

Defendants agree with the court's determination and assert dismissal of plaintiff's claim against them for failing to maintain the bridge or its railing was warranted on the basis asserted by the court.

¶ 48 Before the trial court and on appeal, defendants rely heavily on the supreme court's decision in *DiBenedetto*, 153 Ill. 2d 66, 605 N.E.2d 571. That case involved an accident that occurred when a car crossed over an opposite lane of travel, entered and crossed over a shoulder area, landed in a drainage ditch, and immediately overturned, killing the plaintiff's decedent. *DiBenedetto*, 153 Ill. 2d at 68, 605 N.E.2d at 572. The plaintiff alleged the defendant township was negligent in maintaining the right-of-way on the road by placing or permitting to be placed a ditch that was a danger to traffic using the right-of-way. *DiBenedetto*, 153 Ill. 2d at 68, 605 N.E.2d at 572. The supreme court affirmed the trial court's dismissal of the plaintiff's complaint pursuant to section 2-615 based upon a lack of duty owed to the plaintiff. *DiBenedetto*, 153 Ill. 2d at 69, 605 N.E.2d at 572-73. The court stated as follows:

"The question is, Does the defendant township have a duty to the motoring public to make its drainage ditches which run parallel to the traveled way to be safe for vehicular traffic? We hold not. There is no claim here that the traveled portion of the road, including the shoulder, was anything but safe. The drainage ditch was there for the purpose of receiving surface water and thereby protecting the traveled way from flooding. It was not designed to carry vehicular traffic. The right-of-way had three component parts, namely, the traveled way, the shoulder and the drainage ditch. Each of the parts was fulfilling its intended function. What happened in this case was that decedent, for whatever reason, lost control of his car, drove across an oncoming lane of the roadway,

on across the shoulder and into the ditch where his car overturned and he was killed." *DiBenedetto*, 153 Ill. 2d at 70, 605 N.E.2d at 573.

The court noted "[p]eople are not expected to drive in [drainage ditches] and the public cannot be an insurer of those who do." *DiBenedetto*, 153 Ill. 2d at 71, 605 N.E.2d at 573.

¶ 49 Defendants also rely on *Knight v. City of Chicago*, 298 Ill. App. 3d 797, 700 N.E.2d 110 (1998). In that case, a Chicago fire truck drove onto a raised median strip that was under repair, lost control when its wheels entered a planter box and tree pit, entered the opposite lane of traffic, and hit a car occupied by two young women, killing one and injuring the other. *Knight*, 298 Ill. App. 3d at 799, 700 N.E.2d at 111. The First District relied on *DiBenedetto* to find the city was not subject to liability for the accident, stating that a "municipality need only maintain the roadways in a safe and passable condition" and "[t]hat the area surrounding the roadway is unsafe for vehicular travel is not the sort of defect for which a municipality is liable." *Knight*, 298 Ill. App. 3d at 803, 700 N.E.2d at 114.

¶ 50 Defendants argue that just as the drainage ditch in *DiBenedetto* and the median in *Knight* were not intended for vehicular traffic, the bridge railing in the instant case "was not intended or permitted to be used in the manner created by the collision caused by Melton." Although *DiBenedetto* and *Knight* are instructive, we also find them factually distinguishable. Specifically, while a drainage ditch and median strip are not meant for vehicle travel, the intended use of the bridge in this case was to be travelled upon. Further, "the mere existence of the guardrail *** concedes the foreseeability that motorists would deviate from the ordinary course of travel in the direction of the guardrail." *Michalak v. LaSalle County*, 121 Ill. App. 3d

574, 576, 459 N.E.2d 1131, 1132 (1984).

¶ 51 The question that remains is the intended use of the bridge railing. "[A] guardrail stands as a warning of danger, a guide to the eye in keeping to the roadway, and a barrier of sufficient strength to withstand the ordinary weights and forces to which it is subjected." *Michalak*, 121 Ill. App. 3d at 576, 459 N.E.2d at 1132. "It is a question of fact whether a guardrail along a highway need be suitable merely as a warning, or must suffice physically to prevent vehicles from running off the highway into places of danger." *Michalak*, 121 Ill. App. 3d at 576, 459 N.E.2d at 1132.

¶ 52 Initially defendants argue that plaintiff's claim related to their failure to maintain the bridge and its railing cannot withstand a section 2-615 motion to dismiss. However, we note questions of fact are not appropriately resolved in the context of a section 2-615 motion to dismiss, which admits all well-pleaded facts as true and attacks only the legal sufficiency of a complaint. *Lee v. City of Decatur*, 256 Ill. App. 3d 192, 195, 627 N.E.2d 1256, 1258 (1994) ("Questions of fact can never be resolved in a section 2-615 motion."). Here, the trial court determined *as a matter of fact*, that the bridge railing was not intended to withstand the collision that occurred between plaintiff and Melton. Such a matter should not have been determined by the court when considering the legal sufficiency of plaintiff's complaint pursuant to section 2-615.

¶ 53 Although the trial court did not set forth an appropriate basis for dismissing plaintiff's claim against defendants for failing to maintain the bridge and its railing pursuant to section 2-615, we may affirm on any basis supported by the record. For the reasons that follow, we find dismissal pursuant to section 2-615 was warranted based on plaintiff's failure to

sufficiently plead a duty owed by defendants to plaintiff.

¶ 54 To reiterate, to establish that defendants were negligent in maintaining the bridge railing and survive a section 2-615 motion to dismiss, plaintiff had to plead sufficient facts to show they owed him a duty of care. As discussed, defendants had a common-law duty to maintain the bridge and its railing in a reasonably safe condition for its normal and intended use. Both before the trial court and on appeal, plaintiff has argued that the normal and intended use of the bridge railing was to keep vehicles on the roadway and prevent them from falling off the bridge. However, he failed to plead any facts in his complaint regarding the intended use of the bridge railing. Further, although plaintiff generally alleged in his complaint that defendants had a duty to maintain the bridge, he made no similar express allegation with respect to the bridge *railing*. Under these circumstances, plaintiff failed to plead sufficient facts to set forth the existence of a duty owed by defendants and, therefore, failed to state a negligence cause of action against them.

¶ 55 Under the circumstances presented, the trial court's dismissal of plaintiff's complaint pursuant to section 2-615 of the Code was appropriate. We affirm the court's judgment on that basis.

¶ 56 Before the trial court and on appeal, defendants have also argued dismissal of plaintiff's claim alleging failure to maintain the bridge and its railing was appropriate pursuant to section 2-619 of the Code. They argue "affirmative matter (the affidavits and photographs attached to Defendants' motion to dismiss) supports [their] tort immunity defense." We disagree and find the record does not support dismissal of plaintiff's claim on this asserted basis. As an initial matter, the evidentiary material identified by defendants does not constitute "affirmative

matter" under section 2-619. See 735 ILCS 5/2-619(a)(9) (West 2008) (providing for dismissal where "the claim asserted against [the] defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim"). Defendants also generically refer to a "tort immunity defense" without ever specifying the provision of the Tort Immunity Act they believe applies to defeat plaintiff's claim. Further, they have failed to identify other "affirmative matter" that would warrant dismissal pursuant to section 2-619(a)(9).

¶ 57 E. Dismissal With Prejudice

¶ 58 As a final matter, we note the trial court dismissed plaintiff's complaint with prejudice and, on appeal, plaintiff contends he should have been given "another shot at pleading facts to raise a duty and negligence, as well as proximate cause."

¶ 59 "Whether to dismiss an action with or without prejudice is a matter within the trial court's discretion." *Crull*, 388 Ill. App. 3d at 1046, 904 N.E.2d at 1191. "On review, we consider whether the court took the particular facts and unique circumstances of the case into account before determining that the case should be dismissed with prejudice." *Crull*, 388 Ill. App. 3d at 1046, 904 N.E.2d at 1191.

¶ 60 Here, as discussed, the trial court did not dismiss plaintiff's claim against defendants for failing to maintain the bridge railing on an appropriate basis and improperly determined an issue of fact in the context of a section 2-615 and 2-619 motion to dismiss. Although dismissal of plaintiff's claim was warranted under section 2-615 for failure to properly allege a duty owed by defendants in the maintenance of the bridge railing, the record also reflects the complaint at issue was plaintiff's initial pleading against defendants, and he requested the opportunity to replead. Under these circumstances, we believe the court abused its discretion in

dismissing plaintiff's claim with prejudice. We remand to the trial court with directions that it give plaintiff the opportunity to replead his claim relating to the maintenance of the bridge railing.

¶ 61

III. CONCLUSION

¶ 62 For the reasons stated, we affirm the trial court's dismissal of plaintiff's claims against defendants but reverse its *with prejudice* dismissal of plaintiff's claim relating to the maintenance of the bridge railing. We remand the matter to the trial court with directions that it allow plaintiff the opportunity to replead that claim.

¶ 63

Affirmed in part and reversed in part; cause remanded with directions.