2016 IL App (1st) 143865-U

FIFTH DIVISION
June 17, 2016

Nos. 1-14-3865 & 1-15-1198 (cons.)

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

PERRY J. SHWACHMAN and BLAIR SHWACHMAN,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Cook County
	)	
v.	)	
	)	No. 11 L 9598
NORTHFIELD TOWNSHIP HIGH SCHOOL	)	
DISTRICT 225; JILLIAN NOWAK; and	)	
MARK REBORA,	)	Honorable
	)	Eileen Mary Brewer,
Defendants-Appellees.	)	Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Lampkin and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the grant of summary judgment to a school district and two teachers sued by a student injured during an activity in a physical education class.

¶ 2 During a "mushball" game[1] in an honors physical education class at Glenbrook North High School (Glenbrook North), Niko Kollias (Niko) lost control of an aluminum bat. The bat struck and injured another student, Blair Shwachman (Blair). Blair and her father, Perry J.

[1] According to the appellants, mushball is "like baseball with a ball that gets progressively 'mushier' and 'squishier' and takes a greater effort to hit it further with the aluminum bats being used." The activity is referred to as "mushball," "Mushball," and "mush ball" in the record on appeal.

Shwachman (Shwachmans), filed a complaint in the circuit court of Cook County against Northfield Township High School District 225 (the District) and two physical education teachers employed by the District, Mark Rebora (Rebora) and Jillian Nowak (Nowak). The circuit court granted summary judgment to the District, Rebora and Nowak (collectively, School Defendants). On appeal, the Shwachmans assert that the School Defendants failed to establish that they engaged in a policy decision "when deciding to hold the mandatory Mushball activity" on a "backfield without safety equipment" and thus were not entitled to discretionary immunity under section 2-201 of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act or Act) (745 ILCS 10/1-101 *et seq.* (West 2010)). The Shwachmans also contend that the circuit court erred in granting summary judgment where genuine and material issues of fact exist as to whether the actions of the School Defendants "amounted to 'willful and wanton' " conduct pursuant to section 1-210 of the Tort Immunity Act.

¶ 3 For the reasons that follow, we affirm the judgment of the circuit court.

¶ 4 BACKGROUND

¶ 5 The Third Amended Complaint

¶ 6 The operative complaint is the third amended complaint filed on July 12, 2013, which alleged as follows. Blair and Niko were students in an honors gym class at Glenbrook North which was taught by Rebora and Nowak. The class required a greater degree of mandatory participation in activities than the regular gym class, and students were graded daily on their participation. On May 31, 2011, after having directed the class to participate in a mandatory mile run, Rebora and Nowak "knowingly supervised, instructed and directed" the class "to engage in the mandatory Mushball activity on a soccer field and directed and instructed the students to stand in the direct line of bats that could be thrown or let go by Mushball batters."

When Niko swung the bat, he threw it toward the area where the students were directed to stand, and the bat struck and injured Blair. According to the complaint, the teachers knew from their education, training and experience in the field of physical education that there was a "very high likelihood of batters throwing the bat" as they strike the ball during a mushball game.

¶ 7 Count I alleged that the School Defendants were "guilty of one or more of the following willful and wanton acts or omissions." The District, through its employees, "[w]ith conscious disregard and/or utter indifference" for Blair's safety, allegedly instructed the students to stand in an unsafe area, improperly supervised the activity by allowing and directing the students to stand in such area, and failed to warn students of the "high likelihood of injury" that existed while standing where they were directed. Count I further alleged that the teachers directed the students to play mushball on a soccer field "which was not designed or intended to be used as a Mushball field," instead of engaging in another activity that did not require the use of bats.

¶ 8 In counts directed at Niko, Blair alleged that multiple "careless and negligent acts and/or omissions" (Count III) and "willful, wanton and reckless acts and/or omissions" (Count IV) by Niko resulted in her "severe and permanent injuries." In Count II against the School Defendants and Counts V and VI against Niko,[2] Perry Shwachman alleged that he became obligated for medical and dental expenses under the Family Expense Act (750 ILCS 65/15 (West 2010)) because of the defendants' conduct.

¶ 9 School Defendants' Motion for Summary Judgment

¶ 10 On August 18, 2014, the School Defendants filed a motion for summary judgment on the third amended complaint, raising two primary arguments. First, the School Defendants contended they were immune from liability for their discretionary decisions as to where to play

[2] The record on appeal includes various pleadings and orders relating to the counts against Niko. As Niko is not a party to the instant appeal, we need not discuss such documents herein.

mushball and position students awaiting their turn to bat pursuant to the discretionary immunity provision (745 ILCS 10/2-201 (West 2010)) of the Tort Immunity Act. Second, the School Defendants asserted that their decisions regarding where and how to play mushball and where to position the students, as well as their conduct in supervising the students during the game, demonstrated a "conscious regard for safety" and, as a matter of law, "could never rise to the level of willful and wanton conduct" as defined in section 1-210 of the Act (745 ILCS 10/1-210 (West 2010)). The attachments to the motion for summary judgment included the depositions of Rebora, Nowak, Blair, Niko, and Robert Pieper (Pieper), a 17-year employee of the District who had served as chair of the physical education department since 2005.

¶ 11 Deposition of Robert Pieper

¶ 12 During his deposition, Pieper testified that he had seen Rebora with a class of students playing mushball on the soccer field where Blair was injured approximately twenty times during the prior seven or eight years. When asked about the number of times he saw *other* people playing mushball on that field, he answered "in the hundreds." Pieper had personally engaged classes in mushball games on fields without backstops on ten other occasions. As the varsity baseball coach, Pieper had seen the team play baseball on "other fields" and was not aware of any field where the "on deck" batter – the "person who is directly next getting ready to hit" – or individuals "out in the field" are protected by fencing or other safety structures.

¶ 13 Pieper confirmed that "the rules and the authority" in Blair's physical education class were Rebora and Nowak. The teachers determined the lesson plans and selected the day-to-day activities in their class, including the mushball game on May 31, 2011. Pieper also indicated that "how the game operated" was "exclusively Rebora and Nowak's determination." Pieper testified that he did not discipline Rebora or Nowak for the incident involving Blair. After Blair's injury,

a rule was instituted in the physical education department: "no mush ball on fields that don't have backstops." Although Pieper believed that playing mushball on fields without fencing is "not unsafe," the practice was stopped because of the Shwachmans' lawsuit. Pieper was unaware of any student sustaining an injury while playing mushball on a back field prior to the incident involving Blair.

¶ 14 Deposition of Mark Rebora

¶ 15 Rebora testified during his deposition that he had taught physical education at Glenbrook North for 22 years. On May 31, 2011, the class had participated in a "run" prior to the mushball game. According to Rebora, he and Nowak had considered playing mushball on the girls' softball field, but the field was "unaccessible [*sic*] to us" because the maintenance department "had just either lined it or was dragging it at the time." He confirmed that he "made a conscious decision to play the activity of mushball on the backfield instead." Although Rebora acknowledged that the class could have participated in another activity, he testified, "We had talked about it with the students before, and they wanted to play softball. So when we went out that day, all we had with us was softball equipment."

¶ 16 Discussing where he had instructed the students to stand, Rebora stated that he had "paced off about ten paces to the east and then another ten paces to the south." He estimated that the students were placed approximately 45 feet from the batter's position. Rebora stood "in front of the line" of students; he did not recall "[h]ow many people over was Blair," but stated that she "could be four deep or five or six deep in the line." He indicated that the "whole backfield" was available, and he "could have put the kids anywhere [he] wanted to." Rebora testified that "it was a freak accident" and he had placed the students "in what [he] believed was a very safe environment." He knew that bats "could fly out of people's hands" and had previously witnessed

a bat flying further than 45 feet. However, he disagreed with Blair's counsel's assertion that "having these kids stand in [the] area" where Blair was struck "was just a bad idea."

¶ 17 Deposition of Jillian Nowak

¶ 18 Nowak, who had taught physical education at Glenbrook North for five years, similarly testified during her deposition that the varsity softball field was under maintenance. Nowak confirmed that there were no backstops, dugouts or other types of protective barriers for the students on the back fields. She also testified that she could have directed the students to engage in an activity other than softball "but the equipment was with us, and there was an open back field." When asked why she directed the students to play the game on a field without protective equipment, Nowak responded, "It was a relax day, and typically they usually enjoy softball."

¶ 19 At the time of Blair's injuries, Nowak was standing on the "first base side" and Rebora was on the "[t]hird base side." Nowak testified that Rebora "count[ed] ***off" a distance from home plate; an equipment bag placed on the ground marked where the students waiting to bat would form the line. According to Nowak, the bag was placed closer to third base than home plate, and Rebora "made sure that everyone was behind that bag at all times." She also testified that she and Rebora were "monitoring the whole field." Throughout the game, Nowak gave instructions to the students like "[b]atter up, heads up," *i.e.*, "pay attention."

¶ 20 Nowak indicated that, prior to the incident with Blair, she was aware of potential hazards in the game, *e.g.*, the bat or ball hitting a student or students running into each other. She also recognized that mushball play on a field without protective fencing exposed students to the risk of being struck by bats. She acknowledged knowing that "a bat thrown by a righty batter hitting a mush ball with great velocity could travel greater than 10 feet down the line and 10 feet behind the line." Although she admitted that it was a "mistake" to "have the kids play on a field that

didn't have proper protective equipment," she later testified that she felt it was a mistake "[b]ecause of the accident that happened." According to Nowak, "this type of accident has never happened previously" at Glenbrook North.

¶ 21 Deposition of Blair Shwachman

¶ 22 During her deposition, Blair testified that the May 31, 2011, class was intended to be a "reward," *i.e.*, a "fun day in gym." She stated that the varsity girls' field was being groomed "[s]o then the teachers improvised." According to Blair, "[t]he teachers told us what to do and where to stand" during the mushball game. Blair did not know the exact distance between her and the third baseline, although she had been told it was approximately 15 feet. She testified that at least seven or eight students were waiting to bat, and she was standing in the middle of the line when she was struck.

¶ 23 Blair further testified, "Any time I had played softball or something at school before, we had always been on a normal field, protected by a cadge [*sic*] when we were waiting to bat." When asked what Rebora and Nowak "could have done to prevent this incident," Blair responded, "Picked a different game." She further stated that "it was the school's fault that we could not be on the baseball field. I do not think it was the teacher's [*sic*] fault. They were probably just following what they were told as to what we were doing as students." After the incident, Blair reassured Niko that "it was a freak accident."

¶ 24 Deposition of Niko Kollias

¶ 25 In his deposition, Niko testified that approximately fifteen or twenty minutes into the game on May 31, 2011, the bat slipped out of his hands. When asked if there was any reason the bat slipped, he responded, in part: "The bat was a used bat just like how the ball was, the grip, the leather -- it wasn't even leather, it was plastic, it was plastic on a metal bat, aluminum bat that

the plastic wasn't even attached to the bat, so there's like space in between, and along with it being very warm and hot out, my hands were sweaty, the bat was very used, all that together, the incident occurred." He never told Rebora or Nowak that his hands were sweaty or that he had difficulty gripping the bat prior to the incident.

¶ 26 Niko further testified that the "teachers had to remind students to back up because they kept crowding the batter." He stated that the teachers told the students to "stand far away" from the batter "numerous times." When asked about the placement of the equipment bag as a marker, Niko responded, "[T]hey might have had intentions of putting something like that, but really they only brought four bases and a bat and a ball." Niko did not recall Rebora telling the students to line up behind the equipment bag. He estimated that the bat flew approximately 60 feet from home plate before striking Blair.

¶ 27 Ruling on Summary Judgment

¶ 28 During a hearing on November 24, 2014, the circuit court granted the motion for summary judgment. The court stated, in part, that the "teachers' decision to have the students play mush ball is supported by policy determinations in that they selected a team activity, chose to continue that activity at the back fields because the softball field was unavailable, and they took conscious steps to take safety precautions to separate batters from students who were not on the field." The court also stated that "[t]he arguments and allegations by the plaintiff that a bat posed a danger is insufficient to establish willful and wanton conduct." According to the court, "[f]ollowing the plaintiff's logic, willful and wanton conduct, which has been restricted since the adoption of modified comparative negligence, would be broadly defined and permit for any known danger to permit willful and wanton conduct." The court continued:

"For example, we drive and know that a car can hurt people. That would

> permit a willful and wanton count for any car crash because we know the activity could be a dangerous activity. Plaintiff's definition ignores that the knowledge must be tied to a natural and probable outcome from the activity. Furthermore, the Tort Immunity Act adopted a higher standard for willful and wanton conduct in Section 210(c), [*Tagliere v. Western Springs Park District*, 408 Ill. App. 3d 235 (2001)]."

¶ 29 A written order entered on November 24, 2014, provided in part, "Defendants' Motion for Summary Judgment is granted pursuant to §§ 2-201 and 3-108 of the Tort Immunity Act as stated in the record." The order also scheduled a status hearing regarding an outstanding invoice to a physician. On December 19, 2014, the Shwachmans filed a notice of appeal, seeking reversal of the November 24, 2014, order. The appeal was assigned case number 1-14-3865. The Shwachmans subsequently filed a motion in the circuit court requesting a Rule 304(a) finding (Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010)); the court granted the motion on April 21, 2015. On April 27, 2015, the Shwachmans filed a second notice of appeal from the November 24, 2014, order granting summary judgment. The second appeal, assigned case number 1-15-1198, was consolidated with 1-14-3865. We consider the consolidated appeals herein.

¶ 30 ANALYSIS

¶ 31 The Tort Immunity Act "serves to protect local public entities and public employees from liability arising from the operation of government." *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 368 (2003). "By providing immunity, the legislature sought to prevent the diversion of funds from their intended purpose to the payment of damages claims." *Malinksi v. Grayslake Community High School District 127*, 2014 IL App (2d) 130685, ¶ 7. "Unless an immunity provision applies, municipalities are liable in tort to the same extent as private parties." *Van*

Meter, 207 Ill. 2d at 368-69.

¶ 32 The Shwachmans advance two primary arguments on appeal. First, the Shwachmans contend that they "established a question of fact as to defendants' conscious disregard for the safety of students, including plaintiff, who defendants knowingly directed to stand in the 'line of fire' where defendants knew [aluminum] bats could be projected." Second, the Shwachmans assert that "the trial court erred in granting summary judgment where defendants did not provide evidence of a policy consideration when deciding to hold a mandatory mushball game on a field without safety equipment, as required to establish immunity pursuant to [section] 2-201" of the Act. In light of our disposition of the first issue – discussed below – we need not address the second issue.

¶ 33 The Shwachmans argue that the circuit court erred in granting summary judgment where genuine and material issues of fact exist as to whether Defendants' actions amounted to "willful and wanton" conduct pursuant to section 1-210 of the Act. Section 1-210 of the Tort Immunity Act defines "[w]illful and wanton conduct" 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." 745 ILCS 10/1-210 (West 2010). The Shwachmans contend that the School Defendants "are not immune from their utter indifference or conscious disregard for the safety of the students."

¶ 34 Section 2-1005(c) of the Code of Civil Procedure provides that "judgment sought shall be rendered without delay if 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 a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2010). "It is a drastic means of disposing of litigation," and we have "a duty to construe the record strictly

against the movant and liberally in favor of the nonmoving party." *Murray v. Chicago Youth Center*, 224 Ill. 2d 213, 245-46 (2007). "Ordinarily, whether specific acts constitute willful and wanton conduct is a question of fact that is reserved for the jury." *Bielema ex rel. Bielema v. River Bend Community School District No. 2*, 2013 IL App (3d) 120808, ¶ 12. "However, where the record shows absolutely no evidence that the defendant displayed either an utter indifference to or a conscious disregard for the plaintiff's safety, then the court may properly decide the issue as a matter of law." *Mitchell v. Special Education Joint Agreement School District No. 208*, 386 Ill. App. 3d 106, 111 (2008). See also *Bielema*, 2013 IL App (3d) 120808, ¶ 12. "When considering an appeal from a grant of summary judgment, our review is *de novo*." *Payne v. City of Chicago*, 2014 IL App (1st) 123010, ¶ 19.

¶ 35 In granting summary judgment, the circuit court stated, in part: "[T]he Tort Immunity Act adopted a higher standard for willful and wanton conduct in Section 210(c),[3] [*Tagliere v. Western Springs Park District*, 408 Ill. App. 3d 235 (2011)]." According to the Shwachmans, the circuit court "applied a 'higher standard' for willful and wanton conduct than the law requires." The Illinois legislature amended section 1-210 of the Tort Immunity Act in 1998 to add one sentence to the statute after the definition of willful and wanton conduct: "This definition shall apply in any case where a 'willful and wanton' exception is incorporated into any immunity under this Act." P.A. 90-805, § 5 (eff. Dec. 2, 1998). The court in *Tagliere* stated, in part: "The 1998 amendment of section 1-210 of the Act did not change the statutory definition of willful and wanton. However the legislature, in the amendment, clearly indicated that it requires the use of the statutory definition of willful and wanton to evaluate the conduct of public entities in Tort Immunity Act cases to the exclusion of common law definitions[.]" *Tagliere*, 408

[3] Section 1-210 does not contain any subsections. We assume – although need not decide – that the circuit court judge may have stated "see," which was transcribed as "c."

Ill. App. 3d at 243. As to whether the section 1-210 standard for willful and wanton conduct is "higher" – *i.e.*, more stringent – than the common law definition of willful and wanton conduct, the Illinois Supreme Court has characterized the statutory definition in the Act as "entirely consistent with this court's long-standing case law." *Harris v. Thompson*, 2012 IL 112525, ¶ 41. See also *Murray*, 224 Ill. 2d at 242 (rejecting defendants' argument that the 1986 amendments to the Tort Immunity Act – when section 1-210 was enacted – imposed a heightened willful and wanton standard); but see *Bielema*, 2013 IL App (3d) 120808, ¶ 17 (stating that "[a]lthough we do not think that the [*Schneiderman v. Interstate Transit Lines, Inc.*, 394 Ill. 569, 583 (1946)] court's definition of willful and wanton conduct is necessarily consistent with the definition in section 1-210, the legislature clearly intended for the statutory definition to exclusively apply in cases involving the Tort Immunity Act."). In any event, regardless of the circuit court's characterization, we agree with the parties that the School Defendants' actions should be measured against the Act's definition. See *Barr v. Cunningham*, 2016 IL App (1st) 150437, ¶ 16; see also *Collins v. St. Paul Mercury Insurance Co.*, 381 Ill. App 3d 41, 45 (2008) (noting that "[i]n reviewing a grant of summary judgment, this court considers anew the facts and the applicable law").

¶ 36 Section 3-106 of the Act provides: "Neither 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." 745 ILCS 10/3-106 (West 2010). The School Defendants contend that "[a]ny allegation that liability was based upon the condition of the backfields, is immunized pursuant to [section]

3-106 Recreational Property Immunity of the Tort Immunity Act." The Shwachmans respond – and we agree – that section 3-106 "does not apply to the present case."

¶ 37 The definition of willful and wanton conduct is also incorporated into section 3-108 of the Act, which addresses "supervision of an activity or use of property." 745 ILCS 10/3-108 (West 2010). Section 3-108(a) provides: "Except as otherwise provided in this Act, neither a local public entity nor a public employee who undertakes to supervise an activity on or the use of any public property is liable for an injury unless the local public entity or public employee is guilty of willful and wanton conduct in its supervision proximately causing such injury." *Id*. The School Defendants have invoked section 3-108 supervision immunity, and the order granting summary judgment referenced section 3-108. Although the briefs do not address in detail what constitutes "supervision," the Shwachmans assert on appeal – as they alleged in their third amended complaint – that the School Defendants "supervised, directed, controlled and instructed the students with a conscious disregard for their safety." "Supervision has been defined to include not only passive oversight of an activity but also direction, teaching, demonstration of techniques and – to some degree – active participation in an activity while supervising it." (Internal quotation marks omitted.) *Doe v. Dimovski*, 336 Ill. App. 3d 292, 298 (2003). "Such cases typically concern situations involving adult leaders overseeing after-school programs, lifeguards supervising swimming pools, and teachers supervising physical education classes." *Id*. Section 3-108 previously granted absolute immunity to public entities; the legislature amended section 3-108 in 1998 to contain an immunity exception for willful and wanton conduct. *Choice v. YMCA of McHenry County*, 2012 IL App (1st) 102877, ¶ 55. In the instant case, the key issue is whether the School Defendants engaged in "willful and wanton conduct."

¶ 38 The Shwachmans assert that "the Defendants knew of the hazards created by directing the students to line up on the make shift, third base line of a soccer field, while waiting to take their turn at bat in Mushball." They also contend that the "evidence establishes that Defendants knew that holding the mandatory Mushball game on the soccer field without backstops, fencing dugouts, protection or safety equipment exposed the students to the known risk of being hit by a bat." According to the Shwachmans, "Defendants knowingly exposed each student that was directed to line up in the 'line of fire' to the risk of being hit by a bat."

¶ 39 "[W]illful and wanton conduct requires 'foreknowledge of specific and probable harm.' " *Barr*, 2016 IL App (1st) 150437, ¶ 23, quoting *Choice*, 2012 IL App (1st) 102877, ¶ 79. "[M]ere speculation as to potential harm, or conclusory allegations as to knowledge of potential harm, are *** insufficient to sustain a cause of action for willful and wanton misconduct." *Choice*, 2012 IL App (1st) 102877, ¶ 75. The School Defendants contend that "there had never been an instance of a student being injured by a thrown bat in at least the last 22 years and 'hundreds' of mushball games on the backfields." We recognize that "[r]egarding notice, while a prior accident could establish conscious awareness, the absence of a prior accident does not necessarily preclude a finding of willful and wanton misconduct." *Jiotis v. Burr Ridge Park District*, 2014 IL App (2d) 121293, ¶ 45; but see *Floyd ex rel. Floyd v. Rockford Park District*, 355 Ill. App. 3d 695, 701 (2005) (noting that "[p]rior knowledge of similar acts is required to establish a 'course of action' " for purposes of section 1-210). In the instant case, both Rebora and Nowak admitted that they knew – prior to Blair's injuries – that a bat may fly out of the hands of a swinging batter; Nowak also acknowledged that "softball shouldn't be played on a field that doesn't have protective barriers or [has] defective barriers."[4] However, nothing in the

[4] Blair's counsel asked Nowak about her knowledge "that softball shouldn't be played on a field

record suggests a thrown bat and/or any resulting injury was a "specific, foreseeable, and probable danger." *Choice*, 2012 IL App (1st) 102877, ¶ 72. The Shwachmans contend that "[t]hrough his years of experience as the physical education department head, Mr. Robert Pieper never had any of his students participate in the Mushball activity on the soccer field where Blair was injured." However, Pieper indicated that he had engaged classes in mushball games on other fields that did not have backstops on ten occasions and that "hundreds" of mushball games had been played on the field where Blair was injured. Considering mushball has been played at Glenbrook North for years without injury from a thrown bat we would be hard-pressed to conclude that the activity involved "probable" harm or danger.

¶ 40 Section 1-210 defines willful and wanton conduct to include a "course of action *** which, if not intentional, shows an utter indifference to or conscious disregard for the safety" of others. In this case, Rebora marked off an area away from home plate – which he "thought was a very safe area" – for students to wait for their turn at bat. He and Nowak enforced placement at this location and repeatedly cautioned students who would encroach upon the playing field. The teachers thus attempted to minimize the possibility – however remote – that a student would be hit by a bat or otherwise injured during the game. These steps were coupled with other efforts aimed at ensuring the safety of the students, *e.g.*, use of the softer "mushball." The record contains no evidence that Rebora and Nowak displayed either an utter indifference to or a conscious disregard for Blair's safety. See, *e.g.*, *Mitchell*, 386 Ill. App. 3d at 111. As their conduct was not willful and wanton, the teachers are immune from liability. See 745 ILCS 10/1-210 (West 2010); 745 ILCS 10/3-108 (West 2010). The teachers' immunity extends to the

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that doesn't have protective barriers or defective barriers, correct?" Nowak responded, "It could be played there." Counsel then asked, "But you know that from [*sic*] safety reasons it shouldn't, correct?" Nowak answered, "Yes."

District, as a local public entity "is not liable for an employee's actions when the employee is immune." *Kevin's Towing*, 351 Ill. App. 3d 540, 545 (2004); 745 ILCS 10/2-109 (West 2010) (providing that "[a] local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable").

¶ 41 Aided by hindsight, we know that the precautions taken by the School Defendants did not prevent Blair's injury. Nowak expressly acknowledged that "[i]t was a mistake" to have the students play mushball on a field without proper protective equipment. Mere ineffectiveness, however, does not establish a course of action demonstrating that a defendant was utterly indifferent or consciously disregarded the safety of others. See, *e.g.*, *Bielema*, 2013 IL App (3d) 120808, ¶ 19 (affirming grant of summary judgment to school district; finding district "took some action to remedy the danger posed by" a spilled liquid even though school principal's husband "could have done more to warn" the student of the spill); see also *Leja v. Community Unit School District 300*, 2012 IL App (2d) 120156, ¶ 11 (noting that the section 1-210 definition of willful and wanton conduct "contemplates more than mere inadvertence, incompetence, or unskillfulness"). The higher standard of "willful and wanton" conduct – as opposed to negligent conduct – simply cannot be met in this case.

¶ 42 Furthermore, the cases cited by the Shwachmans are distinguishable. For example, in *Murray v. Chicago Youth Center*, a 13-year-old student was severely injured while attempting to perform a forward flip off of a mini-trampoline during an extracurricular tumbling class. *Murray*, 224 Ill. 2d at 217. A subsequent lawsuit alleged, among other things, that the defendants – the board of education, the city youth center, and the center instructor – " failed to supply appropriate safety and protective equipment, failed to supply a spotter, failed to warn [the student] of the risk of spinal cord injury, and failed to stop the class from using the trampoline

unsafely." *Id.* at 218. The circuit court granted the defendants' summary judgment motions, ruling that section 3-109 of the Tort Immunity Act – which addresses "hazardous recreational activity" – did not "trump" the blanket immunity provided by sections 2-201 (discretionary immunity) and 3-108 (supervision immunity). *Id.* at 224-25. The appellate court affirmed the grant of summary judgment "but held, because trampolining is a hazardous recreational activity, section 3-109 of the Tort Immunity Act is the provision that determines the scope of defendants' immunity." *Id*. at 225. In reversing the grant of summary judgment and remanding for further proceedings, the Illinois Supreme Court in *Murray* found that "section 3-109 takes precedence over sections 2-201 and 3-108(a) of the Act." *Id.* at 229. The court stated that "[t]he evidence demonstrates that it is well known that use of a mini-trampoline is associated with the risk of spinal cord injury from improperly executed somersaults and that catastrophic injuries, including quadriplegia, can result from an improperly executed somersault." *Id.* at 246. In addition, the evidence indicated "that the tumbling/trampoline program was not supervised by an instructor with professional preparation in teaching trampolining, nor was it taught in a proper manner with reminders of the risk of injury incorporated into the teaching process." *Id.*

¶ 43 Unlike in *Murray*, the instant case did not involve a hazardous recreational activity, like trampolining. See 745 ILCS 10/3-109 (West 2010).[5] Furthermore, the mushball activity was supervised by trained teachers who had experience with the game; the *Murray* instructor "had never taught the mini-trampoline to anyone prior to instructing" the tumbling class at the plaintiff's school. *Id.* at 218. Rebora and Nowak were actively involved in the supervision of the

[5] The *Murray* plaintiffs "[did] not dispute that, under ordinary circumstances, sections 2-201 and 3-108(a) of the Tort Immunity Act would provide defendants with absolute immunity for discretionary and supervisory conduct." *Murray*, 224 Ill. 2d at 226. We note that, at the time of the injury in *Murray*, section 3-108(a) did not include any reference to "willful and wanton." 745 ILCS 10/3-108 (West 1992).

mushball game; they monitored the playing field and cautioned students throughout the game. Conversely, the *Murray* instructor "had not spotted the students using the mini-trampoline, nor had he assigned other students to act as spotters." *Id.* at 220. While "genuine and material triable issues of fact" (*id.* at 246) existed in *Murray*, the instant case is substantially dissimilar.

¶ 44 The Shwachmans also cite a number of cases addressing section 3-106 "recreational property" immunity. 745 ILCS 10/3-106 (West 2010). For example, in *Muellman v. Chicago Park District*, 233 Ill. App. 3d 1066, 1067 (1992), the plaintiff sustained injures when she stepped into an uncovered pipe in a public park. Affirming the circuit court's judgment against the defendant park district, the appellate court noted that "not only did defendant know that the pipes existed, defendant was aware and acknowledged the danger of pipes protruding from the ground by painting them so machine operators could readily see and avoid the pipes. Defendant, however, consciously disregarded the safety of the general public by painting only those pipes which they determined could damage defendant's equipment." *Id.* at 1069. In *Palmer v. Chicago Park District*, 277 Ill. App 3d 282, 284 (1995), a portion of a wire mesh fence surrounding a playlot – intended to protect children from nearby traffic – had fallen and was lying "in the form of loops" on the ground and sidewalk. A two-year-old child using the playlot ran through the fallen fence area; her father was injured when he tripped on the fence as he ran after her to prevent her from entering the street. *Id*. at 284-85. In reversing the trial court's order denying the plaintiff leave to file a third amended complaint, the appellate court observed: "Common sense dictates that defendant's employees, who inspected the playlot daily, simply could not have missed seeing a fence *3 feet high and 30 feet long* that had been lying on its side on the westerly edge of the playlot for a three-month period prior to plaintiff's injury." (Emphasis in original.) *Id.* at 288. The School Defendants herein did not have knowledge of any significant

and actual danger, *i.e.*, an open pipe in the ground at a public park (*Muellman*) or a damaged fence at a playlot (*Palmer*). Instead, Rebora and Nowak were aware that there was a possibility that a swinging batter could throw a bat. Furthermore, the *Muellman* and *Palmer* defendants ignored the obvious hazards and/or failed to implement remedial or protective measures; the teachers herein purposely positioned the students away from the game and repeatedly warned students about entering the playing area.

¶ 45 The Shwachmans also cite *Peters v. Herrin Community School District No. 4*, 2015 IL App (5th) 130465, ¶ 1, wherein a student was injured running into a bumper that was not visible during a high school summer football camp held on the football field. He alleged, in part, willful and wanton conduct of the defendants (the school district and the board of education), *i.e.*, the grass was not properly cut, the bumper was not visible, and the coaches of the football team instructed the plaintiff to take a particular route when running from the locker room to the football field causing him to run into the bumper. *Id.* ¶ 2. The trial court granted the defendants' motion for summary judgment as to the willful and wanton count. *Id.* ¶ 4. The appellate court directed the trial court on remand to "review the record to determine whether the coaches were informed of the dangerous condition the bumper presented and whether the actions of the coaches amounted to willful and wanton conduct." *Id.* ¶ 57. Similar to *Muellman* and *Palmer*, a critical issue in *Peters* was whether the defendants had been "informed of the dangerous condition." *Id.* As the School Defendants note, "there is simply no evidence that [the School Defendants] had any reason to suspect that any student in that class would throw the bat some forty-five to sixty feet towards their classmates."

¶ 46 Finally, the recent decision of the Illinois Appellate Court in *Barr v. Cunningham*, 2016 IL App (1st) 150437, addressed the scope of "willful and wanton" conduct. In *Barr*, a 15-year-

old student participated in a floor hockey game during a physical education class. *Id.* ¶ 3. During the game, the hockey ball – used in lieu of a hockey puck – bounced up off another player's stick and hit the student in the eye, resulting in injury. *Id.* The student sued his physical education teacher and the school district, alleging that the teacher's failure to require students to wear the available safety goggles constituted willful and wanton conduct. *Id.* ¶ 4. The teacher testified, in part, that (a) she could have required the use of goggles for floor hockey but was uncertain if she had enough goggles for all the students who played that day; (b) she was unaware of any rule or regulation requiring the use of goggles during floor hockey; and (c) none of her students had ever been hit in the face with a ball or stick despite the fact that the ball occasionally bounced in the air. *Id.* ¶ 9. The trial court granted the defendants' motion for a directed verdict, agreeing that the student had failed to prove willful and wanton conduct as a matter of law, and the defendants were thus immune from liability under section 3-108(a) of the Act. *Id.* ¶ 12. The court also found that the defendants were not entitled to discretionary immunity under section 2-201. *Id.* ¶ 29.

¶ 47 The *Barr* appellate court reversed and remanded, finding that a jury could conclude that the teacher's judgment calls were willful and wanton. *Id.* ¶ 25. The court observed that "when evaluating a defendant's conduct, courts ask whether the defendant has taken any action to mitigate danger." *Id.* ¶ 19. The *Barr* defendants took several steps to ensure the safety of the students who played floor hockey, *e.g.*, the use of plastic sticks and a "squishy" ball, limiting the number of players, and banning certain tactics such as high-sticking and checking. *Id.* ¶ 20. However, the teacher did not testify that she believed that these measures would prevent the ball from reaching a player's eyes. *Id.* "Thus," the court reasoned, "a jury could find [the teacher] did nothing to mitigate this particular danger." *Id.* The court also stated "that the trial court

should have allowed this case to go to the jury for its consideration, simply because the conscious decision to forego the use of already-available safety equipment is the sort of conduct that a jury could find to be willful and wanton." *Id.* ¶ 22. A dissenting justice opined, in part, that "the majority's decision requires public entities to take every possible precaution to prevent all injuries, no matter how remote and improbable those injuries may seem, lest they find themselves liable for willful and wanton conduct." *Id.* ¶ 39 (Mason, J., dissenting).

¶ 48 *Barr* is distinguishable from the instant case. Rebora and Nowak did not make a "conscious decision to forego the use of already-available safety equipment." *Id.* ¶ 22. The record is clear that the softball field which the teachers intended to use was being "dragged" and was thus unavailable to the class. Wherein, the use of goggles would almost certainly have prevented or minimized the *Barr* plaintiff's injury. Herein, even if the mushball game had been played on a field with protective features, the risk of injury to Blair or others would not have been eliminated. For example, an errant bat could have struck an "on deck" batter or any of the players on the field, *e.g.*, the pitcher. As the *Barr* majority noted, "[w]illful and wanton conduct involves failure to take reasonable precautions despite having notice that substantial danger was involved." (Internal quotation marks omitted). *Id.* ¶ 23. Even assuming *arguendo* there was notice of a "substantial danger," the teachers herein took "reasonable precautions," as described above. Furthermore, as noted in the *Barr* dissent: "[T]his is a quintessential example of a teacher taking, at worst, 'insufficient precautions' for her students' protection; and our supreme court has determined that such failure does not, as a matter of law, amount to willful and wanton misconduct." *Id.* ¶ 36 (Mason, J., dissenting), citing *Lynch v. Board of Education of Collinsville Community Unit District No. 10*, 82 Ill. 2d 415, 430 (1980).

¶ 49 We conclude that there is no genuine issue as to any material fact regarding "willful and

wanton" and that the School Defendants are entitled to judgment as a matter of law. See 735 ILCS 5/2-1005(c) (West 2010).[6] In light of our conclusion, we need not reach the Shwachmans' argument that the circuit court erred on the issue of discretionary immunity.

¶ 50 CONCLUSION

¶ 51 The judgment of the circuit court of Cook County is affirmed.

¶ 52 Affirmed.

[6] In Count II of the third amended complaint, Perry Shwachman asserts a claim under the Family Expense Act (750 ILCS 65/15 (West 2010)) for medical and dental expense obligations. As Blair cannot recover on Count I, summary judgment is also appropriate as to Count II.