Nos. 1-10-0498 and 1-10-0901, Consolidated

FIFTH DIVISION
March 31, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LORRAINE PATTULLO-BANKS and GEORGE BANKS, Plaintiffs-Appellants, v. RAND E. GERALD, an Individual; CITY OF PARK RIDGE, a Municipal Corporation; UNION PACIFIC RAILROAD COMPANY, a Corporation; REGIONAL TRANSPORTATION AUTHORITY, a/k/a COMMUTER RAIL DIVISION OF THE REGIONAL TRANSPORTATION AUTHORITY, a/k/a NORTHEAST ILLINOIS REGIONAL COMMUTER RAILROAD CORPORATION, d/b/a METRA, a Municipal Corporation; and ROBERT D. CASEY, JR., individually and as Trustee of the Robert D. Casey Profit Sharing Plan and of the Robert D. Casey, Jr. Pension Plan, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 08 L 7074 Honorable Lynn M. Egan, Judge Presiding

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JUSTICE HOWSE delivered the judgment of the court.

Presiding Justice Fitzgerald Smith and Justice Epstein concurred in the judgment.

O R D E R

_____*HELD:* Because a section 2-619(a)(9) motion could not be used at this stage to rebut a well-pled fact in plaintiffs' complaint, the circuit court's dismissal of the claims against the City of Park Ridge based on section 3-102(a) of the Tort Immunity Act was improper. The dismissals of the claims against defendants George Banks and Union Pacific are affirmed.

Plaintiffs George Banks and Lorraine Pattullo-Banks filed negligence and loss of consortium actions against defendants Rand Gerald, the City of Park Ridge, Union Pacific Railroad Co. and Robert Casey in order to recover damages for personal injuries Pattullo-Banks suffered after she was hit by an automobile while crossing Touhy Avenue in the City of Park Ridge. After the cases were consolidated, the trial court granted Park Ridge's and Union Pacific's motions to dismiss plaintiffs' claims. The trial court also granted Casey's motion for summary judgment.

On appeal, plaintiffs contend the trial court erred in finding Union Pacific, the City of Park Ridge and Casey did not owe a duty to plaintiffs with regards to Pattullo-Banks' injuries. Plaintiffs also contend the trial court erred in not allowing plaintiffs leave to file a third amended complaint. For the reasons that follow, we affirm the trial court's judgment in part, reverse in part, and remand for further proceedings.

BACKGROUND

On February 20, 2008, plaintiff Pattullo-Banks was seriously

injured when she was struck by a car while crossing Touhy Avenue near the intersection of 3rd Street in Park Ridge, Illinois. Pattullo-Banks and her husband George Banks filed negligence actions against defendants the City of Park Ridge (City), Union Pacific Railroad Co. (Union Pacific), Rand Gerald and Robert Casey, Jr. The cases were consolidated before Judge Egan.

In their second amended complaint in the consolidated action, plaintiffs alleged Pattullo-Banks was a "train commuter" who safely exited the Park Ridge train station on Summit Avenue via the City's public sidewalk on the south side of Touhy Avenue. Plaintiffs alleged Pattullo-Banks used this particular exit because a pedestrian bridge over Touhy Avenue provided by Union Pacific was closed due to the City's construction of the "Uptown Redevelopment Project." After Pattullo-Banks exited the train station, she walked westbound along the south side of Touhy Avenue until she reached the intersection of Touhy Avenue and 3rd Street. Plaintiffs alleged that because Pattullo-Banks could no longer walk on the sidewalk due to an "unnatural accumulation of ice and snow" on the portion of the sidewalk that crossed defendant Casey's private property, Pattullo-Banks was "forced to cross Touhy Avenue in an unmarked crosswalk at the intersection of 3rd Street in order to continue her westbound journey." While crossing the street, Pattullo-Banks was struck by an automobile

driven by defendant Gerald. Plaintiffs allege that as a direct and proximate result of the above-noted circumstances, Pattullo-Banks suffered severe and permanent injuries.

In Count II of their complaint, plaintiffs specifically alleged Casey was negligent by failing to maintain his property and allowing an unnatural accumulation of snow and ice to block the portion of the sidewalk that crossed his private property along Touhy Avenue.

In Count III, plaintiffs alleged the City was responsible for snow and ice removal on Touhy Avenue. Plaintiffs alleged the City was negligent by "creating or aggravating an unnatural accumulation of snow and ice by plowing snow from the street, onto the sidewalks and crosswalks, thereby preventing pedestrians from safely walking on the sidewalks and crosswalks along Touhy Avenue." Plaintiffs also alleged the City was negligent because they had knowledge of, and participated in, the closure of Union Pacific's pedestrian bridge. Plaintiffs alleged the City knew that the closing of the pedestrian bridge, mixed with the City's elimination of the signal and crosswalk at Meacham and Touhy Avenues, created an unsafe condition for train commuters. Plaintiffs suggested it was reasonably foreseeable that known and permitted users of the train station who exited the station would "cross Touhy Avenue with no pedestrian safeguards" since the

pedestrian bridge and Meacham/Touhy crosswalk were no longer available. Plaintiffs further alleged the City knew that commuters who lived north of Touhy Avenue and west of the train station could not safely walk along the south side of Touhy Avenue to the Cumberland Avenue intersection, where a marked crosswalk existed, because of the condition it and private landowners had created on the sidewalk along the south side of Touhy Avenue.

In Counts IV and V, plaintiffs alleged Union Pacific engaged in negligent and/or willful and wanton conduct by: closing access to the pedestrian bridge in spite of the forseeability of the dangerous condition such a closure would create for train commuters; failing to give notice of the closure; failing to provide an alternate route for train commuters to safely cross Touhy Avenue; failing to reopen the pedestrian bridge after receiving complaints from train commuters regarding the unsafe condition; and failing to warn train commuters of the unsafe condition upon exiting at Touhy Avenue. Plaintiffs alleged that as a direct and proximate result of Union Pacific's negligent and/or willful and wanton conduct, Pattullo-Banks was struck and seriously injured by Gerald's automobile as she crossed Touhy Avenue at 3rd Street.

Union Pacific filed a section 2-615 (735 ILCS 5/2-615 (West

2008)) motion to dismiss plaintiffs' claims, which was converted by agreement to a section 2-619.1 (735 ILCS 5/2-619.1 (West 2008)) motion. In its motion, Union Pacific alleged plaintiffs' claims failed as a matter of law because Union Pacific owed no duty to Pattullo-Banks after she safely exited the train station. The City brought a combined section 2-619(a)(9) and 2-615 motion to dismiss, alleging the City owed no duty to Pattullo-Banks because she was not an "intended user" of Touhy Avenue and the danger was "open and obvious." The City also alleged its actions could not be a proximate cause of Pattullo-Banks' injuries. In support of its motion, the City attached diagrams and photographs of the accident cite, and an affidavit from City of Park Ride Police Department Sergeant Kirk Ashleman, an investigating officer and accident reconstructionist who was sent to the scene after plaintiff Pattullo-Banks was struck by Gerald's automobile.

The trial court granted the City's and Union Pacific's motion to dismiss. In granting the City's 2-619.1 motion, the court specifically found plaintiff Pattullo-Banks was not an "intended user" within the meaning of section 3-102 of the Tort Immunity Act (Act) (745 ILCS 10/3-102(a) (West 2008)). The court also found the danger to Pattullo-Banks was "open and obvious." In granting Union Pacific's motion to dismiss, the court found "imposing this sort of a duty on an entity like Union Pacific or

a village or a city is absolutely staggering, and I can't imagine how it could be sustained." The court noted that even if plaintiffs' duty argument was limited to winter months, "the notion that a village or city or entity like Union Pacific has an obligation to apprise itself at all times of the status of adjoining property, the passibility of that property, and then presumable [*sic*] take some action to make it clear and passable is something that I don't think is warranted under Illinois law."

The trial court also granted defendant Casey's separately-filed motion for summary judgment, finding the same analysis with respect to Union Pacific's alleged duty to the plaintiff applied to Casey's summary judgment motion. The court stayed plaintiffs' case against Gerald pending the outcome of plaintiffs' consolidated appeal.

ANALYSIS

I. Standard of Review

A section 2-619(a)(9) motion to dismiss admits the legal sufficiency of the complaint and raises defects, defenses, or other affirmative matters that defeat the claims. 735 ILCS 5/2-619(a)(9) (West 2008); *Valdovinos v. Tomita*, 394 Ill. App. 3d 14, 17 (2009). The question on review is whether a genuine issue of material fact precludes dismissal or whether dismissal is proper as a matter of law. *Fuller Family Holdings, LLC v. Northern*

Trust Co., 371 Ill. App. 3d 605, 613 (2007). We review a circuit court's judgment on a section 2-619 motion to dismiss *de novo*. *Valdovinos*, 394 Ill. App. 3d at 18.

Summary judgment is appropriate where the pleadings, depositions, admissions, and affidavits on file, when taken in the light most favorable to the nonmovant, show there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2008); *Intersport, Inc. v. National Collegiate Athletic Ass'n.*, 381 Ill. App. 3d 312, 318 (2008). Our review of the circuit court's grant of summary judgment is *de novo*. *Intersport, Inc.*, 381 Ill. App. 3d at 318.

II. Casey's Motion for Summary Judgment

Plaintiffs contend the trial court erred in granting summary judgment in defendant Casey's favor. Specifically, plaintiffs contend the trial court erred in finding Casey did not owe a duty of care to Pattullo-Banks. We disagree.

To properly state a cause of action for negligence, the plaintiff must establish that the defendant owed a duty of care, a breach of that duty, and an injury proximately caused by the breach. *Wojdyla v. City of Park Ridge*, 148 Ill. 2d 417, 421 (1992). "Whether or not the duty of care exists is a question of law to be determined by the court." *Wojdyla*, 148 Ill. 2d at 421,

citing *McLane v. Russell*, 131 Ill. 2d 509, 514 (1989). The touchstone of a court's duty analysis is to " 'ask whether a plaintiff and a defendant stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff.' " *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 280-81 (2007), quoting *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 436 (2006). Four factors drive such an inquiry: "(1) the reasonable forseeability of injury, (2) the likelihood of injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing the burden upon the defendant." *Forsythe*, 224 Ill. 2d at 281, citing *Marshall*, 222 Ill. 2d at 436-37.

In support of his summary judgment motion, Casey attached an affidavit in which he said he had "no ownership interest" in the sidewalk at issue that crossed his vacant property along Touhy Avenue. Casey averred that he did not clear the sidewalk of snow or ice, nor hire any individuals or companies to clear the sidewalk of snow and ice, between May 31, 2006, and February 1, 2009. Casey also averred that no defects in the building caused any snow, ice or accumulations of any kind to collect on his property or the adjacent sidewalk at any time. Casey attached a "Plat of Survey" completed in 1984 to his motion, which allegedly indicated the sidewalk did not belong to him. Although

plaintiffs contend it has not been clearly established that Casey does not own the sidewalk at issue here, we note plaintiffs failed to present any evidence to rebut Casey's factual allegations in his affidavit that he had no ownership interest in the sidewalk. Because facts unrebutted in an affidavit are taken as true, we find Casey established below that he was not an owner of the sidewalk. See *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 262 (2004) ("When supporting affidavits have not been challenged or contradicted by counteraffidavits or other appropriate means, the facts stated therein are deemed admitted"); *Valenti v. Mitsubishi Motor Sales* of America, *Inc.*, 332 Ill. App. 3d 969, 972 (2002).

The general rule is that an owner or occupier of a premises is not liable for personal injuries incurred on a public sidewalk that is under the control of a municipality. *Burke v. Grillo*, 227 Ill. App. 3d 9, 16 (1992). An owner or operator of a premises has a duty to insure a public sidewalk is safe only when he appropriates the sidewalk for his own use. *Burke*, 227 Ill. App. 3d at 17, citing *Dodd v. Cavett Rexall Drugs, Inc.*, 178 Ill. App. 3d 424, 432 (1988). However, an abutting landowner does have a duty to exercise ordinary care not to create an unsafe condition that would interfere with the customary and regular use of the walk. *Burke*, 227 Ill. 2d at 17, citing *Thiede v. Tambone*,

196 Ill. App. 3d 253, 260 (1990).

Moreover, " '[a] property owner has no duty to remove a natural accumulation of snow and ice from his property; however, a property owner who voluntarily undertakes the removal of snow and ice can be subjected to liability where the removal results in an unnatural accumulation of snow or ice that causes injury to a plaintiff.' " *Tzakis v. Dominick's Finer Foods, Inc.*, 356 Ill. App. 3d 740, 746 (2005), quoting *Russell v. Village of Lake Villa*, 335 Ill. App. 3d 990, 994 (2002). This court has noted that in order to avoid summary judgment in a case such as this, a plaintiff "must allege sufficient facts for a trier of fact to find that defendants were responsible for an unnatural accumulation of water, ice or snow which caused plaintiff's injuries." *Tzakis*, 356 Ill. App. 3d at 746.

Plaintiffs contend that the photographs of the sidewalk abutting Casey's property attached to the City's motion to dismiss show that someone made a "half-hearted" effort to clear a path in the parking lot of Casey's property. Plaintiffs suggest a jury could reasonably conclude Casey was responsible for clearing the partial path through his parking lot. Plaintiffs also suggest a jury could reasonably conclude that the snow removed to create the path through the parking lot was eventually deposited onto the abutting public sidewalk, thereby contributing

to the allegedly unnatural accumulation of snow that forced Pattullo-Banks to leave the sidewalk and cross Touhy Avenue.

Although we recognize a plaintiff need not prove his or her case at a summary judgment hearing, we note the plaintiff must present facts to show the origin of the snow or ice that resulted in the plaintiff's injury was unnatural or caused by the defendant. See *Tzakis*, 356 Ill. App. 3d at 745. We find plaintiffs have failed to do so here.

Nothing in the record, besides plaintiffs' speculation, suggests Casey contributed to the creation of the allegedly unnatural accumulation of snow on the public sidewalk that plaintiffs suggest led to Pattullo-Banks' injury. While the photographic evidence certainly reflects some type of path was created or worn through a portion of the parking lot (not the adjoining public sidewalk) on Casey's property, nothing in the record suggests the path's creation contributed to any alleged unnatural accumulation on the public sidewalk that might have led to Pattullo-Banks' injury. In fact, Casey's unrebutted affidavit established he took no action with regards to removing snow or ice from either his own vacant property or the adjoining public sidewalk prior to Pattullo-Banks' injury. Moreover, plaintiffs' own allegations below strongly suggest the allegedly unnatural accumulation of snow and ice that made the public sidewalk

impassable actually resulted from the City's efforts in plowing and clearing Touhy Avenue after a snow storm, not by any conduct on Casey's behalf as a landowner.

Accordingly, we find the trial court was correct in granting Casey's summary judgment motion as a matter of law. See *Tzakis*, 356 Ill. App. 3d at 747.

III. Union Pacific's Motion to Dismiss

Plaintiffs contend the trial court erred in granting Union Pacific's motion to dismiss plaintiffs' claims based on a finding that Union Pacific did not owe a duty to Pattullo-Banks after she safely exited Union Pacific's property. Plaintiffs contend Union Pacific was aware of the dangerous condition it created for train commuters like Pattullo-Banks by closing the pedestrian bridge crossing Touhy Avenue, in effect depriving her of a safe means of "egress" from the station.

Generally, " '[a] landowner has a duty to provide a safe means of ingress and egress to his premises for his invitees.' " *Ford v. Round Barn True Value, Inc.*, 377 Ill. App. 3d 1109, 1114 (2007), quoting *Harris v. Old Kent Bank*, 315 Ill. App. 3d 894, 902 (2000). Within limits, that duty may extend beyond the precise boundaries of the landowner's property. *Ford*, 377 Ill. App. 3d at 1114; *Hanks v. Mount Prospect Park Dist.*, 244 Ill. App. 3d 212, 217 (1993). However, where the landowner "has

exercised no control over the adjacent property, he will not be held liable for injuries which occur on adjacent property." *Hanks*, 244 Ill. App. 3d at 217. Moreover, liability will not be imposed where the injury is not caused by a physical defect in the adjacent property, but rather is the result of an independent factor. *Hanks*, 244 Ill. App. 3d at 217, citing *Laufenberg v. Golab*, 108 Ill. App. 3d 133 (1982).

In *Swett v. Village of Algonquin*, 169 Ill. App. 3d 78 (1988), the plaintiff, her husband and her mother were crossing Illinois Route 31 while walking from the Iron Skillet restaurant towards the Iron Skillet's parking lot across the street when they were struck by an automobile. Plaintiffs filed a negligence cause of action against Iron Skillet, alleging the restaurant owed them a duty of care to properly maintain a safe ingress and egress to and from the restaurant. The trial court granted Iron Skillet's section 2-615 motion to dismiss plaintiffs' claims. On appeal, plaintiffs contended they adequately alleged Iron Skillet breached the duty owed to them by failing to either improve existing lighting or construct adequate lighting at the roadway crossing area, by failing to install or request a marked and posted crosswalk, and by failing to warn them of the unsafe condition of the crossing area.

In rejecting plaintiffs' contentions, the court held it was

clear there was "no static, hidden defect of the roadway which was known to the Iron Skillet but not plaintiffs" that caused their injuries. *Swett*, 169 Ill. App. 3d at 88. Although Iron Skillet was clearly aware that its invitees were crossing the roadway, its only duty to plaintiffs was to disclose or warn against latent or concealed perils that it had knowledge of and its invites did not. *Swett*, 169 Ill. App. 3d at 88. Because the plaintiffs had not alleged they were unaware that the area they were crossing was a roadway for vehicular traffic, the court held the plaintiffs could not be said to have been unaware of the ordinary danger of crossing such a roadway. *Swett*, 169 Ill. App. 3d at 88. The court also concluded Iron Skillet owed plaintiffs "no duty to protect them from the motorists traveling on the public roadway located between its restaurant and its parking lot." *Swett*, 169 Ill. App. 3d at 89-90.

Similarly, in *Laufenberg v. Golab,* 108 Ill. App. 3d 133 (1982), the plaintiff was injured by an automobile while crossing a public street in the Village of Maywood. The plaintiff's amended complaint alleged the defendant "had a duty to provide safe access across said 5th Avenue from the stable areas located on either side of 5th Avenue." Specifically, the complaint alleged the defendant failed to exercise reasonable diligence, failed to have signals in the vicinity of the intersection,

failed to furnish adequate crossing guards and failed to maintain a crosswalk. The trial court granted the defendant's motion to dismiss the plaintiff's claims. On appeal, this court noted its first inquiry was to determine as a matter of law whether the defendant owed the plaintiff a duty to take steps to prevent the plaintiff's injury. *Laufenberg*, 108 Ill. App. 3d at 135. Noting the mishap occurred on a public street over which the defendant had no authority and did not result from the condition of the street itself, the court recognized it was difficult to find the existence of a legal duty. *Laufenberg*, 108 Ill. App. 3d at 135. Because the injuries allegedly suffered by the plaintiff had no connection of any kind with the physical condition of the roadway, and, instead, resulted entirely from the intervention of an independent factor beyond the defendant's control, the court found the defendant had no legal duty to the plaintiff. *Laufenberg*, 108 Ill. App. 3d at 136.

In this case, plaintiffs admit Pattullo-Banks safely exited Union Pacific's train station. The record below also reflects Pattullo-Banks walked a distance from the train station prior to encountering the impassible portion of the public sidewalk that crossed Casey's land. Although plaintiffs suggest Union Pacific was negligent in choosing to close the pedestrian bridge that crossed Touhy Avenue closer to the train station, we note

plaintiffs do not allege Union Pacific either actually created or knew of the hazard on the portion of public sidewalk that crossed Casey's land and allegedly forced Pattullo-Banks to step into Touhy Avenue. Because Pattullo-Banks' injury resulted from the intervention of independent factors beyond Union Pacific's control--namely the fact that she crossed Touhy Avenue in an unmarked area of the road where she was struck by an automobile driven by Gerald--we find the trial court was correct in determining Union Pacific did not owe a legal duty to plaintiffs in this case. See *Swett*, 169 Ill. App. 3d at 88.

Moreover, the specific facts of this case "confirm the soundness of the policy of not imposing a general duty to guard against the negligence of others." See *Abdo v. Trek Transportation,* 221 Ill. App. 3d 493, 500 (1991). We agree with the trial court's determination that Union Pacific had no obligation to either apprise itself at all times of the status of adjoining public sidewalks near its property that it had no control over, or to take steps to ensure the public sidewalks near its property remained clear and passable. Imposing such a duty upon Union Pacific in this case would create the type of "intolerable burden on society" this court seeks to avoid. See *Abdo,* 221 Ill. App. 3d at 500 ("when a third party is in the best position to prevent a plaintiff's injury, there is no

justification for imposing liability upon a landowner.") Accordingly, we affirm the trial court's dismissal of those counts of plaintiffs' amended complaint that alleged negligence against Union Pacific.

IV. Leave to Amend

Plaintiffs contend the trial court erred in denying them leave to amend their claims against Casey and Union Pacific. We disagree.

Pursuant to section 2-1005 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1005 (West 2008)), the trial court shall permit pleadings to be amended before or after entry of summary judgment upon just and reasonable terms. *Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992). When determining whether a plaintiff should have been given leave to amend, we must examine: (1) whether the proposed amendment would cure the defective pleadings; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment was timely; and (4) whether previous opportunities to amend the pleading could be identified. *Loyola Academy*, 146 Ill. 2d at 273. A trial court's decision as to whether to grant a plaintiff leave to amend is reviewed for an abuse of discretion. *Judge-Zeit v. General Parking Corp.*, 376 Ill. App. 3d 573, 587 (2007).

In this case, we find the trial court did not abuse its discretion because plaintiffs' proposed amendments would not have cured the defective pleadings with regards to their claims against Casey or Union Pacific. As explained above, plaintiffs allegations failed to establish that either Union Pacific or Casey owed a legal duty to Pattullo-Banks. We find plaintiffs' proposed amendments would not have cured those defects. See *Judge-Zeit*, 376 Ill. App. 3d at 587.

V. City of Park Ridge's Motion to Dismiss

Plaintiffs contend the trial court erred in granting the City's motion to dismiss plaintiffs' second amended complaint. Specifically, plaintiffs contend they adequately established the City owed Pattullo-Banks a duty of care because she was a permitted and intended user of the publicly owned and maintained sidewalk that ran along Touhy Avenue. Plaintiffs also contend Pattullo-Banks was forced into crossing the street based an unnatural accumulation of snow and ice created by Park Ridge, which allegedly made a portion of the sidewalk running along Touhy Avenue impassible. Plaintiffs further contend the trial court erred in finding the "open and obvious danger" doctrine applied to their claims.

A. Duty of Care

The trial court granted the City's section 2-619 motion to

dismiss based in part on its finding that Pattullo-Banks was not an "intended user" of Touhy Avenue under section 3-102(a) of the Tort Immunity Act (Act).

Under the Tort Immunity Act, a defendant has a duty to maintain its property only for people who are both "intended and permitted" users of the property. *Bonert v. Village of Schiller Park*, 322 Ill. App. 3d 557, 560 (2001). Section 3-102(a) of the Act specifically provides:

> "(a) Except as otherwise provided in this Article, a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used, and shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to

remedy or protect against such condition."

745 ILCS 10/3-102(a) (West 2008).

Because pedestrians are not intended users of streets, a defendant generally does not owe a duty of reasonable care to pedestrians who attempt to cross a street outside the crosswalks. *Williams v. City of Chicago*, 371 Ill. App. 3d 105, 107 (2007). The intent requirement is determined by the property's nature, not the intent of the person who uses it. *Wojdyla v. City of Park Ridge*, 188 Ill. 2d 417, 425-26 (1992). Our supreme court has noted: "Marked or unmarked crosswalks are intended for the protection of pedestrians crossing streets, and municipalities are charged with liability for those areas. Those areas do not, however, include a highway in midblock." *Wojdyla*, 188 Ill. 2d at 426. "The law imposes no general duty on municipalities for the safeguarding of pedestrians when they are using public streets as walkways *** [t]he law is well-settled, therefore, that a municipality owes no duty to a pedestrian crossing a public street outside of the crosswalk." *Mason v. City of Chicago*, 173 Ill. App. 3d 330, 331-32 (1988).

Initially, Park Ridge and plaintiffs disagree on appeal regarding whether the facts below established Pattullo-Banks crossed Touhy Avenue in an unmarked crosswalk, as plaintiffs alleged, or midblock, as Park Ridge alleged.

In an affidavit filed in support of Park Ridge's motion to dismiss, City of Park Ridge Police Department Sergeant Kirk Ashleman, the Department's accident reconstruction officer, said he responded to the scene of Pattullo-Banks' accident at 6:30 p.m. on February 20, 2008, approximately 9 minutes after the accident occurred. Sergeant Ashleman averred that the accident "did not occur in, at or near a marked crosswalk as no crosswalk was present at this location." In support of his affidavit, Sergeant Ashleman attached a copy of the accident reconstruction diagram, a copy of the reconstruction accident report he prepared for Park Ridge, and several photographs of the accident site. The attached report notes "[i]t appears that [Pattullo-Banks] decided to cross Touhy midblock instead of crossing at an intersection."

We recognize "[e]vidence which merely refutes [an] ultimate fact and well-pled allegation is not an 'affirmative matter' under section 2-619." *Malanowski v. Jabamoni*, 293 Ill. App. 3d 720, 724 (1997), citing *Evergreen Oak Electric Supply and Sales Company, Inc. v. First Chicago Bank of Ravenswood*, 276 Ill. App. 3d 317, 319 (1995) ("Affirmative matter within the meaning of 2-619(a)(9) must be something more than evidence offered to refute well-pled facts in the complaint, since the well-pled facts must be taken as true for purposes of a motion to dismiss.") However,

a defendant's section 2-619 motion only admits all well-pleaded facts that are proper within the limited context of what is necessary to establish plaintiff's claim. *Barber-Colman Co. v. A & K Midwest Insulation Co.*, 236 Ill. App. 3d 1065, 1073 (1992). A defendant "does not admit the truth of any allegations in plaintiff's complaint that may touch on the affirmative matters raised in the 2-619 motion." *Barber-Colman Co.*, 236 Ill. App. 3d at 1073. "If the facts alleged in the complaint are the basis of the claim, the section 2-619 motion admits them. If, however, the allegations are not part of the claim, and most particularly, if they challenge the affirmative factual matters raised by the section 2-619 motion, they are not admitted." *Barber-Colman Co.*, 236 Ill. App. 3d at 1073.

If a party moving for dismissal supplies facts which, if not contradicted, would entitle the party to a judgment as a matter of law, the opposing party cannot rely on bare allegations alone to raise issues of material fact. *Atkinson v. Affronti*, 369 Ill. App. 3d 828, 835 (2006). "Facts contained in an affidavit in support of a motion to dismiss which are not contradicted by counter-affidavit must be taken as true for purposes of the motion." See *Atkinson*, 369 Ill. App. 3d at 835. The rule assumes, however, that the affidavit supports an allegation of affirmative matter, not material that contests facts that support

the claim." *Evergreen Oak Electric Supply and Sales Company, Inc.*, 276 Ill. App. 3d at 319.

Plaintiffs contend a material question of fact exists regarding whether Pattullo-Banks crossed Touhy Avenue outside of an unmarked crosswalk. We agree.

Although we recognize Sergeant Ashleman alleged in his affidavit in support of Park Ridge's motion to dismiss that Pattullo-Banks crossed the street outside of a crosswalk, we note plaintiffs properly alleged in their amended complaint that Pattullo-Banks "was forced to cross Touhy Avenue in an unmarked crosswalk at the intersection of 3rd Street in order to continue her westbound journey." Because the facts alleged in plaintiffs' amended complaint formed the basis of their claim and must be accepted as true at this stage, we find the facts alleged in Sergeant Ashleman's affidavit in support of Park Ridge's 2-619(a)(9) motion to dismiss merely refute a well-pled allegation. Since an affirmative matter must be based on something more than evidence offered to refute a well-pled fact, we find the trial court erred in dismissing plaintiffs' claim as barred by section 3-102(a) of the Act based on the facts alleged in the affidavit. Plaintiffs are correct that the issue amounts to a factual dispute that should not have been decided in a section 2-619(a)(9) motion. See *Evergreen Oak Electric Supply and Sales*

Company, Inc., 276 Ill. App. 3d at 319 ("Affirmative matter within the meaning of 2-619(a)(9) must be something more than evidence offered to refute well-pled facts in the complaint, since the well-pled facts must be taken as true for purposes of a motion to dismiss.")

In reaching the above conclusion, however, we note we are not addressing the underlying merit of plaintiffs' allegations that Park Ridge owed Pattullo-Banks a duty here. We simply find that in light of plaintiffs' well-pled allegation, the trial court erred in granting Park Ridge's section 2-619(a)(9) motion to dismiss plaintiffs' claims based on section 3-102(a) of the Act at this stage.

B. Open and Obvious Condition

Notwithstanding, Park Ridge also contended below, and the trial court agreed, that it had no duty to warn Pattullo-Banks of the "open and obvious danger" of being struck by a car while crossing the street.

Ordinarily, parties who own, occupy, control or maintain land are not required to foresee and protect against injuries from potentially dangerous conditions that are open and obvious. *Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 85 (2004), citing *Bucheleres v. Chicago Park District*, 171 Ill. 2d 435, 447-48 (1996). "The open and obvious nature of the condition itself

gives caution and therefore the risk of harm is considered slight; people are expected to appreciate and avoid obvious risks." *Bucheleres*, 171 Ill. 2d at 448, citing *Ward v. K mart Corp.*, 136 Ill. 2d 132, 148 (1990). A condition is deemed open and obvious where a reasonable person in the plaintiff's position exercising ordinary perception, intelligence and judgment would recognize both the condition and the risks involved. *Alqadhi v. Standard Parking, Inc.*, 405 Ill. App. 3d 14 (2010). Whether a condition is open and obvious depends on the objective knowledge of a reasonable person, not the plaintiff's subjective knowledge. *Prostran*, 349 Ill. App. 3d at 86. Accordingly, no duty to warn or protect may be imposed upon a defendant where the danger is open and obvious. *Sandoval v. City of Chicago*, 357 Ill. App. 3d 1023, 1028 (2005).

However, our supreme court has noted the existence of an open and obvious condition is not intended as an automatic or *per se* bar to the finding of a legal duty on the part of the defendant who owns, occupies, or controls the area where the injury occurred. *Bucheleres*, 171 Ill. 2d at 449. Illinois courts have stated at various times that whether a condition presents an open and obvious danger is a question of fact. *Quershi v. Ahmend*, 394 Ill. App. 3d 883, 888 (2010) (citing

cases). However, courts have also treated it as part of the duty analysis and thus a question of law. *Quershi*, 394 Ill. App. 3d at 888. "Under either analysis, it seems to be a fact-intensive inquiry examining the use of the instrument by a reasonable person." *Quershi*, 394 Ill. App. 3d at 888.

In this case, we see how one could view crossing a busy street as a dangerous condition that was open and obvious to Pattullo-Banks. Assuming the law could be interpreted to not impose a duty on Park Ridge to prevent or warn of such an open and obvious condition, such an interpretation would prevent Park Ridge from being liable for Pattullo-Banks' injuries unless the distraction exception or the deliberate encounter exception is found to apply. See *Prostran*, 349 Ill. App. 3d at 92.

Although nothing in plaintiffs' allegations suggest the distraction exception would apply, plaintiffs allegations and arguments below do suggest the deliberate encounter exception to the open and obvious danger rule might be applicable here. The deliberate encounter exception provides that a landowner owes a duty of care even in the face of a known and obvious danger if the landowner should still anticipate the harm despite such knowledge. *Simmons v. American Drug Stores, Inc.*, 329 Ill. App. 3d 38, 43 (2002), citing *Ward*, 136 Ill. 2d at 149. "Harm may be reasonably anticipated when a possessor of land has reason to

expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk." *Simmons*, 329 Ill. App. 3d at 43. "If a hazard is open and obvious 'liability stems from the knowledge of the possessor of the premises, and what the possessor had reason to expect the invitee would do in the face of the hazard.' " *Simmons*, 329 Ill. App. 3d at 45, quoting *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 391 (1998).

Even assuming the danger presented to Pattullo-Banks in crossing the street at an unmarked crosswalk can properly be considered an open and obvious condition, we find a question still exists at this stage regarding whether the deliberate encounter exception should apply to plaintiffs' allegations. See *Simmons*, 329 Ill. App. 3d at 45. Based on the well-pled allegations before us, which we must accept as true at this stage, we note a trier of fact could properly conclude Park Ridge should have anticipated Pattullo-Banks would be forced to cross the street in an unmarked crosswalk in order to avoid the otherwise impassable section of the public sidewalk. As this court noted in *Simmons*, "[h]arm may be reasonably anticipated when a possessor of land has reason to expect that the invitee will proceed to encounter the known or obvious danger because to

a reasonable man in his position the advantages of doing so would outweigh the apparent risk." *Simmons*, 329 Ill. App. 3d at 43.

Accordingly, we find the trial court should not have granted Park Ridge's section 2-619 motion to dismiss at this stage based on the allegedly "open and obvious" nature of the danger Pattullo-Banks faced in crossing the street. See *Simmons*, 329 Ill. App. 3d at 45 ("Even assuming *arguendo* that the "cartnapper" barriers presented an open and obvious danger, plaintiff correctly notes that a possessor of land should anticipate the harm despite such knowledge.")

C. Proximate Cause

Lastly, Park Ridge contends on appeal that we should find the trial court properly granted Park Ridge's motion to dismiss because plaintiffs failed to establish Pattullo-Banks' injury was proximately caused by Park Ridge's allegedly negligent conduct. Although Park Ridge recognizes the trial court did not rely on this basis in granting its motion to dismiss, Park Ridge properly notes we may affirm the dismissal on any ground that appears in the record, regardless of the trial court's ultimate reasoning. *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 261 (2004).

While proximate cause is ordinarily a question of fact, it can be determined as a question of law when the facts are

undisputed and of such a character that no reasonable persons could differ regarding the inferences to be drawn from them. *Wood v. Village of Grayslake*, 229 Ill. App. 3d 343, 354-55 (1992); *Simmons*, 329 Ill. App. 3d at 45.

In *Scerba v. City of Chicago*, 284 Ill. App. 3d 435, 439 (1996), the plaintiff was struck and injured by a car while crossing the street outside of a marked crosswalk. The facts established the plaintiff crossed the street midblock because a Chicago Transit Authority (CTA) bus was blocking the crosswalk. Although the CTA did not contest it owed a duty to the plaintiff, it contended, and the trial judge agreed, that the CTA bus created only a "condition" when it blocked the crosswalk, and that the immediate and proximate cause of the injury was the plaintiff's independent decision to cross in front of the bus onto the middle of the road.

Reversing the trial court's grant of summary judgment in the CTA's favor on the issue of proximate cause, this court noted "a reasonable jury could find an unbroken causal connection between the blocked intersection and the injury." *Scerba*, 284 Ill. App. 3d at 441. Although the court recognized the plaintiff foolishly rejected several safe routes for the risky path he chose, the court noted "availability of another route, standing alone, is not enough to erase the forseeability of [the plaintiff] pursuing

the path he traveled." *Scerba*, 284 Ill. App. 3d at 441. Moreover, while the court recognized the plaintiff also could have just waited the 40 seconds or so it would have taken for the bus to clear the intersection, the court held that, too, was a matter for the jury to consider. *Scerba*, 284 Ill. App. 3d at 441. The court noted:

> "It could be that [the plaintiff's] conduct was the sole proximate cause of his injury. Or maybe the car driver's conduct was the sole proximate cause of the injury. We believe these are matters for a jury to determine. We cannot draw a bright line between matters of fact and matters of law." *Scerba*, 284 Ill. App. 3d at 441.

Likewise, in *Johnson v. City of Rockford*, 35 Ill. App. 2d 107 (1962), the plaintiff alleged he was forced into the road where he was struck by a car because the public sidewalk was obstructed by a bank of snow and ice that rendered it impassable. The court noted that according to the allegations in the amended complaint, the plaintiff's presence in the street was due to the negligent acts of the defendants and the blow to his body was delivered by the act of the motorist. The court held "[b]oth acts, that is of the motorist and defendants, were commingled in

the single act of the injury." *Johnson*, 35 Ill. App. 2d at 119. Recognizing proximate cause may only be determined as a question of law when reasonable persons would not differ as to the inferences to be drawn from the facts, the court held "a jury might reasonable find that defendants could have reasonable foreseen the injuries to the plaintiff as a natural and probable result of their negligence." *Johnson*, 35 Ill. App. 2d at 119. The court held "[w]hether or not the piling of the snow and ice on the sidewalk and permitting it to remain there was the proximate cause or one of the proximate causes of the injury in question, we believe to be a question of fact to be determined by the jury, and to withdraw such question from its consideration is to usurp its function." *Johnson*, 35 Ill. App. 2d at 119.

Here, similar to *Scerba* and *Johnson*, we find it was reasonably foreseeable that the unnatural accumulation of snow and ice on the sidewalk that allegedly forced Pattullo-Banks to leave the sidewalk and cross Touhy Avenue could be considered one of the proximate causes that led to her being struck by an automobile. Accordingly, we find, based on the record before us, that the issue of proximate cause is something that should not be determined by a court as a question of law at this stage. See *Scerba*, 284 Ill. App. 3d at 441; *Johnson*, 35 Ill. App. 2d at 119.

CONCLUSION

We affirm the trial court's order granting summary judgment in favor of Casey. We also affirm the trial court's order granting Union Pacific's motion to dismiss. We reverse the trial court's order granting Park Ridge's 2-619 motion to dismiss and remand the cause for further proceedings consistent with this order.

Affirmed in part, reversed in part, and remanded for further proceedings.