2011 IL App (2d) 100375-U
No. 2—10—0375
Order filed August 23, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

YVONNE DELONGCHAMP, Individually and as Administrator of the Estate of KIM DELONGCHAMP, deceased, YVONNE DELONGCHAMP, ALEXIS DELONGCHAMP, as a Minor by her Mother and Next Friend, YVONNE DELONGCHAMP and JESSE DELONGCHAMP, as a Minor by his Mother and Next Friend, YVONNE DELONGCHAMP,	)	Appeal from the Circuit Court of Lake County.
Plaintiffs-Appellants,	)	No. 09 L 204
v.	)	Honorable David M. Hall Judge, Presiding
VILLAGE OF GRAYSLAKE, a municipal corporation,	)	
Defendant-Appellee.	)	

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Hutchinson concurred in the judgment.

ORDER

Held: The trial court properly dismissed plaintiffs' first amended complaint on the ground that section 4—107 of the Tort Immunity Act provided unconditional immunity for the Village of Grayslake, a public entity. 745 ILCS 10/4—107 (West 2008).

¶ 1 Plaintiffs, Yvonne Delongchamp, individually and as personal representative of the estate of Kim Delongchamp, along with her children, Alexis and Jesse Delongchamp, brought a wrongful death action against defendant, the Village of Grayslake (Village), after Kim Delongchamp was struck by a train and died after being released from custody in an intoxicated state from the Village's police department. 625 ILCS 5/1—501(a)(1) (West 2008). The Village filed a motion to dismiss on the ground that it was immune from liability under sections 4—102 and 4—107 of the Local Governmental and Governmental Employees Tort Immunity Act (Act). 745 ILCS 10/4—102, 4—107 (West 2008); 735 ILCS 5/2—619 (West 2008). The trial court granted the Village's motion to dismiss. Plaintiffs appeal. For the following reasons, we affirm.

¶ 2 I. FACTS

¶ 3 The record reflects that on March 4, 2008, the Village's police officers arrested Kim Delongchamp for driving while under the influence of alcohol. 625 ILCS 5/11—501(a)(1) (West 2008). At the time of his arrest, Mr. Delongchamp's blood alcohol content was 0.305, nearly four times the legal limit. After he was arrested, Mr. Delongchamp was taken to the Village's police station. Village police officers subsequently spoke to Mr. Delongchamp's family, and the family told the officers that they were en route to pick him up at the police station. Before his family arrived at the station, however, Mr. Delongchamp was released from custody. After he left the station, Mr. Delongchamp walked onto the train tracks of a Metra commuter train in Libertyville, Illinois and was struck and killed.

¶ 4 On February 27, 2009, plaintiffs brought an eight count complaint against the Village, seeking recovery for injuries proximately caused by the death of Mr. Delongchamp. In their original complaint, plaintiffs alleged that the Village acted negligently and engaged in willful and wanton

misconduct when it released Mr. Delongchamp from custody in an intoxicated state. The Village moved to dismiss the complaint, and the motion was granted. See 735 ILCS 5/2—619(a) (West 2008).

¶ 5 On August 19, 2009, plaintiffs filed a first amended complaint. In the amended complaint, plaintiffs dropped the negligence allegations, and only alleged that the Village had a duty to act in a reasonable manner, and to refrain from willfully and wantonly releasing Mr. Delongchamp from custody while he was incapacitated by alcohol. Plaintiffs alleged that the Village breached this duty by showing a deliberate indifference for Mr. Delongchamp's safety and well-being. Specifically, plaintiffs alleged that the Village failed to do one or more of the following: (1) hire and/or train competent individuals to work as police officers and to perform the duties of same; (2) observe and/or monitor Mr. Delongchamp; (3) create and establish proper procedures and/or guidelines for police officers regarding protective custody and the release of intoxicated persons; (4) train and/or supervise the police officers with proper procedures and/or guidelines for protective custody and/or the release of intoxicated persons; (5) take reasonable precautions to protect Mr. Delongchamp's health and safety; (6) properly and adequately screen Mr. Delongchamp before releasing him from custody; (7) take Mr. Delongchamp to an approved facility for treatment; (8) hold Mr. Delongchamp until he could be taken to an approved treatment facility; (9) hold Mr. Delongchamp until he could be released to an otherwise responsible party; and (10) protect Mr. Delongchamp from doing harm to himself.

¶ 6 In its motion to dismiss plaintiffs' first amended complaint, the Village argued that a public entity is totally immune from liability arising out of the failure to provide police protection or adequate police service pursuant to section 4—102 of the Tort Immunity Act. 745 ILCS 10/4—102 (West 2008). The Village also argued that it had absolute immunity from liability stemming from

injuries caused by the release of a person in custody pursuant to section 4—107 of the Act. 745 ILCS 10/4—107 (West 2008). In response, plaintiffs argued that the Village was not entitled to total immunity because section 2—202 of the Act provided an exception for willful and wanton conduct to any alleged immunity. See 745 ILCS 10/2—202 (West 2008). After a hearing on the motion, the trial court granted the Village's motion to dismiss.

¶ 7 In dismissing the first amended complaint, the trial court held that the Illinois Supreme Court's decision in *DeSmet v. County of Rock Island*, 219 Ill. 2d 497 (2006), was controlling. Specifically, the trial court held:

> "The majority in *DeSmet* views it from a different perspective, that 4—107 and similar statutes mean what they say in that blanket immunity is blanket immunity, and they don't need to be specific in mentioning willful and wanton conduct. In their point of view, it automatically does include willful and wanton conduct as being subject to immunity.
>
> My conclusion is that *DeSmet*, in its majority opinion, is controlling. I believe that the motion to dismiss does need to be granted with prejudice as to the Village of Grayslake. My conclusion is that 4—107 does provide blanket immunity even if the conduct of the public entity could be said to be willful and wanton."

Plaintiffs filed a motion to reconsider, which was denied.

¶ 8 II. ANALYSIS

¶ 9 On appeal, plaintiffs argue that the trial court erred in granting the Village's motion to dismiss the first amended complaint when it held that section 4—107 of the Tort Immunity Act provided total immunity to the Village. 745 ILCS 10/4—107 (West 2008). As support for their contention, plaintiffs raise three arguments: (1) the trial court erroneously construed the Illinois Supreme Court's decision in *DeSmet v. County of Rock Island*, 219 Ill. 2d 497 (2006), as establishing unconditional

immunity for the Village; (2) when viewed in a light most favorable to the plaintiffs, the instant case should be found to satisfy the three elements enumerated in *DeSmet* in order for the plaintiffs' cause of action to move forward pursuant to section 2—202 of the Act (745 ILCS 10/2—202 (West 2008); and (3) the trial court erred in not giving enough weight to a recent fifth district opinion which recognized the liability of a municipality for tortious injuries resulting from willful and wanton conduct, even though that opinion has been overruled on other grounds. See *Keener v. City of Herrin*, 385 Ill. App. 3d 545, 559 (2008), *overruled by Keener v. City of Herrin*, 235 Ill. 2d 338 (2009).

¶ 10 Immunity provided by the Tort Immunity Act is an affirmative matter properly raised in a motion brought pursuant to section 2—619 of the Code of Civil Procedure. 735 ILCS 5/2—619 (West 2008); 745 ILCS 10/1—101 *et seq.* (West 2008). Governmental entities bear the burden of proving their immunity under the Act. *Van Meter v. Darien Park* District, 207 Ill. 2d 359, 370 (2003). When a trial court rules on a section 2—619 motion to dismiss, it must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party. *Van Meter*, 207 Ill. 2d at 367-68. We review a dismissal pursuant to section 2—619 on a *de novo* basis. *DeSmet*, 219 Ill. 2d at 504.

¶ 11 Section 4—102 of the Tort Immunity Act provides, in pertinent part, that "[n]either a local public entity nor a public employee is liable . . . if police protection service is provided, for failure to provide adequate police protection or service . . ." 745 ILCS 10/4—102 (West 2008). Section 4—107 of the Tort Immunity Act provides that "[n]either a local public entity nor a public employee is liable for an injury caused by the failure to make an arrest or by releasing a person in custody." 745 ILCS 10/4—107 (West 2008). Both sections 4—102 and 4—107 have been held to provide absolute immunity. *Lacey v. Village of Palatine*, 232 Ill. 2d 349, 360 (2009). Section 2—202 of the

Act pertains to public employees and provides, "[a] *public employee* is not liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes willful and wanton conduct." (Emphasis added.) 745 ILCS 10/2—202 (West 2008).

¶ 12 In *Ries v. City of Chicago*, 242 Ill. 2d 205 (2011), the Illinois Supreme Court has recently revisited the issue of absolute immunity as provided to municipalities under certain provisions of the Act. In *Ries*, the court held that, if a section of the Act grants municipalities and their employees absolute immunity, then the limited immunity allowed under section 2—202 of the Act will not trump the absolute immunity provided for in another section of the Act. "[E]xceptions for willful and wanton misconduct may not be read into [Act] provisions that do not contain them." *Ries*, 242 Ill. 2d at 225.

¶ 13 Accordingly, *Ries* disposes of this appeal. Since section 4—107 of the Act provides the Village with absolute immunity, plaintiffs may not recover, regardless of whether the Village acted willfully and wantonly. Therefore, the trial court properly dismissed plaintiffs' first amended complaint.

¶ 14 The judgment of the circuit court of Lake County is affirmed.

¶ 15 Affirmed.