2013 IL App (2d) 121026-U
No. 2-12-1026
Order filed July 17, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JAMES DAY, a minor, by his mother and next friend, ANDREA AGUILERA, and ANDREA AGUILERA, individually, Plaintiffs-Appellants, v. CRYSTAL LAKE PARK DISTRICT, Defendant-Appellee.	)	Appeal from the Circuit Court of McHenry County. No. 11-LA-103 Honorable Thomas A. Meyer, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Burke and Justice Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in dismissing the plaintiffs' third amended complaint for failure to state a cause of action for willful and wanton conduct.

¶ 2 On April 18, 2012, the plaintiffs, James Day and Andrea Aguilera, filed a third amended complaint against the defendant, Crystal Lake Park District, to recover damages for injuries Day sustained after colliding with a fence that had been erected by the defendant, while sledding down a hill. On the defendant's motion, the trial court dismissed the complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2010)), finding that the plaintiffs

had failed to state a cause of action for willful and wanton conduct. The plaintiffs appeal from that order. We reverse and remand.

¶ 3 BACKGROUND

¶ 4 The plaintiffs' third amended complaint alleged as follows. Beginning in the year 2000, the defendant promoted and advertised a particular hill at Indian Prairie Park, located on Miller Road in Crystal Lake, as available for sledding during the winter months. The defendant admits that the defendant had designated this particular hill for winter sledding activities. From 2000 to 2003, there was no fence on the sled hill. In 2003, the defendant installed a plastic fence with flexible fiberglass posts along the south side of the sled hill, from the top to the bottom. Later during that same winter, the defendant replaced the plastic fence and flexible posts "with a stiff, inflexible wooden fence fastened to unprotected steel metal posts, hidden within the fence and evenly positioned every 10 feet or so along the fence."

¶ 5 The plaintiffs alleged that the wooden fencing was defective in that it was stiff and inflexible and unable to safely absorb the repeated collision of people running into the fence while on their sleds. There were repeated instances where a person sledding down the hill abruptly veered toward and struck the fence. Based on the repeated collisions, the plaintiffs alleged that the defendant was aware that the fencing constituted a hazard to sled hill users. The collisions caused damage to the fence and the defendant had to repeatedly repair and replace portions of the fence.

¶ 6 The plaintiffs further alleged that during the winter of 2008-2009, the defendant was notified that Luke Herzog had struck the wooden fence while sledding down the hill. The collision caused damage to the fence and personal injury to Herzog. Herzog's father had notified the defendant within days of that accident and had warned of the hazards posed by the fence. Despite knowledge of the repeated collisions, the defendant "demonstrating supreme indifference to the known hazards,

continued to promote the 'sled hill' as safe to the public." The defendant never posted any signs warning of the danger posed by the placement of the fence.

¶ 7 On February 11, 2013, 10 year-old Day was at the sled hill and failed to recognize the hazard posed by the wooden fence. "Day positioned his sled in close proximity to the fence and slid down the hill, and while his sled traveled a short distance picking up speed, his sled was caused to suddenly veer toward and strike the subject wooden fence (the same fence as Herzog and countless others before) with great force, causing him to suffer severe and permanent injury." The plaintiffs alleged that the defendant acted in a willful and wanton manner by installing the wooden fence knowing that it posed a danger; failing to warn of the dangers of the sled hill; failing to remove the fence, or replace it with a shock-absorbing fence, after learning that it posed a great risk of injury; maintaining the sled hill so as to cause sledders to veer toward and strike the fence; and failing to grade the sled hill to prevent sledders from veering toward and striking the fence. Finally, the plaintiffs alleged that as a proximate result of one or more of these acts and omissions, Day suffered bodily injury, became permanently scarred and disabled, and had and will become obligated for large sums of money for medical care now and in the future. Count two stated a claim under the Family Expense Act (750 ILCS 65/15 (West 2010)) alleging that, based on the same willful and wanton conduct, Aguilera had become indebted and will incur future indebtedness for the necessary medical care of her son, Day.

¶ 8 Prior to the filing of the plaintiffs' third amended complaint, the defendant had filed two combined motions to dismiss the plaintiffs' second amended complaint pursuant to section 2-619.1 of the Code. In the first motion, the defendant argued that it owed no duty because the wooden barrier fence was an open and obvious condition. The defendant also argued that it did not intend that Day sled into the wooden fence and that it therefore owed him no duty of care, pursuant to

section 3-102(a) of the Tort Immunity Act (Act) (745 ILCS 10/3-102(a) (West 2010)). The defendant argued that under that section of the Act, its duty to maintain its property extended only to the intended and permitted uses of its property. Both arguments were made under section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2010)).

¶ 9 In the second combined motion to dismiss, the defendant argued that the allegations failed to state a cause of action for willful and wanton conduct and the complaint should be dismissed pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)). Alternatively, the defendant argued that the complaint should be dismissed pursuant to section 2-619(a)(9) because the defendant actually exercised a conscious regard for the safety of its patrons by installing the wooden snow fencing to minimize the risk that sled hill users would collide with culverts and drainage areas near the base of the sled hill.

¶ 10 On April 4, 2012, the trial court entered an order setting a briefing schedule for the second motion to dismiss, which was based on lack of willful and wanton conduct. With respect to the motion to dismiss based on the absence of any duty, the trial court entered and continued the motion for status. On April 18, 2012, an agreed order was entered. The order gave the plaintiffs leave to file their third amended complaint. It modified the briefing schedule for the motion to dismiss based on willful and wanton conduct. It further ordered that the defendant's pending combined motions to dismiss would pertain to the third amended complaint. Thereafter, the plaintiffs filed a response to the motion to dismiss for failure to state a cause of action for willful and wanton conduct and the defendant filed a reply. There was no response or reply as to the motion to dismiss based on lack of duty.

¶ 11 On July 10, 2012, a hearing was held on the defendant's motion to dismiss based on lack of willful and wanton conduct. At that hearing, the parties argued only as to whether dismissal was

proper under section 2-615 of the Code. The parties did not argue as to the defendant's section 2-619(a)(9) contention that the defendant actually exercised a conscious regard for the safety of its patrons by installing the wooden snow fencing to minimize the risk that sled hill users would collide with culverts at the base of the sled hill. Following the hearing, the trial court granted the defendant's motion to dismiss on the basis of section 2-615, for failure to state a cause of action for willful and wanton conduct. The trial court found that the case boiled down to whether the mere existence of a barrier that somebody could run into satisfied the requirement for willful and wanton conduct. The trial court found that the mere placement of the fence was not willful and wanton. The plaintiffs filed a motion to reconsider. In denying the motion to reconsider, the trial court stated that its determination was a matter of public policy. It could not find the defendant liable for a child sledding into a perfectly visible and well constructed fence. The trial court did not rule on any of the section 2-619 motions. The plaintiffs filed a timely notice of appeal.

¶ 12 ANALYSIS

¶ 13 On appeal, the plaintiffs argue that the trial court erred in dismissing their third amended complaint, because they properly pled a cause of action for willful and wanton conduct against the defendant. In particular, the plaintiffs argue that, despite knowledge of sledders veering into the fence at issue and of at least one prior injury, the defendant failed to modify the fencing system or provide warnings, evincing an utter indifference to or conscious disregard for the plaintiffs' safety.

¶ 14 A motion to dismiss brought under section 2-615 of the Code attacks the sufficiency of the complaint on the basis that, even assuming the allegations of the complaint to be true, the complaint does not state a cause of action that would entitle the plaintiff to relief. 735 ILCS 5/2-615 (West 2010); *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 8 (1992). "When reviewing the dismissal of a complaint pursuant to section 2-615, a court must accept as true all well-pleaded facts and

reasonable inferences drawn therefrom and view the complaint in the light most favorable to the plaintiff." *Leja v. Community Unit School District 300*, 2012 IL App (2d) 120156, ¶ 9. A claim should not be dismissed on the pleadings "unless it is clearly apparent that no set of facts can be proved which will entitle [the] plaintiff to recover." *Nielsen-Massey Vanillas, Inc. v. City of Waukegan*, 276 Ill. App. 3d 146, 151 (1995). We review the dismissal of a complaint pursuant to section 2-615 *de novo*. *Wallace v. Smyth*, 203 Ill. 2d 441, 447 (2002).

¶ 15 It is undisputed that the defendant is a local public entity immune from liability for negligence under section 3-106 of the Act. That section 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).

Therefore, under section 3-106, defendant is liable to the plaintiffs only if it proximately caused Day's injuries by willful and wanton conduct. Section 1-210 of the Act defines "willful and wanton conduct" as follows:

> " 'Willful and wanton conduct' as used in this Act means a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property. This definition shall apply in any case where a 'willful and wanton' exception is incorporated into any immunity under this Act." 745 ILCS 10/1-210 (West 2010).

Willful and wanton conduct can be slightly more than negligence, slightly less than intentional conduct, or anywhere in between such a continuum of liability. *Hill v. Galesburg Community Unit School District 205*, 346 Ill. App. 3d 515, 522 (2004).

¶ 16 A determination of willful and wanton conduct must be based on the specific facts of each case. *Leja*, 2012 IL App (2d) 120156, ¶ 11. While this determination is usually a question of fact for a jury to determine, a court may decide as a matter of law whether a plaintiff's allegations of willful and wanton conduct are sufficient to state a cause of action. *Id.* "[C]ourts employing the Act's definition have found willful and wanton conduct to exist where a public entity knew of a dangerous condition yet took no action to correct the condition (*e.g.*, *Muellman v. Chicago Park District*, 233 Ill. App. 3d 1066, 1069 (1992)), where a public entity was aware of prior injuries caused by a dangerous condition but took no action to correct it (*e.g.*, *Carter v. New Trier East High School*, 272 Ill. App. 3d 551, 557-58 (1995)), and where a public entity intentionally removed a safety feature from recreational property despite the known danger of doing so (*e.g.*, *Benhart v. Rockford Park District*, 218 Ill. App. 3d 554, 559-60 (1991))." *Id.*

¶ 17 In determining whether the plaintiffs have stated a cause of action for willful and wanton conduct, we find several cases instructive. In *Straub v. City of Mt. Olive*, 240 Ill. App. 3d 967 (1993), the plaintiff had tripped over an unmarked baling wire, supporting a young tree, that was attached from the tree to a stake in the ground. *Id.* at 970. The plaintiff filed a complaint against the City alleging, in part, willful and wanton conduct. The trial court dismissed those claims, finding that the plaintiff failed to allege facts to support them. In reversing the trial court, the reviewing court held that "plaintiff's allegations that (1) the City knew of the danger associated with the support wire and (2) it knew other individuals had tripped or fallen over the wire sufficiently set forth a claim based on willful and wanton misconduct." *Id.* at 978.

¶ 18 In *Hill v. Galesburg Community Unit School District 205*, 346 Ill. App. 3d 515, 517 (2004), the plaintiff's right eye was injured when a beaker exploded while he was performing an experiment in chemistry class. The plaintiff filed a complaint against the school district alleging, in part, willful and wanton conduct. *Id.* at 518. The trial court granted the defendant's motion to dismiss the plaintiff's complaint. *Id.* The reviewing court reversed the dismissal, holding that the plaintiff's complaint had sufficiently stated a cause of action for willful and wanton conduct. *Id.* at 522. Specifically, the court noted that the plaintiff's complaint alleged that "the teacher (1) had actual knowledge that [the plaintiff] was performing the experiment without wearing eye protection, (2) had actual knowledge of the dangers of performing the experiment, and (3) consciously disregarded [the plaintiff's] safety by permitting him to participate in the experiment without eye protection." *Id.*

¶ 19 In *Thurman v. Champaign Park District*, 2011 IL App (4th) 101024, ¶ 17, the reviewing court affirmed a section 2-615 dismissal of the plaintiff's complaint because the allegations did not rise to the level of willful and wanton conduct. The complaint alleged that the plaintiff was severely and permanently injured while playing tennis in defendant's facility "when he ran into a structural steel beam that was placed at an angle and hidden by a tarp" erected by defendant. *Id.* at ¶ 2. The reviewing court held that the complaint failed to state a cause of action for willful and wanton conduct because there were no allegations that the defendant had prior notice of similar injuries, or any injuries, caused by the beams or allegations of a defective condition or the removal of any known safety feature or device. *Id.* at ¶ 17.

¶ 20 In *Leja*, this court similarly found that the plaintiff's complaint failed to allege facts to support a claim of willful and wanton conduct. In that case, the plaintiff was injured when a volleyball net crank that she was operating snapped back and hit her in the face. *Leja*, 2012 IL App

(2d) 120156, ¶ 5. This court held that "knowledge of the crank's tendency to 'snap back,' without additional factual allegations showing that defendant was aware or should have been aware of a serious danger posed, does not cross the threshold required for willful and wanton conduct." *Id.* at ¶ 13. This court further noted that the plaintiff's complaint failed to allege any specific condition which caused the plaintiff's injury or that the defendant knew or should have known of that condition and of the high risk of injury that it posed. *Id.* at ¶ 14.

¶ 21 Similar to *Straub* and *Hill*, the plaintiffs' complaint here properly alleged a claim for willful and wanton conduct. Specifically, the plaintiffs alleged that the defendant knew of the dangerous condition created by the location of the fence on the sled hill, knew that others sledders had crashed into the fence, and knew of at least one other injury. Under these circumstances, the plaintiffs' complaint was sufficient to withstand a section 2-615 motion to dismiss. *Straub*, 240 Ill. App. 3d at 980. This determination is also supported by the rulings set forth in *Thurman* and *Leja* because, unlike those cases, the complaint in the present case included allegations that the defendant was on notice of at least one other injury that had occurred in a similar manner and that sledders had repeatedly run into the fence. Accordingly, the trial court erred in granting the 2-615 dismissal of the plaintiffs' complaint.

¶ 22 In arguing that the dismissal should be affirmed, the defendant contends that the plaintiffs' allegations, indicating that the defendant had installed the fence at issue and repeatedly repaired it, do not support an inference of willful and wanton conduct. The defendant relies on *Callaghan v. Village of Clarendon Hills*, 401 Ill. App. 3d 287, 302 (2010). In *Callaghan*, the plaintiff filed a claim for willful and wanton conduct against the village because she had slipped on an icy sidewalk. *Id.* at 288. The ice was allegedly the result of the park district creating, as a result of snow removal, an unnatural massive pile of snow near the sidewalk. *Id.* at 302. This court noted that the snow was

likely removed for the safety of pedestrians and stated that even if the village removed snow in such a manner as to cause a hazardous condition on the sidewalk, this conduct did not give rise to an utter indifference for the safety of persons such as the plaintiff. *Id.* The defendant argues that, similar to *Callaghan*, the defendant's actions of installing, inspecting and maintaining the fence on the sled hill were performed for the safety of its patrons and do not establish a conscious disregard for the safety of others.

¶ 23 The defendant's reliance on *Callaghan* is unpersuasive. The *Callaghan* court also stated that the plaintiff had failed to establish a cause of action for willful and wanton conduct because she had not pleaded any facts as to how the snow and ice pile was unreasonably dangerous. *Id.* at 302. In the present case, unlike *Callaghan*, the plaintiffs alleged that numerous sledders veered into the fence, as evidenced by the repetitious need for repairs to the fence, and alleged that a previous accident with injury had occurred.

¶ 24 The defendant also relies on *Winfrey v. Chicago Park District*, 274 Ill. App. 3d 939 (1995). In *Winfrey*, the plaintiff was injured when he fell through an opening in a chain-link fence and landed on railroad tracks 15 feet below. *Id.* at 940-41. The complaint alleged the defendant "was willful and wanton in leaving the hole in the fence despite the danger it posed to invitees" and "failing to repair the hole even though plaintiff and other invitees would be exposed to a substantial drop-off." *Id.* at 945. The reviewing court found the plaintiff's allegations were insufficient to support a claim of willful and wanton conduct. *Id.* The court noted the plaintiff did not allege "that defendant had received complaints about the condition of the fence or that defendant ignored the problem after inspecting the fence" and stated "[s]uch facts would serve to indicate that defendant showed an utter indifference or a conscious disregard for plaintiff's safety." *Id.* at 946.

¶ 25 The defendant argues that if a "gaping hole" in a fence to a substantial drop-off below were insufficient to state a cause of action for willful and wanton conduct, the plaintiffs' allegations here also cannot satisfy that pleading standard. We disagree. As noted above, the *Winfrey* court's determination was based on the fact that there was no allegations that the chain-link fence was inspected or that there were complaints about the condition of the fence. In the present case, the plaintiffs alleged that there was a previous injury, complaints about the fence, and the necessity for repeated repairs. These allegations are sufficient to state a cause of action for willful and wanton conduct.

¶ 26 The defendant also cites numerous other cases in support of the section 2-615 dismissal. However, those cases are also distinguishable from the present case in that, in the cases cited, the defendant did not have notice of any allegedly defective condition or of any previous injuries. See, *e.g.*, *Tagliere v. Western Springs Park District*, 408 Ill. App. 3d 235 (2011) (failure of defendant to discover defect despite repeated inspections was not willful and wanton conduct); *Bialek v. Moraine Valley Community College School District*, 267 Ill. App. 3d 857, 865 (1994) (where plaintiff was injured colliding with goal post during a football game, the plaintiff's claim for willful and wanton conduct was insufficient because there were no allegations that the defendant had notice of prior injuries as a result of the goal post structure); *Rooney v. Franklin Park Park District*, 256 Ill. App. 3d 1058, 1061 (1993) (where there were no allegations of previous injury, the plaintiff failed to state a cause of action for willful and wanton conduct).

¶ 27 In so ruling, we note that the defendant argues on appeal that the trial court's determination can be affirmed on the basis that the danger was an open and obvious condition or because certain affidavit and deposition testimony established that (1) the defendant exercised a conscious regard for the safety of its patrons and (2) the previous injuries did not occur in a similar manner. We

acknowledge that, generally, a reviewing court may affirm on any basis appearing in the record. *City of Chicago v. RN Realty, L.P.*, 357 Ill. App. 3d 337, 344 (2005). However, it is also well established that "[c]ourts of review function to review rulings and judgments of the circuit courts and generally will not pass upon any question as to which the circuit court failed to make a decision." *In re Marriage of Bennett*, 225 Ill. App. 3d 828, 830 (1992). The alternative bases suggested by the defendant would require us to affirm the dismissal based on arguments raised by the defendant, pursuant to section 2-619 of the Code, in its motion to dismiss based on the lack of duty. However, after this motion was filed, the trial court stayed the motion and only allowed responses and argument as to the issues raised in the motion to dismiss based on lack of willful and wanton conduct. Accordingly, the plaintiffs did not have an opportunity to present evidence or argue that dismissal was improper as to the section 2-619 arguments raised by the defendant in the motion based on lack of duty. Additionally, although the response and reply to the motion based on lack of willful and wanton conduct addressed the section 2-619 argument that the defendant's conduct established a conscious regard for the safety of its patrons, the parties did not raise or fully argue the issue at the hearing on the motion to dismiss and the trial court never ruled thereon. Under these circumstances, we decline to address these section 2-619 arguments and affirm the dismissal on any of those bases. *Id.*; see also *Oak Grove Jubilee Center, Inc. v. City of Genoa*, 347 Ill. App. 3d 973, 986-87 (2004) (declining to address motion for summary judgment for the first time on appeal because motion was not fully argued below).

¶ 28 CONCLUSION

¶ 29 For the reasons stated, the decision of the circuit court of McHenry County is reversed and the matter is remanded for further proceedings not inconsistent with this order.

¶ 30 Reversed and remanded.