SIXTH DIVISION
September 6, 2013

No. 1-12-2803

TONISHA JOHNSON,	)	Appeal from the
	)	Circuit Court
Plaintiff-Appellant,	)	of Cook County
	)	
v.	)	No. 10 L 2475
	)	
CHICAGO PARK DISTRICT and AMALGAMATED	)	
TRANSIT UNION LOCAL 241,	)	Honorable
	)	Drella C. Savage
Defendants-Appellees.	)	Judge Presiding.

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

ORDER

¶ 1 Held: In a personal injury action following the plaintiff's injury on a park district softball field, the circuit court did not err in granting summary judgment in favor of the defendant park district or the defendant labor union which organized the softball game.

¶ 2 Plaintiff Tonisha Johnson (Johnson) appeals an order of the circuit court of Cook County granting defendants Chicago Park District (District) and Amalgamated Transit Union Local 241 (Union) summary judgment on Johnson's first amended complaint in a personal injury action. On appeal, Johnson argues genuine issues of material fact exist regarding: (1) the District's

alleged willful and wanton conduct; (2) the District's actual or constructive notice of a dangerous condition on one of its softball fields; and (3) the Union's alleged voluntary undertaking of a duty to inspect softball fields. For the following reasons, we disagree and affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 The record on appeal discloses the following facts. The operative pleading in this case is Johnson's first amended complaint (complaint), filed on November 10, 2010. In her complaint, Johnson alleged the District owned a softball field at Washington Park in Chicago. The Union managed and maintained a softball league solely for Chicago Transit Authority (CTA) employees (CTA league).

¶ 5 On or before June 30, 2009, Johnson was a CTA employee. Johnson was also a member of a softball team which paid $800 to participate in the CTA league.

¶ 6 On June 30, 2009, while playing in a CTA league game at Washington Park, Johnson was caused to trip and fall in a hole in the softball field, resulting in personal injuries. Johnson alleged the hole was large enough for the heel of her foot to become lodged therein. Johnson also alleged she had not seen the hole, as it was obscured by grass growing around the edge of the hole.

¶ 7 Although not alleged in the complaint, the record on appeal indicates Washington Park contained an outdoor pool, outdoor basketball court, 13 softball diamonds, four baseball diamonds, three cricket fields, three softball fields, and an unspecified number of football fields. Johnson further alleged the District's softball fields were generally in poor condition during CTA

league games, including bumps, holes and uneven surfaces. Johnson asserted the conditions of the fields were the subject of complaints to both the District and the Union. Previous CTA league games had been delayed or cancelled due to the poor condition of the softball fields.

¶ 8 Johnson's complaint contained three counts, claiming: (1) the District negligently constructed and maintained the softball field and failed to warn of the dangerous conditions; (2) the District engaged in willful and wanton conduct through its failure to properly construct, maintain and repair the softball field; (3) the Union was negligent in breaching its voluntarily undertaken duties to inspect the field, report any holes to the District, warn players of any hazards and move the game if necessary. We observe the circuit court entered summary judgment on all three counts, but Johnson's appeal raises issues relating only to counts II and III of the complaint.

¶ 9 The District's Summary Judgment Motion

¶ 10 On June 8, 2012, the District filed a motion for summary judgment. The District argued it was immune from liability on Johnson's negligence claim pursuant to section 3-106 of the Illinois Local Government and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/3-106 (West 2010)). The District argued it was entitled to judgment on count II because: (1) Johnson could not demonstrate the District engaged in willful and wanton conduct, particularly where the District has a system of maintaining and inspecting its softball fields; (2) the District had neither actual nor constructive notice of the hole; and (3) the District was immune from liability for discretionary policy decisions pursuant to sections 2-109 and 2-201 of the Tort Immunity Act (745 ILCS 10/2-109, 2-201 (West 2010)). The District supported

its motion with deposition testimony from Johnson, District maintenance foreman Shirron Molette (Molette) and District landscape laborer Cedric Mays (Mays).

¶ 11 Johnson testified she did not recall in which particular softball diamond her injury occurred. On the date of her injury, Johnson was playing the position of short center. While shuffling backward to field a ball, Johnson's cleat went into a hole between the grassy area and the dirt. Johnson's foot sunk into the hole and became lodged there, injuring her ankle. According to Johnson, she wore a size 8 ½ shoe and her shoe lodged in the hole from the heel to the middle of her foot.

¶ 12 Johnson also testified she did not see the opening because the grass around the hole was between three and four inches high and the hole was not an obvious defect. Johnson did not know the extent of time the hole had been there. Johnson further testified it was not her job to look for holes on the field. Rather, it was the responsibility of the CTA league "commissioner" and District staff. In addition, according to Johnson, the "District staff is out there in the morning before we even take the field ***." Johnson did not specify which District staff members were present before the games.

¶ 13 Johnson never personally complained to the District regarding the hole. Instead, Johnson complained to individuals in charge of the softball tournament and presumed they would convey her complaint to the appropriate personnel. Johnson did not know of anyone else who complained about the hole or was injured by its existence. Johnson testified her husband returned to the field after her injury and discovered the hole. Johnson claimed other leagues

played on this field throughout the week, but did not know how the District or other teams proceeded.

¶ 14 Molette was the District's maintenance foreman at Washington Park from 2005 through 2011, and was responsible for maintenance of the softball fields on the date of Johnson's injury. Molette testified daily maintenance of the park included trash and debris removal. There is no grass in the infields. Two staff members cut the grass Monday through Friday in the outfield areas of the softball fields, as well as the soccer and cricket fields. The maintenance crew would cut the grass to a height of three inches from the surface.

¶ 15 Before cutting the grass, the District's staff would check for debris, depressions and holes. If the staff discovered any problems, they would telephone Molette and repair the defects. If staff discovered a hole, the machine that groomed the softball diamonds would be used to level the hole, though shovels would also be utilized. According to Molette, it was not really difficult to determine where holes in the outfield were located because the lawn mower would drive back and forth over the entire area.

¶ 16 Molette also testified organizations were told to report any maintenance issues regarding the softball diamonds to the field house. Most of the leagues playing at Washington Park had Molette's contact information and could telephone him regarding any problems. Molette did not recall receiving any complaints from the leagues or organizations using the park during the summer of 2009 that the District staff was not grooming or marking the fields in time for play to begin. Molette added he would have documented any such complaint from the staff.

¶ 17 Molette further testified he spoke to CTA league commissioner Tony Owens on several occasions in 2009. According to Molette, these conversations involved requests for early marking and grooming of the fields, not about complaints of holes in the fields. Molette was unaware of anyone being injured by stepping into a hole at the park. Moreover, Molette testified the athletic fields, "especially the cricket fields and the softball and the soccer fields" were renovated at the end of each season.

¶ 18 Mays testified he and the late Thomas Moore (Moore) maintained the athletic fields at Washington Park in 2009. Starting as early as 6 a.m., Mays and Moore would begin preparing the softball fields on Fridays for play on Friday nights, Saturdays and Sundays. There would be as many as three games played on Saturdays and Sundays, commencing as early as 8 a.m. Mays and Moore would cut the grass. Although holes in the outfield were infrequent, if Mays and Moore discovered a hole, they were required to apply a "quick dry" compound to the surface and fill the hole with dirt. Holes in the infield were also uncommon, but could occur due to base-running and the wear and tear from the players' athletic cleats. According to Mays, Moore would inspect the infield before allowing play to occur on a softball diamond.

¶ 19 Mays also testified he was never notified by the CTA league commissioner of any holes in the field. Mays added he was never advised of any player being injured by stepping in a hole. Mays opined the softball fields at Washington Park were in good condition in June 2009.

¶ 20 In Johnson's response to the District's summary judgment motion, Johnson argued there were material issues of fact which existed regarding the District's purported willful and wanton conduct, where the District allegedly failed to maintain its field in a safe condition over a long

period of time. Johnson also maintained there were genuine issues of material fact which existed regarding the District's actual or constructive notice of the hole. Johnson further argued liability for willful and wanton conduct was not negated by the evidence of the District's maintenance program. Lastly, Johnson contended the District was not immune for its maintenance practices under the provisions of the Tort Immunity Act regarding discretionary policy decisions.

¶ 21 Johnson supported her response with her deposition testimony, as well as that of Mays and Union president Darrell Jefferson (Jefferson). Johnson's deposition recounted the circumstances of her injury and the size of the hole at issue. In addition, Johnson testified team representatives – usually team captains or managers – complained to league commissioner Tony Owens in preseason meetings of the CTA league about the general condition of the fields, including divots or holes in the fields (although she later testified the complaints were not about holes *per se*). Johnson acknowledged she did not know of anyone who complained about the hole at issue nor was she aware of anyone else injured by falling into the hole. Johnson also testified she did not personally complain about the hole.

¶ 22 Mays testified he was present on game days, starting at 6 a.m., to ensure the fields were in proper shape for the games.

¶ 23 Jefferson was the Union's sports director between 2001 through 2005. Jefferson testified he heard complaints from softball players about holes in the fields for several years. Based on recent conversations he overheard, Jefferson testified these complaints extended through 2009. According to Jefferson, there were more complaints in recent years than when he was the sports director. During Jefferson's tenure as sports director, he moved games from one diamond to

another due to field conditions. Jefferson and Owens had discussed moving their games from Washington Park due to conditions of the fields, though Jefferson did not specify whether the games were ever moved entirely from the park. Jefferson also testified that approximately a dozen other individuals have been injured at Washington Park since 2001. Jefferson further testified that some of these injuries were serious and precluded CTA employees from reporting to work. Jefferson did not specify the nature or cause of these injuries.

¶ 24 When Jefferson was sports director, the league commissioner inspected the fields before games to determine whether they were safe for playing a softball game. As far as Jefferson knew, commissioners retained the power to declare a field was too dangerous for a softball game. According to Jefferson, as a preventative measure, both the league commissioner and the Union's sports director walked the field to determine if the playing surface was safe to be utilized. Jefferson did observe the commissioner walk the field before the commencement of games. Jefferson also observed the commissioner warn players about potential hazards in the field. Jefferson further testified the commissioner would report holes to the District. The commissioner would immediately report holes if District staff was present. Otherwise, the commissioner would report holes on the following business day.

¶ 25 The Union's Summary Judgment Motion

¶ 26 On June 8, 2012, the Union also filed a motion for summary judgment. The Union argued it was entitled to judgment on count III, contending: (1) the Union owed no duty to Johnson regarding the condition of the softball field; and (2) it did not voluntarily undertake a duty to Johnson regarding the condition of the field. The Union supported the motion with

deposition testimony from Johnson, District supervisor Janie Collins (Collins), Molette, Mays and Owens, as well as an affidavit executed by Jefferson.

¶ 27 Johnson's deposition again recounted the circumstances of her injury, the size of the hole at issue, and prior complaints regarding the field conditions. In addition, Johnson testified that the examination of the field was the responsibility of the league commissioner and District staff. Johnson also testified she had noticed Owens inspect fields on prior occasions, but did not observe Owens inspect the field on the date she was injured. Johnson never observed Owens physically maintain the field.

¶ 28 Collins testified the CTA league had permits to use the softball fields in June 2009. Collins never visited the fields and did not know who maintained or repaired them. Collins was not aware whether anyone other than the District conducted regular inspections of the fields. According to Collins, there was no rule or regulation requiring permittees to inspect the fields prior to games.

¶ 29 Jefferson executed an affidavit stating the CTA league, comprised primarily of employees of the CTA and Pace, was organized by the Union for stress relief purposes. Jefferson also stated the Union believes the CTA league is of benefit to the CTA.

¶ 30 Owens, a CTA bus operator, was commissioner of the CTA league on the date Johnson was injured. He was always at Washington Park for Sunday games. Typically, District employees were also present. Although Owens remembered a District employee named Cedric, Owens would communicate any problems regarding the conditions of the fields to Collins, as the District was responsible for maintaining the fields and determining whether fields were in

playable condition. Owens was not allowed to perform maintenance on the softball fields because only District staff was authorized to perform such tasks.

¶ 31 Owens testified he inspected the fields only on rainy days. Owens added he never inspected the grassy areas of the outfield or the areas where the grass met the dirt. Owens recalled one incident where a player ran too far fielding a foul ball and stepped in a hole. The player complained about the hole to Owens, who warned both teams and reported the matter to Collins the following Monday or Tuesday. Owens later looked for the hole, but could not find it and presumed the hole had been repaired. According to Owens, this was the only incident involving a hole aside from the batter's box. Owens never observed and was never informed of any holes in the women's softball diamonds, particularly in the area behind second base, during the 2009 season.

¶ 32 Molette, who was responsible for maintaining the softball field in June 2009, confirmed that only District personnel was authorized to drag the infield or mow the grass. Molette was also the one who determined whether to use a "quick dry" compound on the infields. The fields would be groomed as weather permitted. According to Molette, it was not really difficult to determine where small holes would occur in the outfield areas, inasmuch as District staff riding on the grass cutter would detect them when driving over them. Conversely, it may take hours to discover a depression in the outfield, unless the depression was sufficiently deep to be noticed by District staff operating the grass cutters. In addition, Molette testified most of his discussion with Owens related to weather problems, not the conditions of the fields.

¶ 33 Mays testified regarding his field maintenance duties, as he did for the District's motion. In addition, Mays testified he typically dealt with "Stony," whom Mays identified as the CTA league commissioner. According to Mays, when "Stony" examined the softball fields, it was due to issues with rain or puddles. Mays further testified he observed no problems regarding holes in the outfield in the 2009 season. Moreover, Mays received no complaints about the height of the grass in the outfields.

¶ 34 Johnson's response to the Union's motion argued genuine issues of material fact existed regarding the Union's voluntary undertaking to inspect the softball fields. Johnson supported her response with her own deposition testimony and deposition testimony from Jefferson.

¶ 35 Johnson's deposition testimony recounted the circumstances of her injury and the prior general complaints regarding the condition of the fields. In addition, Johnson testified Owens inspected both the infields and outfields. Johnson never inquired of Owens why he was examining the fields, but testified she knew why he inspected the fields. Johnson also testified Owens examined the fields not only due to weather problems, but also when the fields were not dragged and when there were holes or uneven areas in the field.

¶ 36 Jefferson testified the Union and the District did not have responsibilities regarding the condition of the fields at Washington Park. Jefferson testified the league commissioner and the sports director would "walk the field just to make sure *** there's nothing out there that a person can step on or fall into." Jefferson characterized this activity as "just preventative but it wasn't a requirement or responsibility." According to Jefferson, the CTA league commissioner would attend every game. As far as Jefferson knew, it remained the commissioner's decision to move a

game based on field conditions. Johnson also recounted the history of complaints regarding field conditions, past injuries, and the discussion regarding moving league games out of Washington Park.

¶ 37 The Circuit Court Order

¶ 38 On September 11, 2012, the trial court entered an order granting summary judgment to the District, ruling the District was immune from claims of ordinary negligence and no genuine issue of material fact existed regarding the claim of willful and wanton conduct by the District. The circuit court also appears to have rejected the argument the District was immune from liability for discretionary policy decisions.[1] The circuit court also granted summary judgment in favor of the Union, ruling there was no voluntary undertaking. On September 21, 2012, Johnson filed a timely notice of appeal to this court.

¶ 39 DISCUSSION

¶ 40 On appeal, Johnson contends the circuit court erred in granting summary judgment to the District and the Union. Summary judgment is appropriate when "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). The purpose of summary judgment is not to try a question of fact, but to determine whether a genuine issue of triable fact exists. *Adams v. Northern Illinois*

[1] The order denies a claim of "absolute immunity," without reference to a particular section of the Tort Immunity Act.

Gas Co., 211 Ill. 2d 32, 42-43 (2004). In determining whether a question of triable fact exists, "a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent." *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). Summary judgment is "a drastic means of disposing of litigation," and thus, should only be awarded when the moving party's right to judgment as a matter of law is "clear and free from doubt." *Id*. We review grants of summary judgment *de novo*. *Id*. Accordingly, the reviewing court "must independently examine the evidence presented in support of and in opposition to a motion for summary judgment" to determine whether a genuine issue of material fact exists. *Groce v. South Chicago Community Hospital*, 282 Ill. App. 3d 1004, 1006 (1996). With these standards in mind, we turn to examine Johnson's claims against the District and the Union.

¶ 41 Johnson's Claim against the District

¶ 42 Johnson seeks to hold the District liable for the injuries she sustained on the District's softball field. The Tort Immunity Act provides that local governmental entities such as the District are not liable for injuries on public property used for recreational purpose "unless such local entity *** is guilty of willful and wanton conduct proximately causing such injury." 745 ILCS 10/3-106 (West 2010). Whether specific acts amount to willful and wanton conduct is ordinarily a question of fact for the jury. *Prowell v. Loretto Hospital*, 339 Ill. App. 3d 817, 823 (2003). The court, however, may determine as a matter of law whether conduct is willful and wanton "if the evidence so overwhelmingly favors one party that a contrary determination cannot stand." *Brown v. Chicago Park District*, 220 Ill. App. 3d 940, 943 (1991).

¶ 43 The legislature has defined willful and wanton conduct for the purposes of the Tort Immunity Act 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).

In her brief, however, Johnson relies upon *Murray v. Chicago Youth Center*, 224 Ill. 2d 213 (2007), in which the court stated " 'conduct characterized as willful and wanton may be proven where the acts have been less than intentional – *i.e.*, when there has been "a failure, after knowledge of impending danger, to exercise ordinary care to prevent" the danger, or a "failure to discover the danger through *** carelessness when it could have been discovered by the exercise of ordinary care." ' " *Id*. at 239 (quoting *Ziarko v. Soo Line R.R. Co.*, 161 Ill. 2d 267, 274 (1994), quoting *Schneiderman v. Interstate Transit Lines, Inc.*, 394 Ill. 569, 583 (1946)). The *Murray* court stated "the plain meaning of section 1-210 is entirely consistent with this court's long-standing common law precedents." *Murray*, 224 Ill. 2d at 235. Yet *Murray* involved injuries that occurred prior to 1998 and the court, expressed "no opinion on the effect, if any, of the 1998 amendment on willful and wanton liability governed by the Tort Immunity Act." *Id*. at 242-43.[2]

[2] We observe that *Murray* involved willful and wanton conduct in the context of

¶ 44 This district and the Fourth District of the appellate court have determined that the Tort Immunity Act's definition of willful and wanton conduct applies to the exclusion of common law definitions. See *Thurman v. Champaign Park District*, 2011 IL App (4th) 101024, ¶ 13; *Tagliere v. Western Springs Park District*, 408 Ill. App. 3d 235, 243 (2011). These courts rely on the 1998 amendment specifying "[t]his 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)), as well as an exchange from a hearing on the amendment of section 1-210 from the Illinois General Assembly. See *Thurman*, 2011 IL App (4th) 101024, ¶ 13; *Tagliere*, 408 Ill. App. 3d at 243. The Second and Fourth districts of this court, however, have continued to rely, at least in part, on the common-law definition of willful and wanton conduct in cases brought under the Act. In *Vilardo v. Barrington Community School Dist. 220*, 406 Ill. App. 3d 713 (2010), which was decided shortly before *Tagliere* and *Thurman*, but which involved the post-amendment version of section 1-210, the Second District cited with approval the common-law definition of willful and wanton conduct. *Id*. at 724; see also *Bezanis v. Fox Waterway Agency*, 2012 IL App (2d) 100948, ¶ 36. In *Hatteberg v. Cundiff*, 2012 IL App (4th) 110417, the Fourth District did

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hazardous recreational activity which would otherwise be immunized from liability by section 3-109 of the Tort Immunity Act (see *id*. at 226-27), whereas this case involves willful and wanton conduct related to activity on property used for a recreational purpose otherwise immunized by section 3-106. Accordingly, the 1998 amendment and its legislative history, which purports to standardize a particular definition of the term, may matter in a particular case.

the same. *Hatteberg*, 2012 IL App (4th) 110417, ¶ 31. Justice McCullough, who authored *Thurman*, concurred in the *Hatteberg* opinion. Perhaps more significantly, in *Harris v. Thompson*, 2012 IL 112525, another case involving the post-amendment version of section 1-210, our supreme court restated the statutory definition of willful and wanton conduct was "entirely consistent with this court's long-standing case law." *Harris*, 2012 IL 112525, ¶ 41.

¶ 45 We recognize the apparent discrepancies among cases involving section 1-210 of the Tort Immunity Act, and the confusion generated thereby. This court, however, is not required to resolve the issue to decide this case, because Johnson fails to show a genuine issue of material fact exists regarding the District's conduct under either definition of willful and wanton conduct.

¶ 46 Our supreme court has observed "The term 'willful and wanton' includes a range of mental states, from actual or deliberate intent to cause harm, to conscious disregard for the safety of others or their property, to utter indifference for the safety or property of others." *Harris*, 2012 IL 112525, ¶ 41. Insofar as the statutory definition of willful and wanton conduct is "entirely consistent with this court's long-standing case law" (*id*.), however, Johnson must establish a genuine issue of material of fact regarding a "course of action" that proximately caused her injuries. See 745 ILCS 10/1-210 (West 2010). "Inadvertence, incompetence, or unskillfulness does not constitute willful and wanton conduct." *Floyd ex rel. Floyd v. Rockford Park District*, 355 Ill. App. 3d 695, 701 (2005) (citing *Geimer v. Chicago Park District*, 272 Ill. App. 3d 629, 637 (1995)). "Rather, to establish willful and wanton conduct, the public entity must be informed of a dangerous condition, know that others had been injured because of that condition, or intentionally remove a safety feature or device from recreational property." *Floyd*, 355 Ill.

App. 3d at 701 (citing *Winfrey v. Chicago Park District*, 274 Ill. App. 3d 939, 945 (1995)). Prior knowledge of similar injuries is required to establish a "course of action." See *Floyd*, 355 Ill. App. 3d at 701 (and cases cited therein). Moreover, even where there was prior knowledge of a similar injury, a plaintiff must establish the similarities between the prior injury and the plaintiff's injury. See *Floyd*, 355 Ill. App. 3d at 702 (and cases cited therein).

¶ 47 In the context of discovered dangers on public recreational land, the case law examining claims of willful and wanton conduct demonstrates that this court will consider whether the public entity had taken any action to remedy a known danger, or failed to take such action. For example, in *Palmer v. Chicago Park District*, 277 Ill. App. 3d 282 (1995), the plaintiff injured himself after his leg became entangled in a 30-foot section of fence that had fallen in a city park and been left unrepaired for three months, despite the fact that the defendant park district conducted daily inspections and the danger the fence posed was obvious. *Id*. at 284-85. Because the park district knew or should have known about the hazard and had not taken any remedial measures to repair or warn of the danger, the court concluded the plaintiff had stated a cause of action for willful and wanton conduct. *Id*. at 289; see also *Carter v. New Trier East High School*, 272 Ill. App. 3d 551, 552, 556-57 (1995) (the plaintiff, who injured his ankle when he backed into hole on school's tennis court, successfully pleaded willful and wanton conduct against the school board because the plaintiff alleged that the board was aware of prior complaints of and injuries caused by the uneven, broken, depressed, and cracked condition of the tennis court).

¶ 48 In contrast, in *Lester v. Chicago Park District*, 159 Ill. App. 3d 1054, 1059 (1987), where the park district discovered dangerous ruts in a softball field and repaired them, but was alleged

to have done so ineffectively, this court determined the plaintiff could not state a cause of action for willful and wanton conduct. This court affirmed the dismissal, stating "the admitted fact [the District] undertook rehabilitative action to fill in the various holes and ruts in the field indicated a concern for possible injuries, and certainly does not as a matter of law rise to the level of 'utter indifference' or 'conscious disregard' for the safety of lives." *Id*. at 1059. The *Lester* court also stated: "To equate the [District's] actions in discovering the condition complained of and taking affirmative rehabilitative acts after such discovery in an attempt to remedy the problem with willful and wanton conduct would render that standard synonymous with ordinary negligence." *Id*.

¶ 49 In this case, Molette and Mays testified regarding the regular maintenance of the softball fields at Washington Park. District staff members cut the grass Monday through Friday in the outfield areas of the softball fields. Before cutting the grass, District staff would check for holes. If staff discovered a hole, the machine that groomed the softball diamonds would be used to level the hole, though shovels would also be used. According to Molette, it was not difficult to determine where holes in the outfield were located because the lawn mower would drive back and forth over the entire area.

¶ 50 In opposing summary judgment, Johnson relies primarily upon Jefferson's testimony of complaints from softball players about holes in the fields for several years, including 2009. Jefferson also testified approximately a dozen other people have been injured at Washington Park since 2001, but he did not specify the circumstances of these incidents. Such testimony, from the Union's former sports director, does not tend to establish the District knew or should have known

about players being injured due to holes in outfields generally, let alone injured by the hole which caused Johnson's injury. Indeed, in this case, the record does not indicate in which particular field at Washington Park Johnson sustained her injury.

¶ 51 In contrast, Molette testified he was unaware of anyone being injured by stepping into a hole at the park. Mays testified: (1) he was never notified by the CTA league commissioner of any holes in the field; (2) he was never advised of any player being injured by stepping in a hole; and (3) the softball fields at Washington Park were in good condition in June 2009. Johnson testified: she did not (1) recall which softball diamond was the site of her injury; (2) see the hole and it was not obvious; (3) know how long the hole had been there; or (4) know of anyone else who had fallen into, been injured by or complained about the hole.

¶ 52 In short, Johnson fails to raise a genuine issue of material fact regarding the District's knowledge of the dangerous condition which caused her injury. Moreover, the evidence establishes the District's regular maintenance of the softball fields, which indicates a concern for possible injuries, rather than a course of conduct displaying an utter indifference or conscious disregard for the safety of lives. At most, the evidence shows the District failed to discover the hole which caused Johnson's injury, either because it was created over a weekend or due to the inadvertence of District staff. Ordinary negligence is insufficient to establish willful and wanton conduct. *Floyd*, 355 Ill. App. 3d at 701. Accordingly, the circuit court did not err in granting summary judgment in favor of the District.

¶ 53 Johnson's Claim against the Union

¶ 54 Johnson also argues the circuit court erred in granting summary judgment to the Union on Johnson's claim the Union negligently performed its voluntary undertaking of a duty to her. "Generally, pursuant to the voluntary undertaking theory of liability,"“one who undertakes, gratuitously or for consideration, to render services to another is subject to liability for bodily harm caused to the other by one's failure to exercise due care in the performance of the undertaking.' " *Wakulich v. Mraz*, 203 Ill. 2d 223, 241 (2003) (quoting *Rhodes v. Illinois Central Gulf R.R.*, 172 Ill. 2d 213, 239 (1996)). As the cause of action sounds in negligence, Johnson must prove a duty on the part of the defendant, a breach of that duty, and damages proximately caused by the breach. *Thurman*, 2011 IL App (4th) 101024, ¶ 9. Here, Johnson relies on the voluntary undertaking to establish the existence of a duty where one would not otherwise lie. See, *e.g.*, *Day v. Menard, Inc.*, 386 Ill. App. 3d 681, 683-84 (2008). The duty is "limited to the extent of the undertaking." *Id*. at 683. Thus, for example, " 'even a person who has gratuitously assumed to protect others against injury is under no obligation to continue that protection indefinitely.' " *Lewis v. Chica Trucking, Inc.*, 409 Ill. App. 3d 240, 255 (2011) (quoting *Chisolm v. Stephens*, 47 Ill. App. 3d 999, 1006 (1977)).

¶ 55 Our case law also distinguishes between "nonfeasance" (the failure to perform a necessary act) and "misfeasance" (the negligent performance of an act). *Bourgonje v. Machev*, 362 Ill. App. 3d 984, 996 (2005). An "essential element" of a nonfeasance claim is the plaintiff's reasonable reliance upon the defendant's promise to perform the essential service. *Claimsone v. Professional Property Management, LLC*, 2011 IL App (2d) 101115, ¶ 22. A plaintiff's reliance is reasonable where " 'there is a deceptive appearance that performance had been made, or where

a representation of performance has been communicated to plaintiff by defendant, or where plaintiff is otherwise prevented from obtaining knowledge or substitute performance of the undertaking. But, to justify reliance, plaintiff must be unaware of the actual circumstances and not equally capable of determining such facts.' " *Lewis*, 409 Ill. App. 3d at 256 (quoting *Chisolm*, 47 Ill. App. 3d at 1007); see also *Bourgonje*, 362 Ill. App. 3d at 1003, 1005-06 (plaintiff tenant claimed that defendant landlord specifically agreed to light the property in order to protect her from attacks late at night).

¶ 56 The voluntary-undertaking doctrine is to be narrowly construed. *Claimsone*, 2011 IL App (2d) 101115, ¶ 22. Whether a defendant has voluntarily undertaken a duty to a plaintiff is a question of law for the court, but if there is a dispute of material fact affecting the existence of an undertaking of a duty, summary judgment is improper. *Bourgonje*, 362 Ill. App. 3d at 995.

¶ 57 In this case, the testimony from Johnson, Owens and Mays differs on the general questions of whether Owens inspected softball fields only on rainy days and whether those inspections were limited to the infields. Johnson, however, testified she did not see Owens inspect the field on the date she was injured. The Union's duty is limited to its undertaking. The Union was not obliged to inspect softball fields, or the outfields thereof, indefinitely. Johnson's own testimony fails to establish any voluntary undertaking on the date of her injury and thus fails to establish any duty. See *Lewis*, 409 Ill. App. 3d at 255. Furthermore, Johnson produced no evidence of any express promise by the Union to inspect the softball outfields prior to each game. Accordingly, even assuming *arguendo* a duty existed, Johnson cannot rely on past performance

to establish the reasonable reliance necessary to recover on her claim. *Id*. at 256. Thus, the circuit court did not err in entering summary judgment in favor of the Union.

¶ 58 CONCLUSION

¶ 59 In sum, we conclude the circuit court did not err in entering summary judgment in favor of the District and the Union in this case. For all of the aforementioned reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 60 Affirmed.