2019 IL App (2d) 180319-U
No. 2-18-0319
Order filed January 14, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

NANCY SALDANA, as Executor of the Estate of Lonnie Diane Wilkinson, Deceased,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellant,	)	
v.	)	No. 15-L-501
MATTHEW M. MALAWSKI and FOX VALLEY PARK DISTRICT,	)	Honorable Susan Clancy Boles,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted defendant Park District's motion to dismiss plaintiff's fifth amended complaint.

¶ 2 Plaintiff, Nancy Saldana, executor of Lonnie Diane Wilkinson's estate, sued defendants, Matthew M. Malawski and the Fox Valley Park District, pursuant to the Wrongful Death Act (740 ILCS 180/1 *et seq.* (West 2014)) and the Survival Act (755 ILCS 5/27-6 (West 2014)), for damages related to Wilkinson's death. On March 29, 2018, the trial court granted the Park

District's motion to dismiss plaintiff's fifth amended complaint.[1] Plaintiff appeals and, for the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On September 5, 2015, Wilkinson was riding her bicycle westbound on the Virgil Gilman Trail in Aurora. The public bicycle trail runs generally in an east-west direction and intersects Densmore Road, a two-lane road running in a north-south direction. In that intersection, Wilkinson was struck by Malawski, who was driving his vehicle southbound on Densmore Road. Wilkinson died from her injuries. There is no dispute that the Park District had previously placed a yield sign on the trail for westbound bicycle and pedestrian traffic.

¶ 5 The fifth amended complaint alleged three counts, the second two against the Park District. Specifically, plaintiff alleged in both counts that westbound cyclists were not able to adequately see southbound traffic on Densmore Road due to overgrown trees, bushes, and shrubbery north of the trail. As there was an alleged restricted sight-line view, plaintiff complained that the Park District was willful and wanton in its acts and/or omissions of: (1) initially placing a yield sign instead of a stop sign on the trail for westbound bicyclists; (2) failing to assess whether westbound bicyclists on the trail had a restricted view of southbound vehicular traffic; (3) failing to provide an adequate view from the trail of conflicting traffic; (4) failing to warn trail users of the intersecting traffic, even though it knew or should have known of the hazard; (5) failing to follow internal custom and practice to inspect trails for potentially

[1] Plaintiff's claim against Malawski remains pending in the trial court. On March 29, 2018, however, the court ordered that dismissal against the Park District was final and appealable under Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016) and that there was no reason to delay enforcement or appeal. Accordingly, Malawski is not a party to this appeal.

hazardous conditions and to remedy those hazards; and (6) installing a yield sign that was too small and violated the mandatory minimum size requirements as set forth in table 9 B-1 of the Municipal Uniform Traffic Control Devices Manual (the Manual).

¶ 6 The Park District, pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2016)), filed a combined motion to dismiss the fifth amended complaint. As to section 2-615 of the Code (735 ILCS 5/2-615 (West 2016)), the Park District argued that the complaint failed to state a cause of action because: (1) it owed no duty to provide an unrestricted view from the trail for roadway traffic; and (2) plaintiff failed to plead facts establishing willful and wanton conduct and, therefore, that the Park District was immune from liability under section 3-106 of the Local Governmental and Governmental Employees Tort Immunity Act (Act) (745 ILCS 10/3-106 (West 2016)). Further, pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2016)), the Park District argued that: (1) its decision to erect a yield sign, as opposed to a stop sign, on the trail reflected an exercise of discretion and, therefore, it was immune from liability under section 2-109 of the Act (745 ILCS 10/2-109 (West 2016)); and (2) the yield sign complied with the minimum size requirements of section 9 B-1 of the Manual.

¶ 7 On March 29, 2018, the court granted defendant's motion to dismiss and, on April 18, 2018, the court issued a written memorandum explaining its decision. The court found first that dismissal under section 2-615 was appropriate because the Park District's cited authority established that landowners have no duty to remove a sight obstruction adjacent to a public road. The court found that plaintiff did not attempt to distinguish that authority, nor did she allege that the yield sign itself was obstructed.

¶ 8 Next, the court determined that dismissal under section 2-619 was also appropriate because the Park District was entitled to discretionary immunity under the Act for its placement of the yield sign. The court rejected plaintiff's assertion that placement of the yield sign was ministerial and that, because the Park District could not state the particular decisionmaking factors it considered when placing the sign, it could not meet its burden of establishing that the sign's placement resulted from an exercise of discretion. "The proof of [the Park District] exercising its discretion is the existence of the yield sign on this path at all at the time of the accident. A sign on this shared used [*sic*] path was not mandated, but the [P]ark [D]istrict chose to erect one." The court continued that the Manual made clear that the Park District's decisions, both whether to place a sign on the trail and, if so, what type of sign, were discretionary, and to have placed the yield sign it "would likely have balanced various interests and factors and then made a judgment call ***[.]" The court noted that a sign on the path was not mandated; rather, the Manual simply provided guidance and factors to consider.

¶ 9 Third, the court disagreed with plaintiff's argument that a factual issue existed concerning the size of the yield sign that was used. The court noted that the Manual required the sign to be 18"x18"x18." In support of its assertion that the sign met the requirements, the Park District submitted with its motion an affidavit and deposition testimony from its risk manager, John Bier, reflecting that: (1) he personally observed the yield sign at the scene a few days after the accident; (2) the yield sign was removed and placed in a Park District "cage"; and (3) he identified the smallest sign in the cage and measured it to be 18"x18"x18", which was consistent with his observations at the scene. The court noted "there is no evidence to the contrary of any other yield sign size in the [P]ark [D]istrict's possession being smaller than the smallest

mandated size in this case of 18"x18"x18". Thus, there is no question of fact as to the appropriate size of the yield sign at issue."

¶ 10 Finally, the court determined that dismissal was appropriate because, unless it had engaged in willful and wanton conduct, which requires an actual or deliberate intent to cause harm or an utter indifference to or a conscious disregard for the safety of others under, the Park District was immune from liability section 3-106 of the Act (745 ILCS 10/3-106 (West 2016)). Here, the court determined, the Park District's discretionary decision to erect a yield sign on the trail, when it was not required to erect any sign, illustrated a conscious *regard* for the safety of others. As plaintiff failed to state a cause of action upon which relief could be granted, the court dismissed the fifth amended complaint with prejudice. Plaintiff appeals.

¶ 11 II. ANALYSIS

¶ 12 A. Standards of Review

¶ 13 A section 2-615 motion to dismiss tests the legal sufficiency of a complaint. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. In contrast, a section 2-619 motion to dismiss admits the sufficiency of the complaint, but asserts that a defense outside the complaint defeats it. *Id.* Specifically, section 2-619(a)(9) of the Code permits involuntary dismissal where the claim is barred by "other affirmative matter." 735 ILCS 5/2-619(a)(9) (West 2010). When ruling on motions to dismiss under either provision, a court must accept as true all well-pleaded facts, as well as any reasonable inferences that may arise from them, but it cannot accept as true mere conclusions unsupported by specific facts. *Patrick Engineering*, 2012 IL 113148, ¶ 31. We review *de novo* a dismissal under either section. *Id.*

¶ 14 We note that the purpose of a motion to dismiss under section 2-619 is to dispose of legal and easily-proved factual issues at the outset of a case and, in ruling on such a motion, the court

may consider pleadings, depositions, and affidavits. See *Zedella v. Gibson*, 165 Ill. 2d 181, 185 (1995). When supporting affidavits have not been challenged or contradicted by counter-affidavits or other appropriate means, the facts therein are deemed admitted. *Id.* The question on appeal is then "whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law." *Id.* at 185-86; see also *United States Bank Trust N.A. v. Lopez*, 2018 IL App (2d) 160967, ¶ 17.

¶ 15 B. Plaintiff's Arguments on Appeal

¶ 16 Plaintiff argues that defendant was not entitled to immunity under section 2-109 of the Act. She argues that the Manual requires the Park District to determine whether an "unrestricted view" exists at the intersection. Specifically, plaintiff notes that the Manual's standards mandate that "yield signs *shall* be installed on shared-use paths at points where bicyclists have an *adequate* view of conflicting traffic as they approach the sign ***" and, further, that stop signs "shall be installed on shared-use paths at points where bicyclists are required to stop." (Emphases added.) Plaintiff therefore concludes that the Park District was first required to determine whether there was an adequate view and, if there existed a "restricted view," was required by the Manual to place a stop sign. If the view was unrestricted, the Park District could then decide whether a stop or yield sign was appropriate. Plaintiff asserts that the Park District failed to present any evidence that it ever assessed whether the view was unrestricted or restricted. As it failed to abide by requirements dictated in the Manual, plaintiff argues that the Park District is not entitled to discretionary immunity.

¶ 17 Plaintiff also argues that she pleaded sufficient facts to establish willful and wanton conduct and, therefore, that the Park District was not entitled to immunity under section 3-106 of

the Act. She argues that the complaint adequately pleaded willful and wanton conduct in that the Park District knew or should have known of the intersection's potential hazard and willfully failed to correct it or adequately warn trail users. Plaintiff agrees that the Park District did not have a duty to clear the trees along the path to create a clear view. However, she contends it did have a duty, as created by the Manual, to analyze the intersection and, when it knew that the view of conflicting traffic was restricted, to maintain proper signage. Plaintiff argues that the trial court improperly decided a factual question when it concluded that the Park District's decision to erect a yield sign reflected a conscious regard for the safety of others, not willful and wanton disregard for the safety of others. Finally, plaintiff argues that there exists a question of fact whether the yield sign complied with the Manual's minimum size requirements and that the trial court's decision on this point was based solely on the speculated size of the sign.

¶ 18 C. Dismissal Properly Granted

¶ 19 We note first that the Park District disagrees that the Manual created a duty or that any duty existed, specifically arguing that: (1) it had no duty to provide trail users with an unrestricted view of traffic on the road; (2) the trial court agreed that there was no existing duty; and (3) duty must first be established before the concept of immunity is even triggered. The Park District's cited authority (see, *e.g.*, *Ziemba v. Mierzwa*, 142 Ill. 2d 42, 51-52 (1991)), generally supports its position concerning the absence of a duty to clear the bushes and trees blocking the view of traffic and that a plaintiff cannot recover for willful and wanton misconduct or ordinary negligence unless the defendant has breached a duty to the plaintiff. See, *e.g.*, *Geimer v. Chicago Park District*, 272 Ill. App. 3d 629, 632 (1995). However, plaintiff does not dispute these propositions. Specifically, plaintiff *concedes* that the Park District had no duty to clear trees or bushes to provide an unrestricted sight line. Rather, plaintiff contends (without citation

to authority) that "there can be no dispute that the Manual created a duty for [the Park District] when initially placing signage among shared-use trails." Her argument continues that the Manual required the Park District to do an initial assessment of the intersection to determine whether the trail users had an adequate view, and only once that determination was made could it assess whether to erect a sign and, if so, which sign to erect. She asserts, "[p]ursuant to the Manual, a yield sign could have only been placed if the Park District made a determination that there was an adequate view of conflicting traffic." Thus, plaintiff's position on duty concerns not an unobstructed view of the road and traffic created by foliage (and, again, there is no dispute that the *yield sign* was unobstructed) but, rather, an alleged duty created by the Manual to conduct an analysis that comported with the Manual. Again, plaintiff cites no specific authority for this proposition. However, we need not decide whether, in fact, the Park District owed plaintiff a duty, as "this court may affirm the trial court's judgment on any basis that is supported by the record." *Stoll v. United Way of Champaign County, Illinois, Inc.*, 378 Ill. App. 3d 1048, 1051 (2008). Here, even if the Park District owed Wilkinson a duty, the trial court properly dismissed the complaint because the Park District is immune from liability under section 3-106 of the Act.

¶ 20 Section 3-106 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 * * * unless such local entity or public employee is guilty of willful and wanton conduct proximately causing such injury." 745 ILCS 10/3-106 (West 2014).

¶ 21 Here, plaintiff does not dispute that her complaint is premised on a "condition" of public property intended to be used for recreational purposes. Indeed, her complaint concerns the trail, the intersection, the sight line, and the yield sign that existed there on account of those conditions.[2] We presume this accounts for the fact that all complaint allegations were cast as "willful and wanton" acts or omissions (*i.e.*, so as to fall under section 3-106's exception to immunity). However, "willful and wanton misconduct" is defined under the Act as:

> "[A] *course of action* which shows an actual or deliberate *intention to cause harm* or which, if not intentional, shows an *utter indifference* to or *conscious disregard* for the safety of others or their property." (Emphases added.) 745 ILCS 10/1-210 (West 2014).

¶ 22 The fifth amended complaint entitled plaintiff's causes of action as "willful and wanton" survival and wrongful death actions, and *all allegations* against the Park District were cast as having constituted willful and wanton conduct. Specifically, the complaint alleged that there was a restricted sight-line view and, so, the Park District was willful and wanton in its acts and/or omissions of: (1) initially placing a yield sign instead of a stop sign on the trail for westbound bicyclists; (2) failing to assess whether westbound bicyclists on the trail had a restricted view of southbound vehicular traffic; (3) failing to provide an adequate view from the trail of conflicting traffic; (4) failing to adequately warn trail users of the intersecting traffic, even though it knew or should have known of the hazard; (5) failing to follow internal custom

[2] With respect to the yield sign, we note that even a movable, non-affixed item may constitute a "condition" of real property under section 3-106. See, *e.g.*, *Grundy v. Lincoln Park Zoo*, 2011 IL App (1st) 102686, ¶ 16 (a stationary but movable warning sign sitting in the same location in the outdoor food court at the zoo for the summer season constituted "a condition of any public property" under section 3-106).

and practice to inspect trails for potentially hazardous conditions and to remedy those hazards; and (6) installing a yield sign that violated the mandatory minimum size requirements. Although, when ruling on a section 2-615 motion to dismiss, we must accept as true all well-pleaded facts and any reasonable inferences drawn therefrom, we cannot accept as true mere conclusions unsupported by specific facts. *Patrick Engineering*, 2012 IL 113148, ¶ 31. "When the plaintiff is alleging that the defendant engaged in willful and wanton conduct, such conduct must be shown through well-pled facts, and not by merely labeling the conduct willful and wanton." *Winfrey v. Chicago Park District*, 274 Ill. App. 3d 939, 943 (1995).

¶ 23 Plaintiff argues that the above allegations adequately pleaded facts reflecting the Park District's conscious disregard for the safety of others and, further, she notes that whether conduct is willful and wanton is typically a question of fact posed to a jury. In addition, she asserts that the Park District acted with conscious disregard for safety in its failure to take action with respect to the trail, when it was on notice regarding the view at the intersection. She points out that a work order shows that a portion of the trail, which included the intersection, was trimmed and mowed just three days before Wilkinson's death. Further, she asserts that the Park District has admitted in its brief that the view of conflicting traffic could change with the seasons, so it "all but admits that the view from the subject intersection could have been restricted and inadequate at the time of Ms. Wilkinson's death."

¶ 24 We disagree. Even if the question whether a defendant is liable for willful and wanton conduct is ordinarily a question for a jury, the issue may be decided as a matter of law where appropriate. See, *e.g.*, *Geimer*, 272 Ill. App. 3d at 637 (the plaintiff failed to establish willful and wanton conduct as a matter of law); see also *Cohen v. Chicago Park District*, 2017 IL 121800, ¶ 34 (summary judgment in Park District's favor affirmed where its conduct in repairing a crack in

pavement of shared-use path was not willful and wanton and, therefore, it was immune from liability under section 3-106); *Barnett v. Zion Park District*, 171 Ill. 2d 378, 385 (1996) (rejecting the plaintiff's claim that whether conduct was "willful and wanton" was a question of fact precluding summary judgment and noting that the ultimate question involved interpreting immunity under the Act, which was a matter of law appropriate for summary judgment); *Thruman v. Champaign Park District*, 2011 Ill. App. (4th) 101024, ¶ 27 (complaint properly dismissed under sections 2-615 and 2-619, where the pleading insufficiently stated a cause of action for willful and wanton conduct and the defendant was, therefore, immunized from ordinary negligence). Here, deciding the issue as a matter of law is warranted. The complaint allegations simply do not state *facts* establishing an "intention to cause harm" or an "utter indifference" or "conscious disregard" disregard for the safety of others. Rather, the allegations simply label what is at most merely negligent conduct as willful and wanton.

¶ 25 Specifically, viewing the allegations in the light most favorable to plaintiff, her allegations assert, at most, that the Park District's alleged assessment of the intersection and its installation of a yield sign was simply *inadequate*, in light of the alleged hazard. However, as a matter of law, simply inadequate or negligent attempts at corrective action are not willful and wanton. Willful and wanton misconduct "consists of more than mere inadvertence, incompetence, or unskillfulness." *Geimer*, 272 Ill. App. 3d at 637. In *Cohen*, a bicyclist's front wheel got caught in a crack in the pavement and he fell; he alleged that the defendant Park District had acted willfully and wantonly in failing to maintain the path. The supreme court disagreed, noting that there were no prior injuries involving the crack, which would have alerted the defendant to an extraordinary risk or danger and that, even though the defendant was aware of the crack, it took corrective action by inspecting it and placing it on the repair list prior to the

accident. *Cohen*, 2017 IL 121800, ¶¶ 31-32. The court rejected the plaintiff's argument that the defendant could have done more and that it should have immediately barricaded the path or performed a temporary repair. The court explained, "[w]hile this may be true, we think it clear that to equate [the] defendant's actions in this case 'with willful and wanton conduct would render that standard synonymous with ordinary negligence.' " *Id.* at ¶ 33 (quoting *Lester v. Chicago Park District*, 159 Ill. App. 3d 1054 (1987) (where the appellate court affirmed the dismissal of the plaintiff's complaint, noting that nothing in the plaintiff's allegations that the defendant park district insufficiently filled in ruts and holes on a softball field could, as a matter of law, amount to "utter indifference" or "conscious disregard" for the safety of patrons)).

¶ 26 Here, plaintiff does not allege *facts* establishing, for example, that the Park District knew of prior accidents at the intersection or that the intersection was generally associated with a risk of serious injury. See, *e.g.*, *Barr v. Cunningham*, 2017 IL 120751, ¶ 21. We acknowledge that, in one conclusory sentence, plaintiff asserts generally that the Park District was "aware of prior complaints about and injuries resulting from the above-mentioned restricted view." However, conclusory complaint allegations fail when not supported by specific factual allegations. See, *e.g.*, *Doe v. Coe*, 2018 IL App (2d) 170435, ¶ 79. The complaint does not specify any *facts* concerning prior complaints or injuries, nor any *facts* that those unspecified prior injuries had any similarity to the injury here. See, *e.g.*, *Dinelli v. County of Lake*, 294 Ill. App. 3d 876, 884-85 (1998) (Complaint allegations for willful and wanton misconduct properly dismissed where an allegation of "a prior injury occurring in the crosswalk" did not "plead facts demonstrating that it had any similarity to the injury suffered herein"); *Floyd v. Rockford Park District*, 355 Ill. App. 3d 695, 702 (2005) (complaint for willful and wanton misconduct properly dismissed

where "even if there was prior knowledge of a similar injury, a plaintiff must plead facts establishing the similarities between the prior injury and the plaintiff's injury.").[3]

¶ 27 Accordingly, plaintiff seeks to impose liability for the Park District's initial decision to place a yield sign instead of a stop sign on the trail for westbound bicyclists; however, as this allegation concerns insufficient or inadequate corrective action, this sounds in a claim for mere negligence. Plaintiff also seeks to impose liability for the Park District's failure to assess whether westbound bicyclists on the trail had a restricted view of southbound vehicular traffic and its failure to provide an adequate view from the trail of conflicting traffic; however, she concedes that, even if there existed a restricted view, the Park District had no duty to provide an unrestricted view and, moreover, that, in fact, it placed a yield sign at the intersection. Again, this reflects at most mere negligence, not a conscious disregard for safety. Plaintiff further seeks to impose liability for the Park District's failure to warn trail users of the intersecting traffic, even though it knew or should have known of the hazard; again, however, it is undisputed that the Park District *placed a yield sign* at the intersection and, if the sign was *insufficient* as a warning there or in its size, the allegations simply sound in mere negligence. Finally, plaintiff seeks to impose liability for the Park District's failure to inspect trails for potentially hazardous conditions and to remedy those hazards; however, she agrees that just three days prior to the accident, the Park District trimmed and mowed the relevant area and, again, that it *installed a*

[3] We note that, albeit with respect to the section 2-619 bases for dismissal, the Park District submitted Bier's affidavit and deposition in which he testified that, prior to Wilkinson's accident, the Park District was not informed of any other accidents or injuries at the intersection nor received any prior complaints concerning visibility there. Plaintiff did not rebut, challenge, or contradict that evidence through counter-affidavit or otherwise.

yield sign at the intersection. As such, we conclude that, even if labeled "willful and wanton," none of the aforementioned allegations constitute acts or omissions that reflect "intention to cause harm," or an "utter indifference" or "conscious disregard" disregard for the safety of others. Accordingly, the Park District is immune from liability under section 3-106 of the Act and the trial court's dismissal of the fifth amended complaint was proper.

¶ 28 III. CONCLUSION

¶ 29 For the reasons stated, the judgment of the circuit court of Kane County is affirmed.

¶ 30 Affirmed.