2018 IL App (2d) 170816-U
No. 2-17-0816
Order filed November 7, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ROGER E. MEDEMA,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 15-L-644
	)	
CITY OF LAKE FOREST,	)	Honorable
	)	Diane E. Winter,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Hudson and Justice Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court improperly found, as a matter of law that defendant's actions were not willful and wanton, as the evidence presents a material question of fact to be resolved at trial. Reversed and remanded.

¶ 2 Plaintiff, Roger E. Medema, brought an action against defendant, the City of Lake Forest, alleging negligence (count I) and willful and wanton conduct (count II) for injuries he alleged were caused when his bicycle slipped out from under him while he was riding across a wet bridge owned and maintained by defendant. Count III against an engineering company is not at issue in this appeal. The trial court granted defendant's motion for summary judgment, finding that defendant's conduct was not willful and wanton. Plaintiff appeals, contending that the record

contains evidence creating a genuine question of material fact regarding whether defendant had acted willfully and wantonly in not remedying the unreasonably dangerous condition of the bridge despite its actual or constructive notice of the dangerous conditions. We agree and reverse and remand.

¶ 3 I. FACTS

¶ 4 On September 13, 2014, plaintiff was riding his bicycle along the Laurel Avenue Bridge in Lake Forest, Illinois, when his bicycle slipped out from under him on the wooden deck of the bridge.

¶ 5 Plaintiff sued defendant for the injuries he allegedly sustained. Plaintiff alleged alternative counts of negligence and willful and wanton conduct. As is relevant to this appeal, count II alleged that defendant was guilty of willful and wanton conduct by failing to, among other things: (1) provide a safe and proper place for plaintiff to travel on the bridge and path despite actual knowledge of numerous prior similar accidents on the bridge attributable to the unduly slippery nature of the surface of the wooden bridge deck of the bridge; and (2) warn plaintiff that the surface of the wooden deck of the bridge was slippery when wet despite defendant's actual knowledge of numerous prior similar accidents on the bridge attributable to the unduly slippery nature of the surface of the wooden deck of the bridge.

¶ 6 Defendant denied the material allegations and raised the affirmative defenses of comparative negligence and immunity under sections 3-102, 103, 105(a), and 106 of the Local Governmental and Governmental Employee Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/3-102, 103, 105(a), 106 (West 2014)).

¶ 7 The following facts were revealed at discovery. Plaintiff was an experienced bicyclist and had bicycled over the bridge multiple times in the past. It had rained the night before

plaintiff's accident and plaintiff knew the wooden bridge deck would be more slippery when wet. At the time of the incident, plaintiff was aware of precautionary measures necessary when crossing a wet bridge, such as moving across the bridge at a slower speed. He testified that he had reduced his speed to about five miles per hour while crossing the bridge prior to his fall. At the time, the weather was sunny and the asphalt leading to the bridge was dry. However, plaintiff testified that the wooden bridge deck itself was damp and it made the bridge deck slippery. When the bicycle slipped out from under him, plaintiff stated that "[i]t completely surprised him." He described it "like being on wet ice." He further testified that he "had absolutely no control." When he slipped, plaintiff stated that he was certain that he did not slip on any debris or other substance on the bridge deck such as loose soil or pebbles.

¶ 8 Erika Bocklund testified that she was walking her dog near the bridge when she saw plaintiff hunched over on the west side of the bridge. Bocklund testified that it was sunny at the time, but she noted that the bridge was wet and slippery with the morning dew. Bocklund also stated that plaintiff told her that the bridge was slippery. Bocklund did not recall a "caution bridge slippery when wet" sign present before the accident.

¶ 9 Defendant disclosed other bicycle accidents that occurred on the bridge dating back to 2004. Peter Siebert, the Fire Chief of the Lake Forest Fire Department, testified that he located two accident reports from August 29, 2004. Shortly after police officers from the police department responded to the second bicycle accident at the bridge on the morning of August 29, 2004, they placed temporary warning signs at the approach to the bridge to warn approaching bicyclists of the unsafe slippery conditions of the bridge. Siebert testified that he was aware of "problems in the past" regarding bicycle accidents at the bridge. However, he stated that prior to his deposition he had not read the police department reports from the two separate bicycle

accidents that had occurred on August 29, 2004. Siebert testified that the only way the fire department would learn of an accident at the bridge would be if the fire department had been called to the scene to render assistance.

¶ 10 Daniel Martin, the Superintendent of the Lake Forest Public Works Department, testified that he did not know what ultimately happened to the temporary "Slow Wet Pavement" signs that were placed at the bridge to warn other riders. The first time permanent "Slippery When Wet" signs were placed near the bridge was in the summer of 2015 after he received an email from Chief Siebert about two 2015 bicycle accidents on the bridge. Tony Caringello, Martin's assistant, testified that he did not know what happened to the temporary warning signs the officers placed at the bridge following the bicycle accidents on August 29, 2004. Caringello testified that, although he had been employed by the public works department since 1989, prior to his deposition, he had no knowledge of the reports of the two separate bicycle accidents that had occurred on the bridge on August 29, 2004.

¶ 11 Michael Kerr averred that sometime between the fall of 2009 and the spring of 2011, he and two other companion bicyclists were riding across the bridge when their bicycles slid out from underneath them, causing all three to fall. Kerr is an avid cyclist who has bicycled across the bridge on numerous occasions. Similar to plaintiff, Kerr averred that the wooden bridge was slippery due to frost, although the asphalt pavement leading up to the bridge was dry. As the three bicyclists entered the bridge, their bikes slid out from underneath each of them causing them each to fall and collide with the bridge deck surface. Kerr further averred that, because his and the other two bicyclists' injuries were not severe enough to require assistance from the police or fire department, they did not report the incident to defendant. Although the three riders were experienced bicyclists and were using due care by riding slowly and cautiously

across the bridge, they had no advanced warning to anticipate just how precisely slippery the bridge was prior to their falls. To the best of his recollection, there were no "Slippery When Wet" signs present at the time.

¶ 12 The most recent documented accidents on the bridge occurred on June 13, 2015, when the fire department responded to a bicyclist injured when his bicycle slid out from under him due to the wooden bridge deck being slippery from moisture. Siebert testified that, after responding to this incident, he sent an email to Caringello and voiced his concerns regarding the safety of the bridge. He wrote:

> "We had multiple bicycle accidents on the bridge at the end of West Laurel Avenue today. I have had problems with this in the past.
>
> * * *
>
> [W]e really need a more permanent solution to make that bridge deck less of a hazard. *** So, I'm hoping you can help me out and direct the right person to possibly come up with a solution to fix this hazardous situation."

¶ 13 After the accident on June 13, 2015, Siebert testified he was notified by a person affiliated with Open Lands, an entity tasked with maintaining the adjoining woods, that they had responded and rendered assistance to a second injured bicyclist who had been involved in another bicycle accident that same day. After these incidents, Siebert placed temporary yellow caution tape over the path to give approaching bicyclists a warning to "slow people down." He "wanted to prevent anything further from happening that day," and "because the bridge was wet," he wanted "~~people~~ to slow people down on their bike(s)." Siebert stated that warning signs were subsequently installed by the public works after his email was sent to the public

works department warning of the hazardous conditions at the bridge to provide a "heads-up" to bicyclists.

¶ 14 Martin testified that the warning signs, which were installed after the two June 13, 2015, accidents, were made in-house for less than $200. Caringello and Martin both testified that, after the two permanent "slippery when wet" signs were installed at the bridge in June 2015, they had not received any reports of other bicycle accidents at the bridge.

¶ 15 Martin testified that, in addition to the bridge, defendant has three other bridges in the city used for pedestrians and bicycles, two of which have concrete deck surfaces. The third bridge has an asphalt surface. Martin stated that there were no bicycle accident reports on the concrete and asphalt surfaced bridges. He further stated that the bridge in question was manufactured off-site and installed using a crane to place it over the Skokie River. The design specified that the deck was to be made of 2" x 10" Number 1 pressure preservative treated yellow pine. The specifications, however, did not include making the bridge deck slip resistant.

¶ 16 Kenneth Magnus of Bleck Engineering, a former defendant city engineer who was hired as a contractor after his retirement from defendant to inspect the bridge in 2012 and 2014 testified that, aside from specifying the type of wood to be used for the decking, the original plans and specifications for the bridge did not make any other specifications for making the decking slip resistant. Magnus testified that, if accidents at the bridge were brought to his attention and he was made aware of "a history of problems on the deck," he would have evaluated the safety of the bridge deck or slip resistance during his inspections of the bridge. He stated that defendant did not apprise him of any of the seven accidents that had occurred on the bridge. Magnus testified that he was not aware of any bicycle accidents on the other bridges in the city.

¶ 17 Nicholas Hyatt, an expert in structural engineering and a certified bridge inspector, testified that the manufacturer of the bridge, Continental Bridge Corporation, used pressure treated wood for the deck when it was built in 1986. The pressure treated wood is an inexpensive construction material but was known at the time for poor skid resistance. Today, Continental would recommend a concrete deck for a bicycle bridge, rather than a wooden deck. In 1986, skid resistance could have been achieved by adding a readily available lightweight and low cost slip resistant coating to the wooden deck surface. This coating could have been added to the bridge prior to plaintiff's 2014 accident without requiring a retrofit.

¶ 18 Hyatt further testified that, although a bridge does not meet current code requirements and may be legally "grand-fathered in," it may not necessarily be safe for its current use. He stated the bridge drawings produced in discovery by defendant do not bear the stamp of an engineer, let alone an engineer licensed in the local jurisdiction, calling into question whether an engineer actually designed and/or approved the design of the bridge. Hyatt testified that there is no specific standard defining when a bridge deck is sufficiently skid resistant, but it is left to the engineer's judgment, and merely because a structure may have met current code when it was originally built, does not necessarily mean the structure is safe for its intended use.

¶ 19 In Hyatt's opinion, the lack of a skid resistant surface on the wooden bridge deck increased the probability of plaintiff's accident at the location of the bridge where plaintiff fell. Hyatt testified that to a reasonable degree of engineering certainty, in his expert opinion, the lack of a "Caution—Bridge Slippery When Wet" warning sign, which was not installed at the Bridge until after plaintiff's accident, contributed to the cause of the accident.

¶ 20 Following discovery, defendant filed a motion for summary judgment. Defendant argued, *inter alia*, that it did not act willfully and wantonly and did not have actual or

constructive notice of the defect in the bridge. The trial court granted summary judgment in favor of defendant, stating:

> "Counsel has made much of Mr. Kerr's accident and the 2015 accidents, but that does not come into consideration in looking at what the City knew or should have known before [plaintiff's] accident. So I find that the City was not aware of an unreasonably dangerous condition prior to [plaintiff's] accident.
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> * * *
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> So for those reasons I find that this conduct did not rise to the level of willful and wanton conduct when you consider only the two accidents prior, the placing of a temporary sign. You know, it's negligence not to make sure a sign stays in place, but I don't find it rises to the level of willful and wanton. So I would grant the motion on that ground and the 3-105(a)."

¶ 21 Plaintiff timely appeals.

¶ 22 II. ANALYSIS

¶ 23 This appeal is taken from the trial court's order granting defendant's motion for summary judgment. Summary judgment is proper only where the pleadings, depositions, admissions, and affidavits on file 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 2014). "Although summary judgment can aid in the expeditious disposition of a lawsuit, it remains a drastic means of disposing of litigation and, therefore, should be allowed only where the right of the moving party is clear and free from doubt." *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). In order to determine whether a genuine issue of material fact exists, the "court must construe the pleadings, depositions, and affidavits strictly against the movant and liberally in

favor of the opponent. *Id*. The purpose of summary judgment is not to try an issue of fact but to determine whether a triable issue of fact exists. *Nunez v. Diaz*, 2017 IL App (1st) 170607, ¶ 29. Therefore, summary judgment is inappropriate when material facts are in dispute, material facts are not in dispute but reasonable persons could draw different inferences, or reasonable persons could give different weight to the relevant factors of a legal standard. *Seymour v. Collins*, 2015 IL 118432, ¶ 42. An appeal following a grant of summary judgment is subject to *de novo* review. *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 254 (2004).

¶ 24 We first address defendant's argument that plaintiff has forfeited any contention regarding whether section 3-105(a) bars plaintiff's action because plaintiff does not argue this in his appellate brief. Section 3-105(a) provides immunity for the condition of roads, sidewalks, or other public ways due to the effect of weather conditions. 745 ILCS 10/3-105(a) (West 2014). The trial court cited section 3-105(a) and the case of *Enriquez v. Chicago*, 187 Ill. App. 3d 1110 (1989), in finding that defendant had immunity. It is not surprising that plaintiff did not address section 3-105(a) based on the trial court's ruling. The court focused its analysis on whether the City's conduct was willful and wanton.[1] While the court mentioned section 3-105(a) as an alternative ground for its ruling, it never explained its reasoning. Nevertheless, forfeiture is a limitation on the parties, not the court. *In re Marriage of Piegari*, 2016 IL App (2d) 160594, ¶ 10. Since the issue has been briefed and fully argued at oral argument, we deny the City's motion to strike plaintiff's reply brief and address the merits.

¶ 25 Section 3-105(a) does not apply in this case because plaintiff's complaint alleges the defective design, construction, and condition of the bridge, which made it slippery when wet. In the *Enriquez* case, which was relied on by defendant and cited by the trial court, the First

[1] Section 3-105(a) contains no willful and wanton exception.

District Appellate Court noted that the plaintiff never alleged a defect in the bridge or that the decking material was especially slippery when wet. *Enriquez*, 187 Ill. App. 3d at 1116. In this case, plaintiff alleged that there was a defect in the bridge in that the bridge surface was "unduly slippery" when wet. These allegations take the case out of the realm of section 3-105(a).

¶ 26 We now turn to plaintiff's argument that the trial court erred in finding that defendant is immune under section 3-106 in that it did not act willfully and wantonly when it failed to take remedial measures to correct the known defective conditions at the bridge. Under section 3-106, "[n]either a local public entity nor a public employee is liable for an injury ~~if~~ 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). The Tort Immunity Act defines willful and wanton conduct 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." 745 ILCS 10/1-210 (West 2014). *Newby v. Lake Zurich Community Unit District 95*, 136 Ill. App. 3d 92, 96 (1985).

¶ 27 Willful and wanton conduct is not a static concept. In examining the concept in the context of a negligence action, the supreme court recognized that willful and wanton conduct exists along a continuum; it may be either intentional or less than intentional, "*i.e.*, where 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.' " *Ziarko v. Soo Line R. Co.*, 161 Ill. 2d 267, 274 (1994) (quoting *Schneiderman v. Interstate Transit Lines, Inc.*, 394 Ill. 569, 583 (1946)).

¶ 28 "Significantly, under the Tort Immunity Act, willful and wanton conduct requires a 'course of action,' indicating more than mere inaction." *Winfrey v. Chicago Park* District, 274 Ill. App. 3d 939, 945 (1995) (citing *Benhart v. Rockford Park* District, 218 Ill. App. 3d 554 (1991)). A public entity may be found to have engaged in willful and wanton conduct if it has been informed of a dangerous condition, or knew others had been injured because of the condition, or if it intentionally removed a safety device or feature from property used for recreational purposes. *Winfrey*, 274 Ill. App. 3d at 945. In addition, the question of willful and wanton conduct is a question of fact for the jury. *Robles v. City of Chicago*, 2014 IL App (1st) 131599, ¶ 17. The question rarely should be ruled upon as a matter of law. *Id.*

¶ 29 Here defendant could be found to have engaged in willful and wanton conduct as there is evidence that it had been informed of a dangerous condition, knew others had been injured because of the condition, and showed an utter indifference to or conscious disregard for the safety of others by failing to remedy the situation. It is uncontradicted that defendant had notice of two bicyclists being injured by the same alleged condition, albeit 10 years earlier. After the earlier accidents, defendant placed temporary signs warning that the bridge was slippery when wet. There is evidence that those signs were not there when plaintiff fell. About nine months after plaintiff's accident, defendant placed permanent signs at a minimal cost. The import of the time gap between the earlier accidents and plaintiff's fall is a fact which should be considered at trial in weighing whether defendant was willful and wanton. Perhaps the bridge had been accident-free for 10 years because the temporary warning signs had been posted for much of that time but some time before plaintiff's accident they had been removed or

fell and had never been replaced. In light of this evidence, we hold that the trial court improperly found, as a matter of law, that defendant's actions were not willful and wanton. Whether defendant's actions amounted to willful and wanton conduct is a question of fact to be resolved at trial.

¶ 30 Defendant cites several cases in support of its argument that the allegations did not rise to the level of willful and wanton conduct, however we find them distinguishable. In none of those cases was there evidence that the defendants had knowledge of prior injuries caused by the same alleged defective condition. See *Ozuk v. River Grove Board of Education*, 281 Ill. App. 3d 239 (1996); *Pomaro v. Community Consolidated School District 21*, 278 Ill. App. 3d 266 (1995); *Rooney v. Franklin Park District*, 256 Ill. App. 3d 1058 (1993); *Oropeza v. Board of Education of City of Chicago*, 238 Ill. App. 3d 399 (1992). In fact, in *Ozuk*, 281 Ill. App. 3d at 246-47, the court noted that willful and wanton conduct had been sufficiently pleaded in cases where the defendant knew of the injuries resulting from defective equipment but failed to remedy the situation.

¶ 31 Defendant argues that section 3-103 provides immunity because the plans for the bridge were approved. However, as plaintiff points out, section 103 also states that the public entity is liable "if after the execution of the plan or design it appears from its use that it has created a condition that is not reasonably safe." 745 ILCS 10/3-103 (West 2014). If plaintiff's case presents a material question of fact on willful and wanton conduct based on defendant's knowledge of prior accidents due to the same defect or condition, there is also a question of fact concerning whether defendant created a condition that is not reasonably safe.

¶ 32 Finally, defendant argues that the slippery bridge was an open and obvious condition. Open and obvious is usually a question of fact to be decided at trial. *Alqadhi v. Standard*

Parking, Inc., 405 Ill. App. 3d 14, 17-18 (2010). Plaintiff did testify in his deposition that he recognized the possible danger of a wet bridge. This is why he slowed to about five miles per hour. Plaintiff also alleged in his complaint that the wooden bridge deck was "unduly slippery." Plaintiff testified that crossing the bridge felt "like being on wet ice." While it is obvious that a bridge may be more slippery when it is wet, whether this bridge was truly unduly slippery is a question of fact for the jury.

¶ 33 Accordingly, we reverse the judgment of the circuit court and remand for further proceedings.

¶ 34 III. CONCLUSION

¶ 35 For the foregoing reasons, the judgment of the circuit court of Lake County is reversed and the cause is remanded.

¶ 36 Reversed and remanded.