

September 25, 2026

No. 1-25-1269

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

MARGARET KESSLER, Individually and as Mother and	)	Appeal from the Circuit Court
Next Friend of A.D., a Minor,	)	of Cook County.
	)	
Plaintiff-Appellant,	)	
	)	
	)	
v.	)	No. 23 L 9181
	)	
THE BOARD OF EDUCATION OF THE CITY OF	)	Honorable
CHICAGO; CHICAGO PUBLIC SCHOOLS; NOBLE	)	Charles S. Beach,
NETWORK OF CHARTER SCHOOLS, an Illinois	)	Judge, presiding.
Corporation; BUTLER COLLEGE PREP; and DENNIS	)	
STRATTON,	)	
	)	
Defendants	)	
	)	
(Noble Network of Charter Schools and Dennis Stratton,	)	
Defendants-Appellees).	)	

JUSTICE C.A. WALKER delivered the judgment of the court, with opinion.
Presiding Justice Gamrath and Justice Hyman concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff-Appellant Margaret Kessler, in her individual capacity and as mother and next friend of her minor son, A.D., appeals from two orders of the circuit court dismissing claims in her suit against the named defendants, Chicago Public Schools (CPS), Board of Education of the City of Chicago (the Board), Noble Network of Charter Schools (Noble), and Dennis Stratton, which sought damages for injuries suffered by A.D. in a high school football game. The claims against CPS and the Board were previously resolved and are not at issue in this appeal. A.D. played for the Butler College Prep (Butler) high school football team at the time of his injury, for which Stratton served as the head coach. Butler was a member of Noble’s network of charter schools. Relevant here, the court granted Noble and Stratton (collectively, the defendants) summary judgment on claims alleging willful and wanton conduct and, separately, a motion to dismiss pursuant to section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2024)) regarding certain negligence claims. For the reasons below, we affirm the grant of summary judgment but reverse the grant of the motion to dismiss, and remand for further proceedings.

¶ 2 BACKGROUND

¶ 3 Kessler filed her complaint on September 12, 2023, and alleged that A.D. suffered significant testicular injury during a high school football game in which he was not wearing an athletic cup to protect his groin. A.D. was a 15-year-old sophomore at the time of the injury. Kessler alleged that during the game at issue, which took place on September 16, 2022, A.D. “was tackled in the testicles and became injured as a result.” After the injury, Stratton “put [him] back into the *** game while he was still injured.” Kessler argued that this act by Stratton constituted “willful and wanton” conduct. She further alleged the defendants acted willfully and wantonly by not requiring players to wear athletic cups during games and failing to instruct them about athletic

cups. Kessler listed each as grounds for recovery for willful and wanton conduct in singular counts against each separate defendant, including count V against Noble and count IX against Stratton.

¶ 4 Following discovery, the defendants moved for summary judgment on November 8, 2024. They argued that Kessler failed to develop any evidence that the defendants' conduct rose to the willful and wanton level, and they were immune from any conduct that did not rise to that level pursuant to the Local Governmental and Governmental Employees Tort Immunity Act (Act) (745 ILCS 10/1-101 *et seq.* (West 2022)).

¶ 5 The defendants identified two primary theories Kessler set forth for willful and wanton conduct: (1) Stratton put A.D. back into the game despite knowing he had been injured and (2) the defendants failed to require players to wear athletic cups during games. As to the second, the defendants argued that under Illinois law, while a school must provide helmets and face guards for football players, “the Illinois Supreme Court has repeatedly found that school employees who exercised some precautions to protect students from injury, even if those precautions were insufficient, were not guilty of willful and wanton conduct,” citing *Lynch v. Board of Education of Collinsville Community Unit District No. 10*, 82 Ill. 2d 415, 430-31 (1980), and *Barr v. Cunningham*, 2017 IL 120751, ¶ 18. It continued that the record showed the defendants “furnished all equipment required by the IHSA (Illinois High School Association) and CPS (Chicago Public Schools).” It contended there was “no policy—IHSA, CPS, Noble or otherwise—that required players to wear athletic cups during football games.”

¶ 6 The defendants attached the depositions of Stratton, Kessler, and A.D. to their motion. Stratton testified in relevant part that he was very familiar with football, having played in high school and college, and he underwent IHSA training before every season. The players were required to wear helmets and shoulder pads, along with knee pads and football pants containing

additional padding, all provided by the school. Players also had to wear mouthpieces in practice and games. The school did not provide or require athletic cups, though Stratton knew what they were. It was the decision of the parents whether a student should wear an athletic cup during games. Stratton had not worn cups while playing football but did for baseball. He did not know the American Urological Association (AUA) or American Medical Society for Sports Medicine (AMS) recommendations regarding athletic cups. He followed the IHSA guidelines because that was the organization that “certifi[ed] us here in Illinois to play football.” He understood testicular injuries can be lifelong and include infertility. He could not recall whether he met with parents before the 2022 season to discuss wearing athletic cups but did not personally discuss the issue with Kessler. Stratton had not seen an injury to the testicles “to this extent” before in his football playing or coaching career and could only recall one or two instances where a player had injured his testicles but simply “walk[ed] it off.”

¶ 7 Kessler testified that she purchased cleats and a mouthguard at the school’s instruction. She asked A.D. if he also needed an athletic cup, but he relayed that “coach said to only get cleats and a mouthguard.” She did not attend the game on September 16 and only learned of the injury “a day and half later.” When she learned the athletic cup was not required, she did not consider making A.D. wear one anyways, explaining, “I don’t know much about the game, so no. I just—if they said it’s not required, then I went off of them.”

¶ 8 A.D. testified that he never had any discussions about athletic cups with Stratton, other coaches, or school personnel. He had never worn a cup previously. Immediately following the play on which he was injured, he came off the field and informed Stratton he had injured his testicles, but Stratton told him to “man up.”

¶ 9 On December 9, 2024, Kessler filed a first amended complaint, which, in relevant part, added negligence claims (count XII against Noble and count XIII against Stratton). These counts alleged that each defendant had “a duty to provide proper sports equipment to its players and to properly supervise and monitor football players” during games, which the defendants breached through

“one or more of the following careless and negligent acts or omissions:

a. Failed to provide proper sporting equipment to its football players, including an athletic cup, including to [A.D.], for use in school sanctioned sophomore football games;

b. Failed to require its football players, including those of the sophomore football team, including [A.D.], to wear proper sporting equipment, including an athletic cup, to participate in football games;

c. Failed to properly ensure and supervise its players at a sophomore football game, including [A.D.], to ensure its players were wearing proper sports equipment, including athletic cups, in football games; [and]

d. Failed to properly instruct its players at a sophomore football game, including [A.D.], in the wearing of proper sporting equipment, including an athletic cup, during football games.”

¶ 10 Kessler then responded to the summary judgment motion. She acknowledged that the Act generally afforded the defendants immunity but argued that immunity did not shield them from her suit because under section 3-109(c)(2) (745 ILCS 10/3-109(c)(2) (West 2022)), the defendants are not immune from willful and wanton conduct, a finding the evidence supported. She contended both Stratton placing A.D. back into the game and the defendants’ failure to provide athletic cups

constituted willful and wanton conduct. She acknowledged Butler provided “football helmets, shoulder pads, football pants with thigh, hip and butt pads” and required players to wear cleats and mouthpieces. Kessler emphasized that Stratton admitted at his deposition that he was familiar with athletic cups and their purpose but still opted not to require them. Moreover, Kessler maintained that before the injury, Stratton never discussed athletic cups with her and did not provide “any literature, flyers, or handouts to parents of football players concerning the issue of using athletic cups during the football season.”

¶ 11 Kessler attached the affidavit of Dr. Daniel Cohen-Neamie, a board-certified urologist, to her response. Therein, Cohen-Neamie averred that he reviewed the complaint, A.D.’s medical records from Northwestern Palos Community Hospital and University of Chicago Comer Children’s Hospital, and the deposition transcripts of A.D., Kessler, Stratton, and Brian Riddick, Butler’s principal. The depositions were not attached to the affidavit, though were included as exhibits to the motion. The other referenced documents were attached to the affidavit.

¶ 12 Cohen-Neamie opined that “All male children in grade school and high school playing contact sports like football must wear protective cups to protect their testicles.” He continued, “The failure to provide a protective cup or require that one be worn created significant risk of injuries” to A.D., and Stratton and Butler “showed reckless conduct and a conscious disregard” for A.D.’s safety “for failing to furnish or require that [A.D.] wear a protective cup.” He averred that both the AUA and AMS had “taken the position that boys playing contact sports like football must wear a protective cup.” These positions constituted standards the defendants should have followed, and their failure to do so showed “conscious disregard for safety of the boys who play tackle football.”

¶ 13 In Riddick's deposition, also attached to Kessler's response, he testified that, to his knowledge, the IHSA does not require football players to wear athletic cups and no parent had previously complained about the school's failure to provide athletic cups to students.

¶ 14 The defendants also moved to dismiss certain counts of the first amended complaint under section 2-619(a)(9) of the Code of Civil Procedure, including counts XII and XIII, arguing the counts failed because the defendants were immune from negligence claims under section 3-109 of the Act (relating to hazardous recreational activities, which included football) and no exception applied.

¶ 15 In Kessler's response to the motion to dismiss, she argued that the Act did not preclude her claims for negligence because the exception in section 3-109(c)(1) of the Act applied. Specifically, she argued that the failure to require and/or provide athletic cups constituted the failure to guard or warn students of a dangerous condition and that both her first amended complaint and the record were sufficient to at least create a factual issue on whether the defendants were guilty of this conduct. She pointed to Cohen-Neamie's affidavit describing the dangers of playing football without a cup and her and A.D.'s deposition testimony revealing their lack of familiarity with athletic cups or previous experience playing football as support. She also stated that her theories of recovery in counts XI and XII were sufficient to invoke section 3-109(c)(1) of the Act when taken in the light most favorable to her, as the court must when considering a motion to dismiss.

¶ 16 The circuit court issued separate orders on the defendants' motions: the first granting summary judgment in part and the second granting section 2-619(a)(9) motion to dismiss in full. In the first order, dated January 13, 2025, the court, in relevant part, delineated between the two primary theories of recovery and denied summary judgment as to Stratton's alleged decision to play A.D. in the game after learning of his injury but granted summary judgment as to the theory

regarding the failure to provide or require athletic cups. The court explained that Kessler had failed to demonstrate the defendants engaged in willful and wanton conduct respecting athletic cups because, “The decision to leave the use of athletic cups to players and their parents is consistent with IHSA policies and does not constitute a breach of safety standards.” It continued, “The IHSA did not required student athletes to wear a cup for football games. The school and coaches provided all necessary items as required by the IHSA.”

¶ 17 Next, in an order dated March 17, 2025, the circuit court granted the defendants’ motion to dismiss pursuant to section 2-619(a)(9), explaining only that the defendants’ “alleged liability is limited when it comes to plain negligence. Therefore, Counts XII and XIII are dismissed.”

¶ 18 On May 5, 2025, Kessler moved for a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016) as to the claims against the defendants on which the court granted summary judgment on January 13 and dismissed under section 2-619(a)(9) on March 17 (namely portions of counts V and IX and counts XII and XIII in their entirety, as relevant to this appeal). The defendants responded, contending that Rule 304(a) language was improper because the dismissed claims were too factually similar to the surviving claims, rendering the orders insufficiently final. On June 6, 2025, the court granted Kessler’s motion. This appeal followed.

¶ 19 JURISDICTION

¶ 20 The circuit court granted Kessler’s motion for Rule 304(a) language on June 6, 2025, and she filed her appeal on July 1, 2025, which satisfies the requirements of Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994) and Rule 303 (eff. July 1, 2017). This does not end our jurisdictional inquiry, however, as the defendants contend this court lacks jurisdiction because the circuit court’s Rule 304(a) decision was an abuse of discretion. See *American Advisors Group v. Unknown Heirs & Devisees of Williams*, 2022 IL App (1st) 210734, ¶ 10. When determining whether the issuance

of Rule 304(a) language constitutes an abuse of discretion, a reviewing court may consider the following (nonexhaustive) factors:

“ ‘(1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the [trial] court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; [and] (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.’ ” *Geier v. Hamer Enterprises, Inc.*, 226 Ill. App. 3d 372, 383 (1992) (quoting *Allis-Chalmers Corp. v. Philadelphia Electric Co.*, 521 F.2d 360, 362 (3d Cir. 1975)).

In a situation “where one claim based on the same operative facts is stated differently in multiple counts, the dismissal of fewer than all counts is not a final judgment as to any of the party’s claims as required by Rule 304(a).” *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 27.

¶ 21 We find the surviving aspects of counts V and IX are sufficiently distinct from those at issue in this appeal such that the circuit court did not abuse its discretion in granting Rule 304(a) language, and accordingly this court has jurisdiction to hear Kessler’s appeal. The question is whether the claims resolved by those orders are separate claims for purposes of Rule 304(a) rather than different theories of the claims that remain pending. We conclude they are. The surviving claims, based on the alleged in-game decision by Stratton to put A.D. back into the game despite knowing of his injury, arise from a distinct set of facts and require distinct legal analysis from the claims at issue in this appeal—whether the defendants can be held liable for failing to require A.D. to wear an athletic cup during the game. Our resolution of this appeal will have no

impact on the resolution at trial on the in-game claims, and as such, there is no basis to find the circuit court abused its discretion in granting the Rule 304(a) motion.

¶ 22 The defendants argue that the other *Geier* factors weigh in their favor such that, even if the issues are unrelated, this appeal still should not go forward. Most of these arguments are duplicative to the above. The only alternative argument is that Kessler unduly delayed filing the motion for the Rule 304(a) finding, but this is belied by the record. Kessler may not have filed immediately after the circuit court granted summary judgment, but there is no dispute the motion to dismiss was still pending when the court issued the summary judgment order and Kessler moved for Rule 304(a) language as to all the dismissed counts across the two orders within a reasonable time after the court granted the motion to dismiss.

¶ 23 ANALYSIS

¶ 24 Turning to the substance of Kessler’s appeal, she claims the circuit court erred by (1) granting the defendants’ motion for summary judgment on the counts for willful and wanton conduct for the athletic cup issue and (2) granting the defendants’ section 2-619(a)(9) motion to dismiss on the negligence counts based on the defendants’ purported immunity under the Act.

¶ 25 There is no dispute that Noble, and Stratton as Noble’s employee, were governed entities protected by the immunity afforded under the Act. Also undisputed is that A.D. was participating in a hazardous recreational activity, bringing the conduct at issue subject to the specific provisions of section 3-109 of the Act. 745 ILCS 10/3-109 (West 2022). Section 3-109 reads in relevant part, “Neither a local public entity nor a public employee is liable to any person who participates in a hazardous recreational activity ***.” *Id.* § 3-109(a). This does not end our consideration, however, as Kessler contends that two statutory exceptions preserve her claims. First, specific to the claims dismissed on summary judgment, Kessler invokes the exception under section 3-109(c)(2) of the

Act, which exempts from immunity “[a]n act of willful or wanton conduct by a public entity or public employee which is a proximate cause of the injury.” *Id.* § 3-109(c)(2).

¶ 26 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 (West 2024). The “court will construe the record strictly against the movant and liberally in favor of the nonmoving party.” *Haase v. Kankakee School District 111*, 2025 IL 131420, ¶ 29. Summary judgment is a drastic remedy that is only appropriate where the record conclusively shows the nonmoving party’s right to judgment is “ ‘clear and free from doubt.’ ” *Id.* (quoting *Seymour v. Collins*, 2015 IL 118432, ¶ 42). We review the grant of summary judgment *de novo*. *Id.*

¶ 27 The 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 2022). Whether an act constitutes willful and wanton conduct is generally a question of fact, but it may be resolved as a matter of law if the evidence overwhelmingly favors the moving party. *Barr*, 2017 IL 120751, ¶ 15. In determining whether a school employee consciously disregarded student safety, courts consider the precautions taken in light of the known risks. *Id.* ¶ 18. Under Illinois law, a school has a duty to provide students with safety equipment that is necessary to prevent serious injury. *Palmer v. Mt. Vernon Township High School District 201*, 169 Ill. 2d 551, 557 (1996) (citing *Gerrity v. Beatty*, 71 Ill. 2d 47 (1978), and *Lynch*, 82 Ill. 2d 415)).

¶ 28 Before addressing the merits of Kessler’s claim regarding summary judgment, we must first resolve the defendants’ contention on appeal that Cohen-Neamie’s affidavit should be disqualified from consideration. As the defendants accurately note, per Illinois Supreme Court Rule 191 (eff.

Jan. 4, 2013), an expert's affidavit on summary judgment "shall have attached thereto sworn or certified copies of all documents upon which the affiant relies." This is a mandatory requirement, and a party's failure to attach the documents is considered grounds for the court to strike the affidavit. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 343-45 (2002). But the defendants cannot invoke this mandatory rule because they failed to move to strike the affidavit in the circuit court, thereby waiving their right to challenge its consideration on appeal. See *Bysom Enterprises, Ltd. v. Peter Carlton Enterprises, Ltd.*, 267 Ill. App. 3d 1, 6 (1994). We reject defendants' argument as to the affidavit accordingly.

¶ 29 It is undisputed that the IHSA requires schools to provide certain equipment for students to participate in football, all of which the defendants provided, and that the IHSA did not require athletic cups. We note that apparently neither party submitted the actual IHSA requirements into the record, but there is no claim that the defendants did not follow the rules, and we will therefore accept the parties' position on this point. Cohen-Neamie opined that athletic cups were mandatory for participation in tackle football and the failure to require cups constituted willful and wanton behavior, citing standards from the AUA and AMS. Stratton testified, and Kessler again does not dispute that he knew and followed the IHSA standards at all relevant times. He also confirmed he knew of athletic cups and their purpose; had worn them himself when playing baseball in the past, but not football; and chose to permit students and their parents to make the decision for themselves, despite knowing that potential testicular injury was a risk associated with playing organized high school football. Stratton had never seen a football player suffer an injury to his groin that the player could not "walk off," and Riddick did not know of any previous issue in which parents of football players had raised the issue of athletic cups.

¶ 30 On this record, the evidence does not permit a reasonable inference that defendants consciously disregarded player safety by failing to require athletic cups. Defendants provided the protective equipment required by the IHSA, and Stratton followed the IHSA equipment requirements. Although Stratton knew the purpose of athletic cups and understood that testicular injuries could be serious, he had never encountered a significant testicular injury during his years playing and coaching football. Nor had Butler received complaints about its failure to require cups. These undisputed facts show, at most, that defendants may have taken insufficient precautions against a particular injury, not that they consciously disregarded A.D.'s safety. See *Barr*, 2017 IL 120751, ¶¶ 14-18. In so finding, we note that IHSA compliance is not conclusive of the willful and wanton issue, and this opinion should not be interpreted as creating such a rule.

¶ 31 Our resolution of this issue is guided by the principles articulated in two Illinois Supreme Court cases, both of which the parties discuss extensively. First, in *Murray v. Chicago Youth Center*, 224 Ill. 2d 213, 217 (2007), our supreme court ruled the defendant Chicago Youth Center (CYC) and their employee James Collins were not entitled to summary judgment for the plaintiff's claim of willful and wanton conduct after the plaintiff was seriously injured when "apparently attempt[ing] to perform a forward flip off a mini-trampoline." The trampoline activity was part of an extracurricular tumbling class. *Id.* The record showed that the injury occurred during a "freelance" period of the class, during which the mini-trampoline was made available, and Collins "would then make sure the [mini] trampoline was locked in position and a double layer of floor mats was placed around" it. *Id.* at 219. During the jump that injured the plaintiff, Collins did not assign a spotter and was not close enough to the mini-trampoline to intervene. *Id.* at 219-20. Plaintiff's expert opined that "the risk of spinal cord injury from improperly executed somersaults" was well known, and the "use of the mini-trampoline requires competent instruction and

supervision, and competent spotters for safety and prevention of catastrophic injury.” *Id.* at 221. The expert cited guidelines from multiple organizations requiring increased safety measures from those the defendants used. *Id.* at 222.

¶ 32 In ruling the willful and wanton claims survived summary judgment, the supreme court stated,

“The evidence demonstrates that it is well known that use of a mini-trampoline is associated with the risk of spinal cord injury from improperly executed somersaults and that catastrophic injuries, including quadriplegia, can result from an improperly executed somersault. The evidence also indicates that the tumbling/trampoline program was not supervised by an instructor with professional preparation in teaching trampolining, nor was it taught in a proper manner with reminders of the risk of injury incorporated into the teaching process. The evidence also indicated that trained spotters and safety equipment were not provided at all times, and none of the United States Gymnastic Federation (USGF) Safety Manual guidelines were followed. Hence, genuine and material triable issues of fact exist in this case on the question of whether defendants are guilty of willful and wanton conduct. Under the circumstances, it was error for the appellate court to affirm summary judgment.” *Id.* at 246.

¶ 33 Next, in *Barr*, the plaintiff was injured while playing floor hockey during a physical education class. He sued the school and his instructor, alleging the latter was “willful and wanton in failing to require the students to wear protective eyewear while playing floor hockey.” *Barr*, 2017 IL 120751, ¶ 3. The equipment for floor hockey included plastic sticks and “safety balls” instead of pucks. *Id.* ¶ 4. The instructor testified that the “modified floor hockey equipment negated the need for protective eyewear” and that she enforced numerous safety rules for the students while

playing the game. *Id.* ¶ 6. She did not know of a previous injury suffered by a student from playing floor hockey. *Id.* ¶ 7.

¶ 34 The Illinois Supreme Court ultimately ruled the defendants were immune under section 3-108 of the Act, which provides immunity for failure to supervise claims, with an exception for “willful and wanton” conduct. *Id.* ¶ 18; see 745 ILCS 10/3-108 (West 2010). In so finding, it explained, “the evidence showed Cunningham consciously considered student safety when she determined that the floor hockey equipment, together with the rules students were required to follow, was sufficient to prevent injuries.” *Barr*, 2017 IL 120751, ¶ 17. The *Barr* court cited *Lynch*, where our supreme court directly considered football and found no willful and wanton conduct where the defendants only warned football could be “rough” and advised the use of mouth guards, but did not supply helmets or other equipment. *Id.* ¶ 18 (citing *Lynch*, 82 Ill. 2d at 430-31). The court continued “the evidence that Cunningham instituted several safeguards to prevent injuries shows that, at most, she took insufficient precautions,” meaning her “decision not to require the students to use available safety equipment, standing alone,” did not rise to willful and wanton conduct. *Id.*

¶ 35 The *Barr* court concluded by rejecting a theory based on Cunningham’s alleged knowledge that “the ball could fly above players’ waists and hit them in the eye,” emphasizing that the plaintiff “failed to introduce evidence of any particular dangers associated with floor hockey that called for the use of protective eyewear by students.” *Id.* ¶¶ 19, 23. In this discussion, the *Barr* court acknowledged and discussed *Murray*, distinguishing its applicability by noting that trampolining was “generally associated with a risk of serious injuries,” unlike floor hockey. *Id.* ¶ 21.

¶ 36 We find the principles from *Barr* and *Lynch* compel a finding that the defendants’ decision not to require athletic cups was not willful and wanton conduct as a matter of law, a conclusion which is not precluded by *Murray*. In so finding, we acknowledge that the *Barr* court addressed willful and wanton conduct in the context of section 3-108 of the Act, not section 3-109, but do not find this to be a meaningful distinction because the statute defines “willful and wanton” as explicitly having the same meaning throughout the Act. 745 ILCS 10/1-210 (West 2022). Akin to the defendants in *Barr* and *Lynch*, the undisputed facts here show that the defendants took precautions to provide for student safety while playing football. Though the risks of football are generally well known, unlike the floor hockey activity at issue in *Barr*, the defendants acted in direct contemplation of these known risks by ensuring that the equipment they provided complied with the requirements of the IHSA. Stratton’s knowledge of athletic cups and their purpose, standing alone, does not alone establish conscious disregard. He testified that he had never worn a cup while playing football or encountered a significant testicular injury playing or coaching football. Riddick also knew of no prior parental complaint about athletic cups. Although Stratton understood that testicular injuries could be serious, the record contains no evidence that he had ever encountered a testicular injury or been advised that the precautions required for high school football were inadequate without an athletic cup. It follows that, as in *Barr*, the record shows defendants took precautions directed at player safety. Those precautions may have been inadequate, but inadequacy does not establish the conscious disregard required for willful and wanton conduct. See *Barr*, 2017 IL 120751, ¶ 18; *Biancorosso v. Troy Community Consolidated School District No. 30C*, 2019 IL App (3d) 180613, ¶ 15.

¶ 37 *Murray* does not require a different result. The *Murray* court emphasized that, despite the general knowledge of significant risk of spinal cord injury from the use of mini trampolines,

essentially none of the fundamental requirements to make the activity safe were followed, including the applicable guidelines from the USGF. *Murray*, 224 Ill. 2d at 246. The defendants here, conversely, undisputedly followed the IHSA guidelines to provide for student safety in light of the known risks of football. And while Cohen-Neamie averred that the AUA and AMS had standards requiring athletic cups, Kessler provided no evidence suggesting the defendants knew of these standards, that these standards were generally accepted and practiced by non-IHSA affiliated football programs, or that the standards were generally known to high school football coaches and administrators. Had the defendants known the IHSA had safety standards, but chose not to consult or follow them, that might show conscious disregard of safety, but the record shows the opposite. Undoubtedly, football is more akin to trampolining in that it is associated with serious injuries. But again, in light of the defendants' conscious efforts to fully comply with the IHSA equipment requirements, *Murray* does not require this court to find a question of fact exists over whether the defendants acted willfully and wantonly.

¶ 38 We also reject Kessler's citation to *Palmer* and *Lynch* for the proposition that school districts must furnish equipment to students to guard against reasonably foreseeable injury. Those cases discussed such a requirement in the context of negligence claims, not willful and wanton conduct. See *Palmer*, 169 Ill. 2d at 560; *Lynch*, 82 Ill. 2d at 434-35 (school district could be found negligent for failing to supply helmets and shoulder pads for "powderpuff" football game).

¶ 39 Kessler's final claim is that the circuit court erred by granting the defendants' motion to dismiss under section 2-619(a)(9) for counts XII and XIII, which survive pursuant to section 3-109(c)(1) of the Act. Under section 2-619(a)(9), a defendant may move to dismiss a claim on the grounds that it "is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2024). Immunity is one such affirmative matter. *Strauss v.*

City of Chicago, 2022 IL 127149, ¶ 56. In filing section 2-619(a)(9) motion, the defendant admits sufficiency of the allegations but asserts that the affirmative matter defeats the claim as a matter of law. *Id.* ¶ 54. To demonstrate dismissal is appropriate under section 2-619(a)(9) based on immunity, an affirmative defense, the “governmental entity has the burden of pleading and proving its immunity.” *Id.* ¶ 56. If successful, “the burden shifts to the plaintiff, who must establish that the affirmative defense asserted either is ‘unfounded or requires resolution of an essential element of material fact before it is proven.’ ” *Epstein v. Chicago Board of Education*, 178 Ill. 2d 370, 383 (1997) (quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993)). The plaintiff may do so through affidavits or other proof. *Id.* We review the grant of section 2-619(a)(9) motion *de novo*. *Strauss*, 2022 IL 127149, ¶ 53.

¶ 40 The parties do not dispute that the defendants met their initial burden of demonstrating they are governmental entities protected by the Act. With the burden shifted to Kessler, she responded that the record showed the exception of failure to warn under section 3-109(c)(1) of the Act preserved her negligence claims. That exception excludes liability for the “[f]ailure of the local public entity or public employee to guard or warn of a dangerous condition of which it has actual or constructive notice and of which the participant does not have nor can be reasonably expected to have had notice.” 745 ILCS 10/3-109(c)(1) (West 2022). The circuit court’s lone explanation for granting summary judgment on these counts was to generally note that the defendants were immune from “plain negligence” claims

¶ 41 We find the defendants have not demonstrated that immunity per section 3-109 of the Act precludes Kessler’s negligence claims in counts XII and XIII as a matter of law. We reverse the circuit court’s dismissal of those counts and remand for further proceedings thereon. Our review of the record demonstrates that Kessler’s first amended complaint sufficiently alleges that the

defendants knew playing football without an athletic cup was dangerous but failed to protect A.D. from that danger, which is enough to bring this case under the section 3-109(c)(1) framework at this stage. Both counts XII and XIII of the first amended complaint contain allegations that the defendants failed to require football players to wear athletic cups (paragraph 29, item (b)) or instruct players about the need to wear athletic cups (paragraph 29, item (d)), and that such conduct was the proximate cause of A.D.'s injury. These allegations, at this stage of the litigation, are sufficient to evoke the "guard or warn" theory described in section 3-109(c)(1) such that dismissal is improper. See *Allumi v. Oswego Community Unit School District 308*, 2026 IL App (3d) 250108, ¶¶ 23-29.

¶ 42 Moreover, after the defendants moved for dismissal under section 2-619(a)(9) citing immunity as the applicable affirmative matter, Kessler submitted evidence supporting section 3-109(c)(1)'s applicability. Specifically, Stratton testified during his deposition that he knew there was a risk for students to play football without wearing an athletic cup, while both Kessler and A.D. testified at their deposition that they had no knowledge of the dangers. A.D. had not participated in organized football before his time at Noble, and Kessler was unfamiliar with the game. Kessler and A.D. maintained that no one informed them of the risk of playing football without an athletic cup, meaning they could not be reasonably expected to know of the dangers. Whether a factfinder would ultimately find in Kessler's favor on the elements of the section 3-109(c)(1) exception based on the above testimony is not at issue at this stage. Kessler has met her burden to rebut the defendants' affirmative matter, and as such, the counts can move forward.

¶ 43 The defendants do not substantively address Kessler's proffered evidence in attempting to invoke section 3-109(c)(1) of the Act, instead basing their entire argument on the proposition that the first amended complaint did not specifically plead the elements of the exception. This argument

fails for two reasons. First, the first amended complaint sufficiently alleged the defendants failed to require athletic cups or instruct the student athletes about them, which is sufficient at this stage to state a claim that survives per section 3-109(c). And second, while Kessler may not have specifically evoked that section of the Act in her pleading, or used the exact phrase “guard or warn,” the argument that this alone defeats her claim is based on the erroneous premise that Kessler had the initial burden to plead the defendants’ immunity. As described above, immunity is an affirmative defense, meaning it was the defendants’ burden to plead it; Kessler was not required to plead facts in her first amended complaint to defeat an affirmative defense not yet advanced. See *Strauss*, 2022 IL 127149, ¶¶ 55-57. The law is clear that it is only once the defendants presented their immunity defense in their section 2-619(a)(9) motion that it became incumbent on Kessler to submit affidavits or other evidence showing there were issues of fact defeating the affirmative matter. *Id.*; *Epstein*, 178 Ill. 2d at 383. Kessler successfully made this showing and thus counts XII and XIII (as limited above) survive the motion to dismiss.

¶ 44 This conclusion does not conflict with our determination that the evidence fails to establish willful and wanton conduct. Section 3-109(c)(1) asks whether defendants had notice of a dangerous condition of which A.D. lacked notice. Section 3-109(c)(2) requires showing more, either utter indifference to or conscious disregard for safety. Evidence sufficient to create a factual issue under 3-109(c)(1) does not necessarily satisfy 3-109(c)(2).

¶ 45 CONCLUSION

¶ 46 The record shows that the defendants did not act willfully and wantonly as a matter of law respecting the athletic cup issue but are not entitled to dismissal based on the affirmative matter of immunity from Kessler’s negligence claims in counts XII and XIII because she presented enough evidence to create an issue of fact as to whether the immunity exception in section 3-109(c)(1) of

the Act applies. Accordingly, we affirm the partial grant of summary judgment regarding counts V and IX but reverse the grant of section 2-619(a)(9) motion to dismiss regarding counts XII and XIII, paragraph 29, items (b) and (d) only for each, and remand for further proceedings.

¶ 47 Affirmed in part and reversed in part; cause remanded.

Kessler v. Board of Education of Chicago, 2026 IL App (1st) 251269

Decision Under Review: Appeal from the Circuit Court of Cook County, No. 23-L-9181; the Hon. Charles S. Beach, Judge, presiding.

**Attorneys
for
Appellant:** David Nemeroff, of Nemeroff Law Offices, Ltd., of Chicago, for appellant.

**Attorneys
for
Appellee:** Jenna L. Mahoney, of Nielsen, Zehe & Antas, P.C., of Chicago, for appellees.
