

2011 IL App (1st) 102817-U

No. 1-10-2817

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FIFTH DIVISION  
September 30, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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KEVIN SEARS,	)	Appeal from the
	)	Circuit Court of
	)	Cook County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 07 L 000286
	)	
MARVIN ATKINS,	)	Honorable
	)	James P. McCarthy,
Defendant-Appellee.	)	Judge Presiding.
	)	

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JUSTICE HOWSE delivered the judgment of the court.  
Justices Joseph Gordon and McBride concurred in the judgment.

ORDER

¶ 1 Held: The trial court erred when it granted defendant's 2-615 motion to dismiss because plaintiffs stated a cause of auction for negligence in count I of their first amended complaint. However, the trial court is affirmed in

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dismissing plaintiffs' count III because willful and wanton conduct is not recoverable under the "fireman's rule."

¶ 2 Plaintiff Kevin Sears, a fireman, appeals from a circuit court order dismissing his complaint against defendant Marvin Atkins for injuries suffered while fighting a fire on Atkins' property. For the reasons set forth below, we reverse in part and affirm in part the decision of the circuit court.

¶ 3 BACKGROUND

¶ 4 Plaintiff Kevin Sears and co-plaintiff Mathew Berk (who is not a party to this appeal) filed a four-count complaint on January 9, 2007, in the circuit court. The first three counts relate to injuries suffered by Sears while fighting a fire in a garage located in Markham, Illinois, and owned by defendant Marvin Atkins. The plaintiffs allege Sears was injured as he walked on the garage roof performing his duties while responding to the fire. Sears alleges he fell when improper spacing between the rafters caused the roof to collapse under his weight. Sears alleges Atkins is liable for his injuries under theories of negligence, premises liability, and willful and wanton misconduct. Under count IV, the plaintiffs allege willful and wanton misconduct regarding injuries suffered by Berk, also a fireman.

¶ 5 Atkins claims the roof collapsed because it was damaged

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by the fire, and therefore, he is not liable for Sears' injuries under the "fireman's rule."

¶ 6 In the first amended complaint, the plaintiffs allege negligence under count I, claiming, *inter alia*, Atkins is the owner of the garage where Sears' injury occurred, he personally constructed the garage, he failed to obtain a building permit, failed to adhere to the requirements of the local building code in the construction of the garage, used improper building materials, failed to provide sufficient support for the garage roof resulting in a situation where the space between the rafters could not support the weight of an adult walking on the roof, and failed to maintain the roof in a structurally sound condition.

¶ 7 Also under the negligence count, the plaintiffs allege the padlocks on the garage violate applicable fire safety codes; Atkins is subject to the Fire Investigation Act (425 ILCS 25/9f (West 2006)), that the fire was caused by alterations to the main power supply to the premises and altered electrical wiring of the furnace.

¶ 8 Count II of the first amended complaint is for premises liability. Here, the plaintiffs allege Atkins should have known the garage was constructed and maintained in an unsafe and unreasonable defective condition.

¶ 9 Count III of the first amended complaint is for willful

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and wanton conduct leading to Sears' injuries. Here, the plaintiffs allege Atkins intentionally altered the main power supply so that electricity bypassed the utility service meter; Atkins intentionally supplied power to the garage in an unsafe manner; he willfully and intentionally failed to seek inspection by the local building inspector regarding the altered power supply; willfully and intentionally installed padlocks in violation of local safety codes; and recklessly failed to provide sufficient support for the garage roof. The plaintiffs allege that as a result of Atkins willful and wanton conduct, Sears was seriously injured.

¶ 10 Count IV is for willful and wanton conduct causing injuries to Berk.

¶ 11 Atkins filed a section 2-615 motion to dismiss (735 ILCS 5/2-615 (West 2006)) plaintiffs' first amended complaint on July 6, 2007. Atkins claims the complaint is barred by the "fireman's rule" as established in *Washington v. Atlantic Richfield*, 66 Ill. 2d 103 (1976). Atkins claims that for the complaint to survive the "fireman's rule," it must allege that the fireman's injuries resulted from a cause independent of the fire. Our supreme court held in *Washington*, that a defendant is not liable to a fireman for negligence which caused or resulted in a fire. *Washington*, 66 Ill. 2d at 108. He claims plaintiffs'

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first amended complaint fails to set forth an independent cause of the plaintiffs' injuries and, thus, is barred by the "fireman's rule."

¶ 12 Atkins claims that the construction of the garage roof was not the cause for Sears' injuries, rather the roof collapsed because it was weakened by the fire. He claims that Sears assumed the risk of injury when he traversed the garage roof knowing a fire raged below it.

¶ 13 Atkins also claims that under *Washington*, a violation of a safety code does not establish liability for the defendant and that allegations that a landowner is subject to premises liability is excused for damages under the "fireman's rule." In addition, Atkins claims that under *Luetje v. Corsini*, 126 Ill. App. 3d 74 (1984), property owners whose willful and wanton misconduct caused a fire are not liable for injuries sustained by firemen in the course of fighting the fire.

¶ 14 In an order dated September 4, 2007, the trial court granted Atkins' section 2-615 motion to dismiss the first amended complaint. The plaintiffs were granted leave to re-plead the dismissed counts from their first amended complaint "strictly for the purpose of appeal" and to file a second amended complaint concerning allegations regarding locks on the garage which survived the motion to dismiss.

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¶ 15 The plaintiffs filed a second amended complaint which was followed by a contentious period of discovery, including many depositions.

¶ 16 When the case came to be heard for trial, Sears presented an oral motion to withdraw count IV of his second amended complaint, which relates to the padlocks on the garage. In an order dated August 25, 2010, the trial court denied Sears' motion to withdraw count IV and granted his oral motion to voluntarily dismiss with prejudice count IV of his second amended complaint. The trial court also found that there is no just reason to delay appeal of the September 4, 2007 dismissal of counts I, II, III and V of Sears' first amended complaint because all matters in controversy had been resolved with the dismissal with prejudice of count IV of the second amended complaint.

¶ 17 Sears filed this timely appeal of the trial court's September 4, 2007 order granting defendant's 2-615 motion to dismiss, which became final and appealable with the trial court's order from August 25, 2010, dismissing count IV of Sears second amended complaint.

¶ 18 ANALYSIS

¶ 19 A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face. *Tedrick v. Community Resource Center, Inc.*, 235 Ill. 2d 155, 160-

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61 (2009). In reviewing the sufficiency of a complaint, we accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. *Id.* at 161. We also construe the allegations in the complaint in the light most favorable to the plaintiff. *Id.* Given these standards, a complaint should not be dismissed, pursuant to a section 2-615 motion, unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief. *Id.* However, the plaintiff must allege facts sufficient to bring a claim within a legally recognized cause of action. *Id.* Review of a section 2-615 motion to dismiss is *de novo*. *Id.*

¶ 20 In this appeal, the plaintiff is asking us to review the trial court's order from September 4, 2007, granting defendant's section 2-615 motion to dismiss plaintiffs' first amended complaint. The issue before us is whether Sears has sufficiently pleaded a cause of action that survives the "fireman's rule." Under the "fireman's rule," a landowner is not liable for negligence in causing a fire but owes a duty of reasonable care to maintain his property so as to prevent injury occurring to a fireman from a cause independent of the fire. *Washington*, 66 Ill. 2d at 108.

¶ 21 Sears claims his injuries resulted from a cause independent of the fire, namely, Atkins' negligent construction

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of the garage roof and his failure to maintain the roof in a structurally sound condition.

¶ 22 Atkins claims that the independent cause of injury under *Washington* has been interpreted to mean independent causes injury that might be faced by an ordinary citizen entering upon the property. *McShane v. Chicago Investment Corp.*, 235 Ill. App. 3d 860, 865 (1992) (citing *Hedberg v. Mendino*, 218 Ill. App. 3d 1087 (1991)). The parties dispute the definition of "ordinary citizen." Atkins claims that ordinary citizens would not climb onto his garage roof and cut a hole. Sears, on the other hand, claims that ordinary citizens such as a workman installing a satellite dish could have been injured on Atkins' garage roof.

¶ 23 The Illinois legislature resolved the question as to whether a fireman is an "ordinary citizen" under the "fireman's rule" when it enacted section 25/9f of the Fire Prevention Act in 2003, creating a statutory duty of care for landowners in respect to firemen. 425 ILCS 25/9f (West 2010). Section 25/9f provides, in part:

"The owner or occupier of the premises and his or her agents owe fire fighters who are on the premises in the performance of their official duties conducting fire investigations or inspections or responding

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to fire alarms or actual fires on the premises a duty of reasonable care in the maintenance of the premises according to applicable fire safety codes, regulations, ordinances, and generally applicable safety standards, including any decisions by the Illinois courts. The owner or occupier of the premises and his or her agents are not relieved of the duty of reasonable care if the fire fighter is injured due to the lack of maintenance of the premises in the course of responding to a fire, false alarm, or his or her inspection or investigation of the premises.

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This Section applies to all causes of action that have accrued, will accrue, or are currently pending before a court of competent jurisdiction, including courts of review."

425 ILCS 25/9f (West 2010).

¶ 24 According to our supreme court:

"The statute \*\*\* imposes a duty of reasonable care on landowners and occupiers

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to firefighters who are injured due to the lack of maintenance of the premises in the course of responding to fires." *Lazenby v. Mark's Construction, Inc.*, 236 Ill. 2d 83, 98 (2010).

¶ 25 Thus, under section 9f, Atkins owes a duty of reasonable care to Sears to properly maintain his property so as to avoid injury.

¶ 26 We note, that in ruling on a section 2-615 motion, only those facts apparent from the face of the pleadings, matters of which the court can take judicial notice, and judicial admission in the record may be considered. *K. Miller Construction Company, Inc., v. McGinnis*, 238 Ill. 2d 284, 291 (2010). The court must also accept as true all well-pleaded facts in the complaint and all reasonable inferences that may be drawn from those facts. *Id.*

¶ 27 Sears pleaded in his first amended complaint that he was injured when the garage roof collapsed due to its negligent construction in violation of local safety codes and Atkins' failure to maintain the roof in a structurally sound condition. When considering a 2-615 motion to dismiss, we accept as true all well-pled allegations. *Id.* Accordingly, we must accept as true Sears' claim in his first amended complaint that the roof was

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constructed in violation of safety codes and as a result the roof could not support the weight of an adult person walking on it. Sears' also alleged Atkins failed to maintain the roof in a structurally sound condition. Sears alleged that when he was injured, he was in the course of his duty responding to the fire on Atkins property. We must accept as true Sears' allegation that the roof collapsed under his weight as a consequence of the inadequate construction and maintenance of the roof. If true, these allegations show Sears' injuries were the result of a cause independent of the fire and recovery of damages is not precluded by the "fireman's rule." Therefore, we find count I of the plaintiffs' first amended complaint, alleging inadequate support in the construction and maintenance of the roof as the cause of Sears' injury, sufficiently states a cause of action for negligence to survive a section 2-615 motion to dismiss. *Ziembra v. Mierzwa*, 142 Ill. 2d 42, 47 (1991).

¶ 28 Next, Sears claims that allegations of willful and wanton conduct by Atkins are not barred by the "fireman's rule." In the present case, Sears alleges Atkins acted willfully and wantonly in illegally augmenting his electrical power supply and furnace safety control devices in causing the fire and Sears' injuries. Sears also alleges Atkins willfully and intentionally installed padlocks in violation of local safety codes.

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¶ 29 We reject these claims because: (1) the landowner's conduct in causing the fire is not recoverable under *Washington*, (2) willful and wanton conduct is not recoverable under *Washington*, and (3) negligent installation of the locks was not pled to be a proximate cause of Sears' injury.

¶ 30 In *Washington*, our supreme court stated:

"The duties of a fireman expose him to risk of harm from fire: this is a reasonable risk of his occupation. The landowner owes a fireman, as well as an invitee, a duty not to expose him to an unreasonable risk of harm - that is, a duty to remove hidden, unusual or not to be expected dangers from the premises, or to give adequate warning thereof."

*Washington*, 66 Ill. 2d at 107.

¶ 31 The court also stated:

"Since most fires occur because of negligence, to hold a landowner liable to a fireman would impose a heavy and unreasonable burden upon the owners." *Id.* at 108.

¶ 32 In 1984, we relied on *Washington* and its progeny to hold that a homeowner is not liable for a firefighter's injuries even though his willful and wanton misconduct may have caused the

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fire. *Luetje v. Corsini*, 126 Ill. App. 3d 74 (1984).

¶ 33 In *Luetje*, we found it significant that in discussing the issue of liability predicated on statutory violations rather than on common law tort principles, the supreme court in *Washington* did not distinguish between negligent and willful and wanton violations, "referring simply to 'conduct that caused the fire.'" *Luetje*, 126 Ill. App. 3d at 79. We held that the nature of a defendant's conduct is not determinative of the issue of landowner liability to an injured firefighter. *Id.*

¶ 34 In *Coglianesse v. Mark Twain LP*, 171 Ill. App. 3d 1 (1988), we recognized *Luetje* and held that the estate of a firefighter who died in a fire on defendant's property could not recover for willful and wanton misconduct in failing to construct and maintain its walls in accordance with the city code. *Id.* at 3-7.

¶ 35 The second district appellate court in *Randich v. Pirtano Construction Company, Inc.*, 346 Ill. App. 3d 414, 421 (2003), declined to follow *Luetje*, finding it "misconstrues the cases it uses to support its position." *Id.* The second district stated:

"[W]e reject *Luetje's* contention that it was the intention of the supreme court in *Washington* to erect a wall separating

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recovery for willful and wanton misconduct between independent causes of harm and acts that cause the emergency itself. \*\*\*. We think that the supreme court in *Washington* merely intended to articulate the current state of the law relating to the fireman's rule and negligence actions. If the supreme court had intended to create an absolute separation between actions causally connected to an emergency and independent actions, it would have been a simple matter to articulate the rule in such a broad fashion. Rather we conclude that the holding in *Washington* did not create a bar to claims of willful and wanton misconduct when they relate to the cause of the emergency." *Id.* at 421-22.

¶ 36 However, we do not find *Randich* persuasive. *Randich* ignores major themes from *Dini v. Naiditch*, 20 Ill. 2d 406 (1960), and *Washington*, including that firemen assume the risk of injury inherent to their profession and it is unreasonable to place a heavy burden of care on the landowner. In *Dini*, our supreme court held that the common law treatment of a fireman as a licensee is an "archaic concept" and "harsh rule." Under the

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licensee concept, a firefighter could recover on willful and wanton conduct of a landowner in causing the fire. However, the supreme court in *Dini* disposed of the licensee concept and found that a landowner owes a firefighter a duty of reasonable care in the maintenance of his property. *Dini*, 20 Ill. 2d at 417. We find it reasonable that in disposing of the licensee concept, *Dini* also disposed of the willful and wanton standard and it did not perpetuate an "archaic concept" and "harsh rule" by allowing multiple theories of liability for a single occurrence of injury, as *Randich* suggests.

¶ 37 We find the following statement from *Washington* instructive:

"Since most fires occur because of negligence, to hold a landowner liable to a fireman would impose a heavy and unreasonable burden upon the owner." *Washington*, 66 Ill. 2d at 108.

¶ 38 This same concept applies here in that adding an additional avenue of liability other than reasonable care to the landowner would impose a heavy and unreasonable burden upon the owner.

¶ 39 We, therefore, see no reason to stray from *Dini*, *Washington* and *Luetje*, and find that while a landowner owes a

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duty of reasonable care to maintain his property so as to prevent injury occurring to a fireman from a cause independent of the fire (*Id.*), a landowner is not liable for willful and wanton conduct in causing the fire itself because imposing such liability is a heavy and unreasonable burden upon the owner. We affirm the trial court's dismissal of the willful and wanton count.

¶ 40 Sears did not argue the issue of premises liability in his brief. Under Supreme Court Rule 341(h)(7), points not argued are waived. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). Sears has waived the issue of premises liability.

¶ 41 CONCLUSION

¶ 42 For the foregoing reasons, we reverse in part and affirm in part the judgment of the trial court and remand this case for further proceedings in accordance with this order.

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