

Berwyn South School District 100 (District 100), a body politic and corporate.¹ They charged District 100 with liability for the death of Hernandez, their son. Hernandez, a student at Heritage Middle School (Heritage), was stabbed and killed by Vincent Kelly (Kelly), another student at the school, three blocks from school property. The circuit court granted summary judgment to District 100, finding the acts and omissions of the school were not the proximate cause of the attack that resulted in Hernandez' death. On appeal, plaintiffs argue the court erred in granting summary judgment to District 100 because questions of material fact exist regarding whether (1) District 100's conduct with regard to its enrollment and supervision of Kelly was based on a discretionary policy decision and was willful and wanton, thus barring immunity under section 2-201 of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/2-201 (West 2010)); and (2) District 100's deliberate and reckless disregard for its own rules regarding supervision and discipline proximately caused Hernandez's death. We affirm.

¶ 3 Background

¶ 4 District 100 enrolled Kelly as an eighth grade student at Heritage, a school operated by the district. On February 21, 2007, Kelly attended his first day of classes. The next day, on February 22, 2007, after school and three blocks from the school premises, Kelly stabbed and killed Hernandez, a fellow student. Plaintiffs, Hernandez's

¹ Plaintiffs also named the City of Berwyn as a defendant but voluntarily dismissed it from the suit by leave of court.

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parents, filed a six-count complaint against District 100 asserting three counts of negligence and three counts of wilful and wanton misconduct. The court dismissed the negligence counts with prejudice and those counts are not at issue here. The remaining willful and wanton misconduct claims were brought under the Wrongful Death Act (740 ILCS 180/2.1 (West 2010)), the Survival Act (755 ILCS 5/27-6 *et seq.* (West 2010)) and the Family Expense Act (750 ILCS 65/15 (West 2010)).

¶ 5 In all three counts, plaintiffs alleged District 100 provided security at the school; was aware of numerous incidents of dangerous weapons entering the school; and was aware of Kelly's violent propensities and disciplinary history, previous schools' records and gang involvement. They alleged Hernandez was involved in a verbal altercation with Kelly in the school lunchroom on the day of the stabbing, during which Kelly threatened Hernandez in the presence of students and school staff; District 100 was aware that Kelly intended to fight Hernandez after school; District 100 had specific knowledge that Kelly had threatened and harassed Hernandez but took no action to reprimand Kelly or prevent him from harming Hernandez. They alleged that, despite staff having witnessed Kelly threaten Hernandez and having called Kelly to the principal's office for an unrelated reason, District 100 did not search Kelly or his locker or discipline him or punish him for his threats or behavior and allowed Kelly to leave the school unaccompanied by an adult. They alleged Kelly, immediately upon leaving the school building, sought out and pursued Hernandez a short distance from the school and stabbed him twice in the chest.

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¶ 6 Plaintiffs alleged District 100 owed a duty to Hernandez to exercise ordinary care to ensure that students were unarmed at school, to protect students from harm and not to act in a wilful and wanton manner with a conscious disregard and utter disrespect for his safety. They alleged District 100 acted in a wilful and wanton manner with a conscious disregard and utter disrespect for Hernandez's safety when it failed to prevent students from carrying weapons on school premises; adequately supervise students; adequately supervise or discipline Kelly despite direct knowledge that Hernandez was being harassed by Kelly; operate metal detectors to prevent weapons in school; punish Kelly despite its knowledge of his violent propensities, gang involvement and prior disciplinary history; remove Kelly from school premises prior to dismissal from school despite direct knowledge that he intended to fight Hernandez after school; and search Kelly's person or his locker. Plaintiffs alleged that, as a proximate result of District 100's willful and wanton acts and omissions, Hernandez suffered severe injuries which led to his death and plaintiffs' damages.

¶ 7 District 100 moved for summary judgment, arguing (1) its staff decisions regarding security and disciplinary actions were discretionary and thus protected from suit under section 2-201 of the Tort Immunity Act; (2) plaintiffs' allegations that District 100 was willful and wanton had to fail because plaintiffs produced no evidence that District 100 staff had any knowledge of any threat to Hernandez's safety prior to the February 22, 2007, stabbing; and (3) plaintiffs produced no evidence showing that District 100's acts and omissions served as a proximate cause of the altercation

between Kelly and Hernandez, after school and three blocks from the school grounds.²

¶ 8 District 100 enrolled Kelly in Heritage Middle School after Kelly and his mother represented to the district that Kelly would reside with his grandmother, who lived in the Berwyn School District.³ Kelly's mother did not live in the school district and Kelly would be a transfer student, starting mid-semester.

¶ 9 Jane Bagus, the District 100 director of staff and student services, testified that she oversaw the district's special education department and consulted with the schools on all new students with special needs. She stated that if a student is a resident of the district and is in "good standing" on the transfer form, District 100 must enroll that student. Bagus testified that Kelly was a student with special needs. After receiving Kelly's request for enrollment, she met with Heritage principal Leslie Hodes, Heritage assistant principal Mary Havis, Heritage social worker Cheryl Schwartz and Heritage special education teacher Matthew Hale to prepare an Individual Education Plan (IEP) for Kelly based on his past history and special needs.

² Section 2-201 of the Tort Immunity Act provides that "[e]xcept as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." 745 ILCS 10/2-201 (West 2010). Any immunity for policy determinations and discretionary acts or omissions by public employees extends to the public employer and immunizes liability for both negligence and willful and wanton misconduct. *Spangenberg v. Verner*, 321 Ill. App. 3d 429, 433 (2001); *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 193-94, 196 (1997).

³ The deposition testimony in the record consists of excerpts from the full depositions. Our review of the evidence is, therefore, necessarily limited to these excerpts.

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¶ 10 Bagus stated that enrolling a special education student such as Kelly would entail looking at his most recent IEP and following the recommendations contained therein. She and the Heritage staff reviewed two IEPs prepared in February 2007 by Ombudsman Educational Services (Ombudsman), Kelly's previous school. Bagus testified that the Ombudsman IEP's showed that Kelly suffered from emotional and behavioral problems but that he had made good progress at Ombudsman and was in "good standing."

¶ 11 The February 9, 2007, Ombudsman IEP contained a time line of Kelly's previous educational history. The time line shows as follows:

- February 1, 2005 - Kelly was in a general education program at School District 102 LaGrange but was suspended for one year for chronic disruptive behavior.
- February 2005 - Kelly's parents moved to Westmont where he was enrolled by School District 60 in an alternative school, Partners for Success. Partners for Success's records show that Kelly needed one-to-one assistance to stay on task and could be very disruptive in the 8 to 10 student classroom. Partners for Success referred Kelly for a case study evaluation because of his behavior.
- July 2005 - Kelly's parents moved to School District 61, which placed him in a therapeutic day school and opened a case study evaluation on him.
- September 2005 - Kelly attended MacNeal School for three days but was physically removed from his classroom and sent to a processing area for not following a teacher's direction.

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- October 2005 - Kelly enrolled in the School for Expressive Arts and Learning (SEAL). In December, he was found eligible for special education. He was "resistant to completing work at SEAL" and "had several incidents of aggression toward staff verbally and physically." In May 2006, SEAL terminated his placement because of the severity of his behavior.
- September 2006 - Kelly enrolled at Ombudsman Educational Services. In Kelly's first few months at the school, he was "resistant to completing work independently" and had "a few instances of inappropriate behavior such as not following teacher directions and not using the computer properly." By December 2006, Kelly was completing work and following teacher directions. He told his teacher that he was interested in returning to public school and his teacher supported "his moving back to the mainstream."

¶ 12 In the same February 9, 2007, IEP, Kelly's teacher at Ombudsman reported that Kelly had "made nice progress" over the past two months. His teacher reported there had been no incidences of severe behavior since Spring 2006 and Kelly's focus and attention had not been a problem in the past two months. Kelly's academic skills were age appropriate and he was reading at the appropriate grade level. Had he remained at District 61 (versus seeking transfer to District 100), his care team at Ombudsman was considering transitioning him back to junior high school. Because of the level of support Kelly had needed over the years, Ombudsman recommended that Kelly receive some special education support at his new school to ensure his successful transition to

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junior high school. Ombudsman suggested that Kelly receive "at least one period [a] day of resource support" in District 100 "and further classes in a special education setting if his behaviors were to become more disruptive in the general education classroom."

¶ 13 Bagus testified that when she consulted with Heritage to prepare Kelly's IEP, she only had Kelly's records from second grade in 2003, because he had been a student in the district at that time, and the two IEPs from Ombudsman. As soon as Kelly registered for enrollment on February 13, District 100 had faxed a request for Kelly's full records to District 61. But, by law, District 61 had 10 days to provide the records and District 100 did not receive the records until after the stabbing.

¶ 14 Bagus testified that she and the Heritage staff read the time line of his previous educational history and the comments on the Ombudsman IEPs. What they "really wanted to know" was what Kelly's last year was like "because for children that's what you look at." Bagus stated that the February 2007 IEPs showed that Kelly had had a successful last year in school, his behavior and attention span were improving, he was completing work and had not had any significant behavioral outbursts in the Spring of 2006. Bagus explained that Kelly's primary characteristic on his IEP was "emotional disability." She only knew what was on the IEPs and was not aware whether Kelly had criminal issues in his past; had been diagnosed with having inappropriate behaviors and feelings under normal circumstances and an inability to build and maintain interpersonal relationships with peers and teachers; or had gang affiliations. She and

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the Heritage team felt that they had enough information from the two IEPs "to put a good behavior plan into place."

¶ 15 Heritage prepared, and Kelly agreed to, a behavior plan. The plan set Kelly's target behaviors as: following the rules, respecting teachers, getting a haircut and completing his work. Bagus testified that part of Kelly's behavior plan at Heritage consisted of constant supervision. Bagus stated the only way to target the behaviors was to put a staff member with him at all times so that Kelly was comfortable, staff was comfortable and the other students were comfortable. She explained it as "So we check in all the time. How is he doing? They're new. How are they doing?"

¶ 16 Kelly's IEP plan required that he report to the school office first thing in the morning each day and Hale, his special education teacher, would come to the office and escort him to his classroom. Kelly would attend regular education courses except for one special education support class taught by Hale during the last period of Kelly's day. Kelly would not be specially supervised during the lunch period, beyond the monitoring provided by the three lunchroom supervisors.

¶ 17 Bagus stated that supervision between class periods would be provided by Hale or his teaching assistant. Constant supervision in the hallway was the most restrictive environment Heritage had. The purpose of the constant supervision was to monitor Kelly's behavior. Bagus explained that the supervision was not the result of concern with respect to Kelly's aggression or violent behavior toward others but rather because District 100 wanted to monitor how Kelly, a new student to the district, "was going to do

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in the first few days of school. It was a precaution. We didn't know him." Bagus stated that the same supervision precaution was applied to any new student with an emotional disability coming into the 600-student school from a much smaller one-classroom setting. Bagus did not know whether Kelly and Hernandez had an altercation of any sort in the lunchroom. She had heard the allegation but never got confirmation that such actually occurred.

¶ 18 Heritage school principal Hodes testified that, at the meeting to develop Kelly's IEP, the staff reviewed the records it had; which, as usual, was "just *** the current information." She stated that, when students are new to the district, the staff did not usually have all of the student's records and, therefore, prepared a temporary IEP until all the records arrived. In Kelly's case, District 100 intended to review his IEP in one month.

¶ 19 Hodes testified that she was aware Kelly had attended an alternative school before he came to Heritage. She knew that he "was successful" at that school but had not done well at the school before that. She remembered he had problems with adults, "real disrespect with adults," at that school but remembered nothing significant regarding problems with other students. She had been concerned that he might have a difficult transition coming to Heritage from a "really small program" and she had concerns about his disrespect to adults. Hodes stated that was why Heritage assigned special education teacher Hale as his home room teacher, because Hale and the other members of the special education team were "very strong with that."

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¶ 20 Hodes testified that as students walk to the lunchroom, teachers stand out in the hallways to monitor them. She testified that there are always three and often four lunch monitors in the lunch room: a teacher, an off-duty police officer and one or two teaching assistants. The monitors walk back and forth and all around in order to keep an eye on everything that is happening in the lunchroom. Hodes testified that Heritage had an off-duty police officer and two teachers or teacher assistants monitoring the front of the building at the time students were dismissed for the day.

¶ 21 Hodes stated that teachers usually know when "something is going on," because they hear it from the students, but on February 22, 2007, no teacher heard anything about a fight between Kelly and Hernandez after school. She knew this because no teacher approached her with this information and because, after the stabbing, she interviewed the teachers who were in the lunchroom and "no one heard anything." If school personnel had known that Kelly threatened to fight Hernandez after school, the school would have called his parents and he would not be allowed to go home until someone picked him up.

¶ 22 Hodes testified that, if a student is caught writing "Old English," a style of gang graffiti, the student is first warned that it is inappropriate . If it happens again, the parents are notified and the student is put on a "gang contract" outlining consequences for further infractions.

¶ 23 Assistant school principal Havis testified that she had concerns about registering Kelly at Heritage given his previous alternative placement was for behavior

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issues. She testified she had no knowledge prior to February 22, 2007, whether Kelly had been expelled from school, had been arrested or was a gang member.

¶ 24 Havis testified that on February 22, 2007, Kelly's teacher, Hale, brought her a paper Kelly had written in which he wrote his name in "a like tag graffiti style writing." She and social worker Schwartz called Kelly into her office toward the end of the day. They told him that Heritage did not allow this style of writing. Havis was not concerned that Kelly's writing his name in this manner was gang related because there was no other writing of this sort and he had not written anything in "Old English."

¶ 25 Havis testified that, if a student was caught using Old English or gang writing, the child would be warned and, if it was a repeat offense, the student would have to sign a gang contract and the parents might be called, depending on the severity of the infraction. Because it was a first offense, she just warned Kelly and told him if it happened again, she would have to call a parent. Havis asked Kelly how he liked Heritage and he was very positive and gave no indication that he was upset.

¶ 26 Havis testified that, during the day on February 22, 2007, she did not learn that there had been a lunchroom altercation or argument between Kelly and Hernandez. She heard about it after the stabbing. Off-duty police officer Don Wilhite, computer teacher Donna Cavalieri and teaching assistant Patricia Ferrell were the monitors during the eight grade lunch period. She never heard that any staff member was aware prior to the stabbing that Kelly and Hernandez had a lunchroom altercation. She remembered hearing about a problem Kelly and Hernandez had at lunch, probably from

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the social workers working as grief counselors after the stabbing who would have gotten the information from the students.

¶ 27 Havis stated that Heritage had no security cameras or metal detectors; Officer Wilhite monitored the students' dismissal from school, along with other supervisors; and teachers and teaching assistants supervised the hallways during passing periods. She testified that students would often report to staff when a student threatened another or if a fight was going to happen. Heritage would call both students' parents and have the children picked up from school. If one student reported that another student had contraband such as drug paraphernalia or a weapon in a school locker or if a student was writing gang writing, staff would search the locker for the contraband or evidence of gang affiliation. Kelly's locker was never searched.

¶ 28 School social worker Schwartz testified that, prior to the February 22, 2007, stabbing, she had no knowledge regarding whether Kelly had any gang involvement, except his hairstyle which was "a possible." Kelly wore his hair in a style referred to as a "shag" and often associated with a street gang. As part of Kelly's behavioral intervention plan, he agreed to get his hair cut prior to attending school. He did not cut his hair.

¶ 29 Schwartz testified that, prior to February 22, 2007, a student told her that he had been in a fight with Kelly during grade school, five years earlier. The same student told her that he heard from other students that Kelly was telling the students he was in the Latin King gang. Schwartz had no other indication that Kelly had been physically

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aggressive with students or had a pattern of threatening and fighting with peers at his previous schools. She was not aware of Kelly's arrest history or how many schools he had been enrolled in prior to Heritage.⁴

¶ 30 Schwartz was not aware of a lunchroom altercation between Kelly and Hernandez. In her grief counseling sessions with students after the stabbing, she heard about something happening in the lunchroom but it was undetected so she never knew whether it was true or not. Noone had come to her before the stabbing and told her about an argument at lunch or a fight after school between Kelly and Hernandez. Had she known of either, she would have called both parents and had the students picked up from school, "especially knowing [Hernandez]'s history and also not knowing [Kelly's] history." Schwartz knew Hernandez well and had twice called his mother to pick him up when he was going to be in a fight.

¶ 31 Schwartz testified that when she heard that Kelly was telling people that he was in a gang, she contacted assistant principal Havis. Havis had a piece of paper given to her by a teacher showing Kelly had written his name in block letters and used stars to dot the "i"s. Five pointed stars are a gang sign affiliated with the Latin Kings. Schwartz and Havis called Kelly down to the office and told him that the lettering was not something that was allowed in the school and warned him of the consequences of such

⁴ A report from the Hinsdale police department shows that Kelly was arrested in December 2006 for mob action and battery. The report states that Kelly, his girlfriend, her sister and several other boys attacked and beat a grade school classmate of the girlfriend's for allegedly disrespecting the girlfriend.

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conduct. Havis and Schwartz also told Kelly that they had heard he was telling people that he was a Latin King. Kelly denied doing that "in a very well-mannered way and respectful" and said he would never bring that into the school. Havis and Schwartz then told Kelly that they wanted him to have a positive experience at Heritage and to "stay away from these kinds of things." They then sent Kelly back to his classroom.

¶ 32 Heritage special education teacher Hale testified that, in preparing Kelly's IEP for his enrollment at Heritage, he understood that Kelly was coming from a more restrictive environment into which he had been placed due to past concerns. Heritage staff created the IEP based on the information that Kelly "was very level appropriate skill wise and behavior had not been an issue as of recently, that he would be receiving support within the regular education classroom. Special education staff would be with him." As part of the IEP, Kelly would report to the front office and wait to be picked up. He would be supervised as he moved between classes because his classes were all on the same hallway and special education team members stood in the doorways supervising the students as they moved through the hallways to the classrooms. Hale and his assistant provided special education support in the regular education classes so either he or his assistant would be in each of Kelly's classes. The only time Kelly would be outside Hale or his assistant's view would be during lunch or during an exploratory class, such as art or technology. During the last period of the day, Kelly would be in the classroom with Hale. Hale had no knowledge of a fight between Hernandez and Kelly until after it had occurred, when a student ran back into the building. No student came

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to him before or after the fight to tell him something happened between Kelly and Hernandez in school that day.

¶ 33 Berwyn police officer Wilhite testified that he worked as a part-time security officer at Heritage. As part of his duties, he was monitoring the lunchroom on February 22, 2007, with two teachers. He did not notice anything "out of the normal" in the lunchroom that day and did not have to intervene with any of the students. During the lunch period, the students are to remain in their seats unless throwing away garbage. His role was "to oversee and make sure [there were] no problems amongst the children." Wilhite testified that he walked around the lunchroom throughout the lunch period and then ushered the students back to their classrooms. He did not recall ever having to deal with a physical or verbal altercation during his years at Heritage.

¶ 34 Wilhite testified that from 3:17 p.m. to 3:30 p.m. on February 22, 2007, he stood in front of the school front doors, on the sidewalk on 31st Street, to monitor the students' dismissal from school. His duty was to ensure that the students left the school in a timely fashion, to make sure traffic was not impeded and to make sure that there were no "issues" with high school students or parents in front of the school. As usual, there were large groups of students clustered in front of the doors and he moved them out from in front of the doors. Wilhite saw Kelly at dismissal time, walking eastbound from the front of the school with a large group of children. Wilhite did not see the altercation between Kelly and Hernandez because it was too far away.

¶ 35 Heritage computer teacher Cavalieri testified that she was the lunchroom

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supervisor on February 22, 2007. Officer Wilhite and teaching assistant Ferrell were also monitoring lunch that day. Cavalieri stated that she was to walk around, watch for "students being disrespectful such as throwing food around," make sure there were only eight students at a table, and release the tables a few at a time. Cavalieri testified that students had no assigned seats during lunch but were limited to eight students to a table.

¶ 36 Cavalieri had taught Kelly in her first period technology class. During lunch, she saw him sitting at a table of nine students, talking to the other students. She asked the students at the table why there were nine students at the table. She was told, and subsequently confirmed, that Mr. McMann, the lunchroom supervisor the previous day, had given permission for Kelly to sit at the table that week because he was new.

¶ 37 Cavalieri remembered that Hernandez was sitting at a table at the front of the lunchroom in front of the cashiers, conversing and eating lunch. Hernandez's table was next to Kelly's table. She never observed Hernandez and Kelly having any communication and testified that "there was no argument." She stated she was standing in front of the table where Kelly was sitting, watching the students as they lined up at the sandwich cart and keeping them orderly and in line. If Kelly had gotten up from the table and had an argument with anyone, "it would have caught [her] eye." She testified she never heard any threats by Kelly about fighting Hernandez and that "nothing out of the ordinary occurred that day."

¶ 38 Heritage teaching assistant Ferrell testified that she was monitoring the

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lunchroom on February 22, 2007. She was not aware of any conversation between Kelly and Hernandez that day and observed nothing unusual. She heard no gossip that there was going to be a fight between students. She remembered talking to the students at a table with nine occupants but did not remember which table.

¶ 39 There was no evidence regarding how or when Kelly obtained the knife with which he stabbed Hernandez.

¶ 40 On October 19, 2011, the court granted summary judgment to District 100 on the three willful and wanton counts, finding that plaintiffs failed to show that the acts and omissions of District 100 were a proximate cause of Hernandez's injuries and death. The court specifically noted that the events of what happened during the school day on February 22 were "hazy at best." It noted the importance of plaintiffs' allegations that there was a verbal altercation between Kelly and Hernandez in the school cafeteria but found insufficient facts to establish that there was a verbal altercation. The court stated that this left only the fact that "a new student was on campus for two days, and after school on the second day he pulls out a knife and stabs another student."

¶ 41 The court stated the crux of the case was whether Kelly's action was foreseeable and whether the lack of supervision was a proximate cause of that action. It found no evidence showing that District 100 voluntarily assumed a duty to protect its students from criminal attacks that occur off school grounds. It held that "[t]he attack here was simply too remote for liability to lie with the school. The acts and omissions of the school were not a proximate cause of the attack that occurred. The attack was the

result of the independent, unforeseeable and criminal conduct of the assailant."

¶ 42 Plaintiffs filed a timely notice of appeal on November 14, 2011.

¶ 43 Analysis

¶ 44 Plaintiffs argue the court erred in entering summary judgment for District 100 for two reasons: (1) District 100 was not immune from liability under section 2-201 because its decisions regarding the enrollment and supervision of Kelly were willful and wanton and discretionary policy decisions that are unprotected by section 2-201; and (2) District 100's deliberate and reckless disregard for its own rules regarding supervision and discipline proximately caused Hernandez's death.

¶ 45 A drastic means of disposing of litigation, a motion for summary judgment is granted only 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." *Axen v. Ockerlund Construction Co.*, 281 Ill. App. 3d 224, 229, 666 N.E.2d 693, 696 (1996), quoting *Purtill v. Hess*, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). The purpose of summary judgment is not to try a question of fact but to determine, construing the pleadings, depositions, admissions and affidavits strictly against the movant and liberally in favor of the respondent, whether a question of fact exists. *Golden Rule Insurance Co. v. Schwartz*, 203 Ill. 2d 456, 462, 786 N.E.2d 1010, 1014 (2003); *Sunderman v. Agarwal*, 322 Ill. App. 3d 900, 902 (2001). We review the trial court's entry of summary judgment *de novo*. *Golden Rule Insurance Co.*, 203 Ill. 2d at 462, 786 N.E.2d at 1014.

¶ 46 Plaintiffs complaint alleged District 100's wilful and wanton conduct was a proximate cause of Hernandez death/their injuries. "Willful and wanton conduct" is not a separate and independent tort but rather is regarded as an aggravated form of negligence. *Jane Doe-3 v. McLean County Unit District No. 5 Board of Directors*, 2012 IL 112479, ¶ 19 (citing *Krywin v. Chicago Transit Authority*, 238 Ill.2d 215, 235 (2010)). To recover damages based on willful and wanton conduct, as with a negligence claim, the plaintiff must plead and prove that the defendant owed the plaintiff a duty, breached the duty and the breach was the proximate cause of the plaintiff's injury. *Jane Doe-3*, 2012 IL 112479, ¶ 19. "In addition, a plaintiff must allege either a deliberate intention to harm or a conscious disregard for the plaintiff's welfare." *Jane Doe-3*, 2012 IL 112479, ¶ 19.

¶ 47 District 100 asserted that it was entitled to summary judgment because (a) it was immune from liability pursuant to section 2-201 of the Tort Immunity Act; (b) plaintiffs produced no evidence that District 100 was willful and wanton; and (c) plaintiffs produced no evidence that District 100's acts and omissions were a proximate cause of the altercation between Kelly and Hernandez. These allegations, if left un rebutted, would entitle District 100 to judgment as a matter of law or demonstrate that plaintiffs would be unable to prove the proximate cause element of their cause of action. Therefore, plaintiffs had to present some evidence allowing the imposition of liability on District 100 and supporting the necessary elements of their cause of action, thereby defining a material issue of fact to be determined at trial. *Bourgonje v. Machev*, 362 Ill.

App. 3d 984, 994 (2005). Although plaintiffs need not prove their case at the summary judgment stage, they must present a factual basis that would arguably entitle them to a judgment or create a genuine issue of material fact as to their claims. *Keating v. 68th and Paxton, L.L.C.*, 401 Ill. App. 3d 456, 470 (2010); *Sunderman*, 322 Ill. App. 3d at 902. If they cannot establish an essential element of their cause of action, summary judgment is proper. *Sunderman*, 322 Ill. App. 3d at 902.

¶ 48 Construing the pleadings, depositions, admissions and affidavits strictly against District 100 and liberally in favor of plaintiffs, we find, as did the circuit court, that plaintiffs failed to establish the proximate cause element of their cause of action.

“Proximate cause” has two requirements: cause in fact and legal cause. *Krywin v. Chicago Transit Authority*, 238 Ill.2d 215, 225-26 (2010); *Lee v. Chicago Transit Authority*, 152 Ill.2d 432, 455 (1992). “Cause in fact exists where there is a reasonable certainty that a defendant's acts caused the plaintiff's injury.” *Krywin*, 238 Ill.2d at 226. A defendant's conduct is a cause in fact if the conduct is a material element and a substantial factor in bringing about the injury, *i.e.*, absent the conduct, the injury would not have occurred. *Krywin*, 238 Ill.2d at 226. In contrast, legal cause is a question of foreseeability: “whether the injury is of a type that a reasonable person would see as a likely result of his or her conduct.” *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 258 (1999) (citing *Lee*, 152 Ill.2d at 455-56).

¶ 49 Plaintiffs main allegations are that, if District 100 had not enrolled Kelly or had not put Kelly in the general school population or had properly supervised Kelly or had

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disciplined Kelly for showing his alleged gang affiliation or had removed Kelly from school after learning of the altercation in the cafeteria and/or his claiming his gang affiliation, Hernandez would not have died. They argue District 100's acts or omissions were a cause in fact of Hernandez's death because Kelly's presence around Hernandez was a substantial factor in the eventual altercation that resulted in Hernandez's death. Plaintiffs assert District 100 knew Kelly had threatened other students in the past and he would likely do so again. They also argue that Hernandez's injury was foreseeable because a reasonable person would foresee a likely altercation between Kelly and another student given Kelly's well-documented past behavioral problems.

¶ 50 The relevant question is: was District 100's conduct a material and substantial element in bringing about the injury/Hernandez's death (the cause in fact), and, if it was, was the injury of a type that a reasonable person would see as a likely result of District 100's conduct (the legal cause)? *First Springfield Bank & Trust*, 188 Ill. 2d at 258-59. Even assuming *arguendo* that, as plaintiffs assert, District 100's conduct in enrolling, supervising and disciplining Kelly was willful and wanton negligence, the answer to the question must be "no."

¶ 51 Arguably, District 100's conduct was a material and substantial element in bringing about the injury here. Absent District 100's alleged misconduct in enrolling/failing to adequately supervise/failing to adequately discipline Kelly, Kelly would not have encountered Hernandez in school, Kelly would not have stabbed Hernandez and Hernandez would not have died. Cause in fact is, therefore, arguably

present.

¶ 52 The question then becomes whether District 100's conduct was the legal cause of plaintiff's injuries. On this record, it was not. Plaintiffs' injury, Hernandez's death, did not result directly from District 100's alleged wilful and wanton conduct. Instead, it resulted from the independent act of a third person, Kelly. The test is whether District 100 should have anticipated Kelly's actions, which were the intervening efficient cause of Hernandez's death, as a natural and probable result of its conduct. *First Springfield Bank & Trust*, 188 Ill. 2d at 257-59. "[I]f the negligence charged does nothing more than furnish a condition by which the injury is made possible, and that condition causes an injury by the subsequent, independent act of a third person, the creation of the condition is not the proximate cause of the injury. *First Springfield Bank & Trust*, 188 Ill. 2d at 257.

¶ 53 Kelly's stabbing of Hernandez and Hernandez's subsequent death was not an injury of a type that a reasonable person would see as a natural and probable result of District 100's conduct. Kelly's decision to fight with and stab Hernandez was entirely of his own making. District 100's conduct may have brought Kelly and Hernandez together, but it neither caused Kelly to make the tragic decisions that he did nor could it have anticipated his decision as a likely consequence of its conduct.

¶ 54 Putting aside the fact that there is no evidence in the record showing that there was actually an altercation between Kelly and Hernandez in the lunchroom on the day of the stabbing, there is nothing to support plaintiff's assertion that school personnel

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knew about a verbal altercation between the two boys in the lunchroom before the stabbing. The record contains eight depositions by school personnel. Each school staff member or security officer testified that they did not hear or suspect, prior to the stabbing, that there had been an alteration in the lunchroom between Kelly and Hernandez or that a fight was brewing between them after school. Principal Hodes and assistant principal Havis testified that students usually reported any such problems in the school but that they were not aware of any students reporting such with regard to Kelly and Hernandez.

¶ 55 Wilhite, Cavalieri and Ferrell were the lunchroom supervisors during the relevant lunch period. They all testified that they saw and heard nothing unusual in the lunchroom that day. Cavalieri, who had taught Kelly in her computer class, specifically remembered where Kelly was sitting at lunch that day because she was standing in front of his table and had questioned the students at his table about the number of students sitting there. She remembered Hernandez sitting at the lunch table next to Kelly's and testified that she saw no interaction between the two. Cavalieri stated she was looking directly at Kelly's table while she watched students going through the sandwich line and, had he left his table and had an argument with anyone, she would have seen it.

¶ 56 Hodes, Havis and social worker Schwartz testified that if an altercation had occurred between the two boys or if they had heard about a possible fight between them, they would have called the boys' parents to pick the boys up from school. But,

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because no school staff member or security officer knew about any problems between the boys, the school/District 100 did not have the boys picked up that day. With no knowledge of any antagonism between the boys, District 100 would have no reason to foresee that future difficulties such as a fight might arise, let alone that Kelly would decide to stab Hernandez after school.

¶ 57 Further, District 100 knew that, although Kelly had had behavioral issues and difficulty with authority figures/teachers in the past, in the two months prior to his admission to Heritage, his behavior problems had been minimal, he had done well in school and his academic skills were on a par with his grade level. Kelly's Ombudsman IEPs did not report that Kelly had any difficulties with fellow students. Director Bagus testified that a child's last year prior to admission to the District 100 school was what the district looks at in terms of developing a plan for a student. Although a student told Schwartz that Kelly had threatened him at a previous school, that incident occurred five years prior to Kelly's admission to Heritage, when both students were in second grade. As far as Heritage/District 100 knew, Kelly had no other difficulties involving violence with fellow students. Based on the IEP reports that District 100 received from Ombudsman, District 100 had no reason to foresee that Kelly, who had a documented history of difficulties with teachers but not with fellow students, would stab a schoolmate after class.

¶ 58 There is no evidence in the record regarding what happened between the two boys after school. There is no evidence what, if anything, happened between them in

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school that day. All the evidence shows is that Kelly chose to have a knife on his person, chose to interact with Hernandez in a confrontational manner and chose to stab Hernandez, off school grounds and out of sight of school personnel. None of Kelly's decisions are a foreseeable likely result of any of District 100' allegedly wilful and wanton actions. District 100's conduct may have put Kelly in proximity to other students, but the dangerous ends to which Kelly followed that proximity were entirely of his own choosing and independent of any willful and wanton conduct by District 100 . No reasonable person could foresee as a likely, natural and probable result of District 100's alleged wilful and wanton conduct that Kelly would injure, let alone kill, a fellow student.

¶ 59 As the circuit court found, plaintiffs do not show that Kelly's attack on Hernandez was anything other than independent and unforeseeable criminal conduct. Accordingly, because plaintiffs fail to show that District 100's acts or omissions were a proximate cause of Hernandez's death, they fail to establish an essential element of their cause of action. We affirm the court's grant of summary judgment to District 100.

¶ 60 Given this decision, we need not address plaintiffs' other argument regarding District 100's immunity under section 2-201 of the Tort Immunity Act..

¶ 61 Conclusion

¶ 62 For the reasons stated above, we affirm the decision of the circuit court granting summary judgment to District 100.

¶ 63 Affirmed.

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