

No. 1-12-1315

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

NIKITA BAILEY, as administrator for the Estate of)	Appeal from the Circuit
MICHAEL DUNBAR,)	Court of Cook County.
)	
Plaintiff-Appellant,)	
)	
v.)	No. 07 L 8252
)	
CITY OF CHICAGO and MICHAEL ALESIA,)	The Honorable
)	James P. Flannery, Jr.,
Defendants-Appellees.)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Rochford and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* Record on appeal was insufficient to establish reversible error.

¶ 2 The plaintiff, Nikita Bailey (acting as administrator for the estate of Michael Dunbar) appeals following a jury verdict against her and in favor of the defendants, the City of Chicago and Chicago Police Officer Michael Alesia, on the plaintiff's wrongful death and battery claims based on Alesia's fatally shooting Dunbar, allegedly without justification. On appeal, the plaintiff argues that the trial court erred in (1) denying her motion for judgment on the pleadings; and (2) imposing on her the burden of proving that Alesia acted without lawful authorization; and (3) instructing the jury that she

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bore that burden. For the reasons that follow, we affirm the circuit court's judgment.

¶ 3 In her complaint, the plaintiff alleged that the defendant shot and killed Dunbar without justification or provocation. In their answer, the defendants alleged that Alesia shot into Dunbar's car because Dunbar was dragging Alesia with his car and ignoring orders to let go of Alesia. The defendants also alleged, as part of an affirmative defense under the Illinois Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/1-101 *et seq.* (West 2010)), that they "were engaged in the enforcement and execution of the law" at the time of Dunbar's death.

¶ 4 The plaintiff moved for judgment on the pleadings, based on the argument that the defendants had admitted that Alesia shot Dunbar and had raised no affirmative defense of self-defense or authorization. The trial court denied that motion, and the case was tried before a jury, which was instructed that the plaintiff bore the burden to prove that Alesia acted without authorization. Although transcripts of pretrial hearings, counsel's arguments to the jury, and the court's instruction conference appear in the record on appeal, the record contains no memorialization of the trial itself. After the jury found in the defendants' favor, the plaintiff filed this timely appeal.

¶ 5 The plaintiff's first argument on appeal is that the trial court erred in denying her motion for judgment on the pleadings. Section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2010)) allows a party to obtain a judgment on the pleadings where the pleadings disclose no genuine issue of material fact, so that the moving party is entitled to judgment as a matter of law. *Clarke v. Community Unit School District 303*, 2012 IL App (2d) 110705, ¶ 21. We review *de novo* a trial court's decision to grant or deny judgment on the pleadings. *Hess v. Loyd*, 2012 Ill App (5th) 090059, ¶ 17.

¶ 6 Here, the plaintiff argues that, by conceding in their answer that Alesia intentionally shot Dunbar and failing to raise authorization as an affirmative defense, the defendants forfeited that defense and conceded the elements of her claim. See *Athens v. Williams*, 327 Ill. App. 3d 700, 705, 764 N.E.2d 586 (2002) ("If a party fails to plead an affirmative defense, he is deemed to have waived the defense, and it cannot be considered even if the evidence suggests the existence of the defense.") However, even assuming *arguendo* that the defendants bore the burden of proving Alesia's justification, we disagree with the plaintiff's premise that the defendants failed to plead accordingly. Section 2-613(d) of the Code (735 ILCS 5/2-613(d) (West 2010)), which the plaintiff cites as authority for the proposition that the defendants failed to plead any justification defense, requires that "[t]he facts constituting any affirmative defense *** must be plainly set forth in the answer or reply." The defendants here did just that. In their answer, the defendants explained that Alesia shot Dunbar only after Dunbar began dragging Alesia down the street and refusing to stop, and it alleged that Alesia was performing his duties to enforce and execute the law at the time. These responses very clearly pleads facts that the plaintiff does not dispute give rise to a justification defense. Thus, the responses created a genuine issue of material fact, so that judgment on the pleadings was not proper. For that reason, we reject the plaintiff's argument that the trial court erred in denying its motion for judgment on the pleadings.

¶ 7 The plaintiff also argues that the trial court erred in imposing upon her the burden to disprove Alesia's justification, and in instructing the jury accordingly. Assuming for the sake of analysis only that the plaintiff's argument in this regard is correct, we may reverse a jury verdict based on erroneous instructions only where the instructions result in prejudice to the appellant. *Studt v.*

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Sherman Health Systems, 2011 IL 108182, ¶ 28. Likewise, we may not reverse a verdict due to trial error absent a showing of prejudice to the appellant. *Central Illinois Electrical Services, L.L.C. v. Slepian*, 358 Ill. App. 3d 545, 550, 831 N.E.2d 1169 (2005). Here, we cannot evaluate the prejudice caused by any purported trial error or by the jury instructions, because we have no record of the trial.

¶ 8 It is axiomatic that the appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record, a reviewing court will presume that the order entered by the trial court was in conformity with the law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392, 459 N.E.2d 958 (1984). Thus, any doubts that arise from the incompleteness of the record must be resolved against the appellant. *Foutch*, 99 Ill. 2d at 392. Without any record of the trial, we cannot determine whether the plaintiff suffered prejudice from any trial error or from the jury instructions; indeed, we cannot even determine if the plaintiff proved that a battery occurred at all. We must, therefore, assume from the gap in the appellate record that any errors caused her no prejudice.

¶ 9 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 10 Affirmed.