2015 IL App (1st) 131654-U

FIFTH DIVISION
March 27, 2015

No. 1-13-1654

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ANGEL MARSHALL, Individually and as Special Administrator of the ESTATE OF AQUAN LEWIS, Deceased, Plaintiff-Appellant, v. EVANSTON SKOKIE SCHOOL DISTRICT 65 d/b/a OAKTON ELEMENTARY SCHOOL Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County No. 10 L 1315 Honorable Kathy M. Flanagan, Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Palmer and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed plaintiff's second amended complaint with prejudice because (1) plaintiff cannot establish the proximate cause to state a cause of action, and (2) defendant is immune from liability under the Tort Immunity Act (745 ILCS 10/1-101 *et seq.* (West 2012)).

¶ 2 This case involves the tragic and untimely death of a 10 year old child while at school.

Plaintiff Angel Marshall, Individually and as Special Administrator of the Estate of Aquan

Lewis, deceased, appeals the trial court's dismissal of her second amended complaint filed

against defendant Evanston Skokie School District 65 d/b/a Oakton Elementary School, alleging negligence and willful and wanton conduct. On appeal, plaintiff argues that the trial court erred in dismissing her complaint because (1) plaintiff pled the necessary facts to allege that Lewis's death was foreseeable and defendant's negligence and willful and wanton conduct proximately caused his death; (2) plaintiff pled the necessary elements to allege a special duty; (3) plaintiff pled the necessary facts to allege that defendant acted in a willful and wanton manner; (4) plaintiff did not allege a negligent failure to supervise such that section 3-108 of the Local Government and Governmental Employees Tort Immunity Act (Tort Immunity Act) was not triggered (745 ILCS 10/3-108 (West 2010)); and (5) section 2-201 of the Tort Immunity Act did not bar plaintiff's claims because defendant's actions were ministerial, not discretionary policy decisions.

¶ 3 On February 3, 2009, Aquan Lewis was a fifth grade student at Oakton Elementary School in Evanston, Illinois. Shortly before 3 p.m. that day, Lewis was found hanging by his shirt collar on a hook on the back of a restroom stall door. Lewis died the next day. The Cook County Medical Examiner determined the cause of death to be suicide.

¶ 4 In January 2010, Marshall, Lewis's mother, filed her initial complaint against defendant alleging wrongful death and survival claims based on negligence and the same claims based on willful and wanton conduct. The complaint alleged that defendant "had a duty to provide care and to protect the well being and safety of its students" including Lewis.

¶ 5 The complaint asserted that at approximately 2:30 p.m. on February 3, 2009, defendant's employee and Lewis's fifth grade teacher Charles Matthews lined up his students in the third floor hallway to walk to the gymnasium on the first floor. Lewis was not with the line of

students and Matthews was aware that Lewis was not present. Matthews took the students to the gym. Lewis was found hanging in the third floor boys' restroom shortly before 3 p.m.

¶ 6 The complaint alleged that defendant was negligent in failing to provide protective services, failed to observe Lewis at all appropriate times, failed to keep track of Lewis's whereabouts, made no attempt to locate Lewis when it was observed that he was not with his class, made no effort to observe the boys restroom prior to taking the students to the gym, failed to find Lewis in a timely manner, failed to provide necessary and required educational and special service support, failed to initiate a search in a timely fashion, failed to recognize Lewis was not with his class at an earlier point in time, and failed to adequately supervise Lewis's activities. As a proximate cause of the one or more of these acts or omissions, Lewis suffered injuries that led to his death. Plaintiff realleged these same acts or omissions for all four counts, adding "acting with a complete and utter disregard for the life of Aquan Lewis" for the two willful and wanton counts.

¶ 7 In April 2010, defendant filed a combined motion to dismiss the complaint pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2010)). Defendant argued that the negligence counts should be dismissed under section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2010)) because the basis of the negligence counts was a failure to supervise Lewis which was barred by section 3-108(a) of the Tort Immunity Act (745 ILCS 10/3-108(a) (West 2010)). Defendant further argued that the willful and wanton counts should be dismissed for failure to state a cause of action under section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)) because plaintiff failed to plead sufficient facts to demonstrate willful and wanton conduct.

¶ 8 Prior to filing a response, plaintiff proceeded to take written and oral discovery over the next two years. In February 2012, plaintiff filed her response to defendant's motion to dismiss. Plaintiff contended that section 3-108 of the Tort Immunity Act did not apply because her complaint did not allege a failure to supervise an activity on school property and that she pled sufficient facts to allege that defendant acted with an utter disregard for Lewis's well being on February 3, 2009. Plaintiff asked the trial court for leave to amend her complaint to add allegations of a violation of a special duty.

¶ 9 Defendant filed its reply in February 2012. In March 2012, the trial court dismissed plaintiff's complaint in a written order, finding that the negligence counts "essentially allege a failure to supervise an activity on public property" and defendant was immune from liability as alleged under section 3-108(a) of the Tort Immunity Act. The court further held that the willful and wanton allegations were "conclusory and do not set forth specific facts which state a cause of action for willful and wanton conduct." The court allowed plaintiff the opportunity to replead her allegations.

¶ 10 In April 2012, plaintiff filed her first amended complaint, again raising four counts—two alleging negligence with a special duty and two alleging willful and wanton conduct. The amended complaint added allegations that "Lewis had a history of mental health problems which included possible suicidal ideation as well as emotional and anger problems." Between November 30, 2007 and December 6, 2007, Lewis was a patient at Rush University for possible suicidal ideation as well as emotional and anger issues. On or about December 20, 2007, Lewis began to treat with a child psychiatrist at Evanston Northwestern Hospital. Also at that time, Lynn Billups, a school psychiatrist employed by defendant, received notification from Evanston Northwestern about Lewis's psychiatric history. On or about December 20, 2007, defendant had

actual knowledge and awareness of Lewis's psychiatric condition, diagnosis, and treatment. The complaint alleged that defendant failed to have a team meeting regarding Lewis, failed to implement an individualized education program (IEP) or plan based on section 504 of the Rehabilitation Act of 1973 (504 plan) as required by its policies, and failed to inform Lewis's teachers for the 2008-09 school year of his mental health conditions.

¶ 11 The complaint alleged that defendant was negligent by failing to provide proper protective services within the school for the safety and well being of Lewis, including IEP and 504 plans, failing "to provide necessary and required educational and special service support pursuant to mandated IEP and 504 plans, despite the awareness of need for same," failing to conduct a mandated evaluation under a 504 plan for Lewis after obtaining his medical records and mental health diagnosis, and failing to inform Lewis's 2008-09 school year teachers of his mental health diagnosis. The allegations for the willful and wanton counts incorporated these new claims in addition to the same claims from the prior complaint.

¶ 12 In May 2012, defendant filed a motion to dismiss the first amended complaint under section 2-619.1 of the Code. Defendant asserted that plaintiff could not establish that defendant proximately caused Lewis's death because suicide was not foreseeable. Further, defendant argued that plaintiff's allegations for educational services, such as an IEP or 504 plan, amount to educational malpractice, which is not a recognized tort in Illinois. Defendant also contended that plaintiff again failed to allege sufficient facts to show either a special duty or willful and wanton conduct. Finally, defendant again argued that the claims were barred by the Tort Immunity Act.

¶ 13 Plaintiff filed a response, but it is not included in the record on appeal. Defendant filed a reply to its motion in September 2012. In October 2012, the trial court granted defendant's motion to dismiss plaintiff's first amended complaint. The court summarized plaintiff's response

to the motion. Plaintiff contended that proximate cause can exist with a suicide when the death was foreseeable, which the evidence of Lewis's mental health issues established. Plaintiff also asserted that Lewis's death may not have been suicide, but instead a game played by students, which raised a question of fact. Plaintiff further argued that she properly pled the elements of a special duty and willful and wanton conduct. Plaintiff also contended that the Tort Immunity Act was inapplicable because she did not allege negligent supervision and defendant's actions were ministerial, not discretionary.

¶ 14 In dismissing the negligence counts, the trial court found that plaintiff failed to plead "specific, relevant facts to support all of the elements needed to establish that the Defendant owed the Decedent a special duty." The court noted that the allegations were "conclusory." The court also found that the negligence counts alleging that defendant failed to provide special educational services cannot stand to the extent that they imply a claim of educational malpractice, which is not recognized in Illinois. The trial court also found that plaintiff's contention that a suicide was not specifically pled and was a question of fact was belied by the allegations which suggest a suicide. The court held that "foreseeability here has not been sufficiently pled" for all four counts of the complaint. The trial court concluded that plaintiff again failed to sufficiently allege willful and wanton conduct and the allegations were "devoid of factual content which show that the Defendant engaged in a course of conduct exhibiting an utter indifference or conscious disregard for the safety of the Decedent."

¶ 15 Further, the trial court noted that it need not reach the section 2-619 portion of the motion since the complaint failed to state a cause of action. Nevertheless, the court found that the negligence counts "still sound in a failure to supervise" and defendant was immune from liability for negligence under section 3-108 of the Tort Immunity Act. The court also found that section

2-201 of the Tort Immunity Act immunized defendant with regard to all counts because defendant's actions were discretionary. "[T]here is no such law or rule alleged in the instant pleading which required the Defendant to act ministerially." In its conclusion, the court observed that "it does not appear" that plaintiff will be able to properly state a claim against defendant, but the court gave plaintiff leave to amend her complaint.

¶ 16 In March 2013, plaintiff filed her second amended complaint, which raised the same four counts as the first amended complaint. The second amended complaint removed the allegations relating to IEP and 504 plans. The complaint continued to allege that defendant was "uniquely aware" of Lewis's mental health issues and failed to disseminate this information, including to his teachers, after Lewis's medical records were obtained. The complaint added allegations relating to Lewis's behavioral problems during the 2008-09 school year, including an allegation that his teacher had given him a "yellow card" on February 3, 2009, for instances of misbehavior.

¶ 17 The complaint made the following allegations of negligence against defendant.

> "(a) Failed to alert Aquan's fourth and fifth grade teachers, including Charles Matthews, once it became aware of Aquan Lewis' mental health history and obtained his mental health records from Rush University and Evanston Northwestern; or
>
> (b) Ignored the specific danger of harm which existed for Plaintiff's Decedent Aquan Lewis once it became aware of his particular unique mental health history and diagnosis."

¶ 18 Plaintiff added further allegations suggesting that "although Plaintiff's Decedent was found hanging, [it] was not due to an act of suicide, more probably true than not." Plaintiff asserted that "students at Oakton School played a 'hanging game' in the boys bathroom where

Aquan Lewis was found." The complaint stated that evidence was found by Evanston police that this game was being played in the bathroom stall where Lewis was found.

> "That the 'hanging game' entailed students placing themselves on the hook of the bathroom stall in order to see how long they could hang or hanging from the upper metal crossbar above the boys bathroom stall where Aquan Lewis was found."

¶ 19 The allegations of defendant's acts and/or omissions for the willful and wanton counts were nearly identical to those raised in the first amended complaint with the removal of allegations relating to IEPs and 504 plans and the addition of allegations that Lewis's teacher failed to get another teacher to watch the class while he searched for Lewis and that he failed to search for Lewis after dropping the class off at the gym and instead checked his mail in the school office. These counts made the same allegations relating to the "hanging game" as in the negligence counts.

¶ 20 Plaintiff attached numerous exhibits to the second amended complaint, including several depositions as well as affidavits from a Florida police officer and a medical doctor. Terry Blake testified in a deposition that in February 2009, she was the health clerk and attendance clerk at Oakton. She knew Lewis, but said the last time she recalled seeing him was the previous fall on Halloween when he showed her his costume. Lewis did not have any medical problems that required her assistance. Blake also stated that Marshall did not give consent for the school to implement a mental health plan for Lewis.

¶ 21 Lynn Billups testified at her deposition that she was the school psychologist at Oakton for the 2008-09 school year. Billups received notification about Lewis's hospitalization including his diagnosis as attention deficit hyperactivity disorder (ADHD), depression and anger issues.

On December 20, 2007, Billups received a letter from Dr. Jane Feldman, Lewis's child psychiatrist, that included the additional information that Lewis had suicidal ideation. Billups stated that the intervention team met to discuss Lewis's mental health issues and asked his teachers if Lewis was displaying these characteristics in the classroom. Her recollection was that if the teacher did not indicate that he was exhibiting these behaviors, then they would not have pursued further meetings "unless [Lewis] was demonstrating those types of concerns in the school setting." Billups said that "based on his behaviors in school as well as these outside services, that [Lewis] was receiving any attention that he needed to be and that he was not a threat to himself at school."

¶ 22 Regarding the implementation of a 504 plan, Billups testified that it was not brought to her attention that Lewis needed certain accommodations or modifications in the classroom. Billups also stated that to her recollection, Marshall did not request an evaluation of Lewis in the 2008-09 school year. Billups did not see or hear of any behavior that she suspected would lead to suicide.

¶ 23 Charles Matthews testified at his deposition that he was Lewis's fifth grade teacher. Matthews stated that Lewis had some behavioral issues, but the incidents were isolated. Matthews admitted that he had not been informed about Lewis's mental health history. On February 3, 2009, Lewis had received a "yellow card" warning from Matthews. He explained that a "yellow card" meant Lewis had received three warnings to try to improve his behavior and not talk as much. These warnings did not involve extreme behavior. Matthews explained that a "red card" might result in a phone call to a parent, but three additional behavior warnings were needed for that reprimand. Matthews noted that it was the end of the school day meaning Lewis would likely not have gotten a more significant reprimand.

¶ 24 Matthews testified that his best recollection of the last time he saw Lewis was five minutes before the class lined up for gym, which would have been 2:35 p.m. The class lined up for gym at 2:40. The class lined up in the third floor hallway and went down two flights of stairs to the gym on the first floor. He first noticed Lewis was not present when the class stopped on the second floor near the office. He took the class to the gym and intended to return to the third floor to look for Lewis. On his way, he paused to check his mailbox in the office. Matthews estimated it took him 5 to 10 seconds to check his mailbox. As he started toward the third floor, he heard another teacher call down from the third floor to call 911. He and the principal ran up the stairs to the boys restroom where Lewis was found.

¶ 25 Plaintiff included depositions from Evan Quarles and Jayvon Clifton. Both boys were in the fifth grade during the 2008-09 school year and were friends with Lewis, but were in different classrooms. Quarles testified that he heard of a game where "people hung on bars" and did pull ups in the bathroom. He heard it called a pull up hanging game, when the boys grabbed the crossbars over the stall doors. He denied that he ever played the game or saw anyone play. Quarles did not remember people playing with the hooks, but he remembered people grabbing them. He also stated that teachers never saw anyone play the game.

¶ 26 Clifton testified that he first heard of the hanging game after Lewis's death. He heard it involved kids putting themselves on the hook. He never played it and never saw anyone play the game, including Lewis or Quarles. Clifton stated that the first time he heard about it was when he overheard other boys talking about it after Lewis's death.

¶ 27 The exhibits also included an affidavit and curriculum vitae from Michael Knox, a police detective from Jacksonville, Florida. He stated that in his professional opinion, within a reasonable degree of forensic certainty, "that the autopsy findings, while specific to a

determination of the cause of death being due to hanging, are not specific to the finding that the manner of death is suicide to the exclusion of any other manner of death. The medical evidence alone cannot be used to rule out accident or homicide as reasonable alternative manners of death."

¶ 28 Another exhibit attached was an affidavit and the curriculum vitae of Kris Sperry, M.D. Sperry stated in his affidavit that he was chief medical examiner for the State of Georgia, Georgia Bureau of Investigation Division of Forensic Science. He was retained by plaintiff's attorney to perform an autopsy on Lewis and found that he "died from injuries consistent with being found hanging." He also stated that in his professional opinion, within a reasonable degree of medical certainty, "that it is extremely rare for children of ten-years of age or younger to form the intent and follow through with a suicidal act."

¶ 29 In April 2013, defendant filed a motion to dismiss the second amended complaint pursuant to section 2-619.1 of the Code. The section 2-615 portion of the motion continued to argue that plaintiff failed to allege facts showing that defendant's actions proximately caused Lewis's death, plaintiff failed to plead sufficient facts establishing a special duty, and plaintiff failed to state a cause of action based on willful and wanton conduct. Defendant also reasserted that it was immune under the Tort Immunity Act for the section 2-619 portion of the motion.

¶ 30 Also in April 2013, the trial court entered an order granting the motion and dismissing plaintiff's second amended complaint with prejudice. The court specifically noted that it was ruling on the motion without a response from plaintiff, finding that a response and a reply were unnecessary. The court found that as to the negligence counts, despite adding the "voluminous evidentiary material," plaintiff had "again failed to plead specific, relevant facts to support all of the elements needed to establish that the Defendant owed the Decedent a special duty." The

court also held that with regard to all four counts, "there are no factual allegations which provide a causal nexus between the Defendant's acts or omissions and the Decedent's death."

> "To the extent that the pleading still alleges death as a result of suicide, proximate cause has not been alleged as the Decedent's suicide breaks the chain of causation and, in any event, there are still no allegations of foreseeability. Further, as noted in the prior ruling, the allegations failed to evince the foreseeability of the Decedent's death at that time and place alleged whether it was as a result of suicide or not. Thus, regardless of whether the Plaintiff alleges that the Decedent died as a result of suicide, a hanging game, murder, or some other cause, there is nothing in the pleading which connects the Defendant's acts to the death. As such, the Plaintiff has again failed to plead proximate cause in all four counts of the pleading."

¶ 31 The trial court also held that plaintiff failed to sufficiently allege willful and wanton conduct, observing that the willful and wanton counts "contain the same allegations as in the negligence counts, adding only that the acts were done in a willful and wanton manner with an utter disregard for human life." The allegations are "devoid of factual content" to show that defendant was engaging in a course of conduct with an utter indifference or conscious disregard for Lewis's safety.

¶ 32 The trial court further found that it need not reach defendant's arguments under section 2-619, but noted defendant again would be immunized pursuant to sections 3-108 and 2-201 of the Tort Immunity Act. The court then dismissed the complaint with prejudice.

¶ 33 This appeal followed.

¶ 34 Section 2-619.1 is a combined motion that incorporates sections 2-615 and 2-619 of the Code. 735 ILCS 5/2-619.1, 2-615, 2-619 (West 2010). We review a trial court's dismissal of a complaint under section 2-619.1 of the Code *de novo*. *Morris v. Harvey Cycle and Camper, Inc.*, 392 Ill. App. 3d 399, 402 (2009). A motion to dismiss pursuant to section 2-615 of the Code attacks the legal sufficiency of the complaint by alleging defects on its face. *Gatreaux v. DKW Enterprises, LLC*, 2011 IL App (1st) 103482, ¶ 10. "In ruling on a section 2-615 motion to dismiss, a reviewing court must examine the allegations of the complaint in the light most favorable to the plaintiff and accept as true all the well-pleaded facts and reasonable inferences therefrom." *Id*. "If the facts are insufficient to state a cause of action upon which relief may be granted, then dismissal pursuant to section 2-615 is appropriate." *Id*. In contrast, a motion to dismiss pursuant to section 2-619 admits the legal sufficiency of the complaint, but raises an affirmative defense or another basis to defeat the claims alleged. *Id.* "As a reviewing court, we may affirm the judgment of the circuit court on any basis appearing in the record." *Id.* We will first consider the section 2-615 portion of the motion to dismiss.

¶ 35 Initially, we note that plaintiff has raised the trial court's dismissal of her claims contained in the first amended complaint regarding defendant's failure to provide educational resources, such as, an IEP or 504 plan, for Lewis. However, plaintiff failed to include these claims in her second amended complaint. "It is well established that in Illinois, a party who files an amended pleading waives any objections to the trial court's ruling on prior complaints." *Tunca v. Painter*, 2012 IL App (1st) 093384, ¶ 29 (citing *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 96 Ill. 2d 150, 153 (1983)). "Our supreme court has held that, following entry of an order dismissing a complaint, if a party files an amended complaint that is complete

in itself and does not refer to or adopt the prior pleading, the party has waived any challenge to the order dismissing the prior complaint." *Gaylor v. Campion, Curran, Rausch, Gummerson and Dunlop, P.C.*, 2012 IL App (2d) 110718, ¶ 35 (citing *Foxcroft*, 96 Ill. 2d at 154-55).

¶ 36 "To avoid forfeiture and preserve claims for appellate review, a party can: (1) stand on the dismissed counts, take a voluntary dismissal of any remaining counts, and argue the matter at the appellate level; (2) file an amended pleading that realleges, incorporates by reference, or refers to the dismissed counts; or (3) perfect an appeal from the dismissal order prior to filing an amended pleading that does not refer to or adopt the dismissed counts." *Jacobson v. Gimbel*, 2013 IL App (2d) 120478, ¶ 19 (citing *Gaylor*, 2012 Ill. App (2d) 110718, ¶ 36).

¶ 37 Plaintiff failed to undertake any of these options to preserve her claims that defendant was negligent in failing to provide educational resources for Lewis. These claims were contained in the first amended complaint, which was dismissed by the trial court. These allegations were abandoned and not realleged in the second amended complaint. Accordingly, plaintiff forfeited any claim on appeal relating to this issue.

¶ 38 We next turn to plaintiff's claims of negligence based on a special duty. "In order to recover in an action for negligence, a plaintiff must establish the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury to the plaintiff proximately caused by the breach." *Sameer v. Butt*, 343 Ill. App. 3d 78, 86 (2003).

¶ 39 We observe that while plaintiff has alleged that a "hanging game" was being played in the boys restroom, plaintiff fails to make any negligence allegations against defendant in regard to this game. Plaintiff's complaint asserted that defendant was negligent in failing to alert Lewis's teachers about his mental health history and it ignored the specific danger of harm that existed for Lewis after it was aware of his mental health history. Plaintiff then suggests that Lewis's

death was not an act of suicide,"more probably true than not." Plaintiff describes the "hanging game," but never alleged any duty, breach or injury proximately caused by defendant's acts or omissions in regard to the "hanging game." "A complaint for a negligent tort must allege facts from which the law will raise a duty, and specific facts showing an omission of that duty and resulting injury; otherwise, the complaint is properly dismissed." *Gallagher Corp. v. Russ*, 309 Ill. App. 3d 192, 197 (1999). Plaintiff has failed to allege any negligence by defendant regarding the "hanging game," and we conclude that this allegation was properly dismissed and we will not consider the "hanging game" any further.

¶ 40 Defendant argued in its motion to dismiss that plaintiff has failed to plead sufficient facts to establish proximate cause. " 'A proximate cause is one that produces an injury through a natural and continuous sequence of events unbroken by any effective intervening cause.' " *Crumpton v. Walgreen Co.*, 375 Ill. App. 3d 73, 79 (2007) (quoting *Chalhoub v. Dixon*, 338 Ill. App. 3d 535, 539 (2003)). Here, plaintiff has alleged that defendant knew of Lewis's mental health history, including possible suicidal ideation, and by its omissions, defendant placed Lewis in a position in which he could harm himself. However, " '[i]t is well established under Illinois law that a plaintiff may not recover for a decedent's suicide following a tortious act because suicide is an independent intervening event that the tortfeasor cannot be expected to foresee.' " *Id.* (quoting *Chalhoub*, 338 Ill. App. 3d at 539-40).

¶ 41 Plaintiff relies on *Winger v. Franciscan Medical Center*, 299 Ill. App. 3d 364 (1998), as support. In *Winger*, the plaintiffs' decedent was admitted to a psychiatric hospital after five suicide attempts in five months. While at the hospital, the decedent was given access to the bathroom as well as belts, shoelaces, telephone cords, and other objects that could be used for self harm. The decedent expressed that he felt "hopeless" to a nurse and later that night he

committed suicide using shoelaces to hang himself from the showerhead. *Winger*, 299 Ill. App. 3d at 366. The reviewing court reversed an order for summary judgment in favor of the defendant, finding that whether the suicide was foreseeable and whether the conduct of the defendant was reasonable were questions of fact for the jury. *Id.* at 375. However, the reviewing court noted the unique circumstances of this case, finding that fault "may be applied in cases of intentional conduct when it can be demonstrated, as in this case, that the conduct arose from the plaintiff's mental state (*e.g.*, severe depression), the act of suicide was foreseeable, and the plaintiff was in the custody or control of the physician or hospital at the time he acted." *Id.*

¶ 42 In contrast, plaintiff's complaint failed to allege any facts regarding Lewis's mental health in the year following his hospitalization. There is nothing alleged to show that Lewis continued to have depression or suicidal ideation at the time of his death. Further, unlike the decedent in *Winger*, Lewis was at school, not a psychiatric hospital and his suicide did not follow multiple suicide attempts and indications of continued negative thinking. *Winger* is limited to the circumstances presented in that case where the health provider gave the decedent access to objects used in causing his death and does not apply to the facts of this case. Here we do not know whether Lewis committed suicide or whether he was playing a game that went wrong.

¶ 43 Plaintiff's complaint fails to allege any facts that would make it an exception to the established principle that "suicide is an independent intervening event that the tortfeasor cannot be expected to foresee" (*Crumpton*, 375 Ill. App. 3d at 79), breaking the chain of causation. Plaintiff has not alleged how defendant proximately caused Lewis's death. Absent proximate cause, plaintiff's action cannot stand and the trial court properly dismissed plaintiff's complaint for failure to state a cause of action.

¶ 44 However, even if plaintiff's complaint properly pled proximate cause, plaintiff failed to sufficiently plead the existence of a special duty or facts establishing willful and wanton conduct.

¶ 45 The "special duty" doctrine was created as an exception to the common law "public duty" rule by the supreme court. *Zimmerman for Zimmerman v. Village of Skokie*, 183 Ill. 2d 30, 32 (1998). "The public-duty rule is a common-law principle that protects a governmental entity from tort liability sought by an individual injured member of society. The basis upon which the rule is grounded is that the governmental entity owes a duty of care to the public at large, not to individual members of the public." *Doe-3 v. White*, 409 Ill. App. 3d 1087, 1093 (2011) (citing *Zimmerman*, 183 Ill. 2d at 32). "This 'special-duty exception' applies when the otherwise immune governmental actor assumes a special relationship to an individual member of the general population." *Id*. at 1094 (citing *Huey v. Town of Cicero*, 41 Ill. 2d 361, 363 (1968)). "The special duty doctrine has therefore been applied in those narrow instances when the governmental entity assumed a special relationship to an individual 'so as to elevate that person's status to something more than just being a member of the public.' " *Zimmerman*, 183 Ill. 2d at 45 (quoting *Schaffrath v. Village of Buffalo Grove*, 160 Ill. App. 3d 999, 1003 (1987)). The special duty exception has generally been applied to police and fire protection. See *Thames v. Board of Education of the City of Chicago*, 269 Ill. App. 3d 210, 214 (1994). "The special duty doctrine has been extended by Illinois courts as an exception, also, to the immunities provided" under the Tort Immunity Act. *Grant v. Board of Trustees of Valley View School Dist. No. 365-U*, 286 Ill. App. 3d 642, 644 (1997).

¶ 46 The special duty doctrine requires the satisfaction of four elements before it can be applied.

> "Those are (1) the governmental entity must be uniquely aware of the particular danger or risk to which the plaintiff is exposed; (2) there must be allegations of specific acts or omissions on the entity's part; (3) the specific acts must be affirmative or willful in nature; and (4) the injury must occur while the plaintiff is under the direct and immediate control of employees or agents of the entity." *Doe-3*, 409 Ill. App. 3d at 1094.

¶ 47 Plaintiff has failed to allege sufficient facts to establish all four of these elements of the special duty doctrine. First, "[u]nique awareness requires knowledge of a particular danger to the particular plaintiff." *Thames*, 269 Ill. App. 3d at 215. Here, plaintiff alleged that defendant and its employees were aware of Lewis's mental health history from more than a year prior to his death. There is nothing in the allegations that defendant or its employees were aware of a particular danger to Lewis. There are no facts relating to Lewis's mental health following his hospitalization in late 2007 that presented a particular danger in early 2009. Plaintiff alleged that Lewis had general behavioral problems at school, but his teacher testified at his deposition that on the day of his death, Lewis had received minor warnings and was not at risk for a punishment.

¶ 48 Further, plaintiff did not allege any facts that defendant undertook any specific acts or omissions toward Lewis that were affirmative or willful in nature. The negligence counts of the complaint alleged that defendant failed to inform Lewis's teachers about his mental health history and ignored the specific danger of harm that existed for Lewis after it learned about his mental health history. These allegations do not rise to the level of willful and wanton conduct.

¶ 49 Finally, "the requirement of 'direct and immediate control' is met where the public employee 'creates a position of peril ultimately injurious to a plaintiff, as opposed to situations

where a plaintiff merely seeks protection from the public employee that is not normally provided.' " *Leone v. City of Chicago*, 156 Ill. 2d 33, 39 (1993) (quoting *Burdinie v. Village of Glendale Heights*, 139 Ill. 2d 501, 525 (1990)). Plaintiff has failed to allege any facts beyond Lewis's presence in the school and the school's awareness of his past mental health history. "The determinative factor for a finding of direct and immediate control is whether the public official was responsible for the occurrence which gave rise to the need for protection." *Thames*, 269 Ill. App. 3d at 217. Plaintiff's complaint does not allege that defendant or its employees were responsible for the circumstances in which Lewis needed protection. Rather, the allegations establish that Lewis left class without permission, went to the boys restroom, and was found hanging from a hook a short time later. His teacher noticed he was missing and was on his way to look for Lewis within approximately 10 minutes. No employee was exercising direct and immediate control over Lewis such that it created a position of peril for Lewis. The allegations of defendant's awareness of Lewis's mental health history are not sufficient to establish this element.

¶ 50 Plaintiff's second amended complaint failed to set forth sufficient specific facts establishing that a special duty existed between Lewis and defendant and its employees. Therefore, the counts alleging negligence based on a special duty in the second amended complaint were properly dismissed with prejudice for failure to state a cause of action.

¶ 51 Next, we consider whether plaintiff's complaint alleged sufficient facts to plead willful and wanton conduct. The Tort Immunity Act defines willful and wanton conduct as "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property." 745 ILCS 10/1-210 (West 2010). "When the plaintiff is alleging that the defendant engaged in

willful and wanton conduct, such conduct must be shown through well-pled facts, and not by merely labelling the conduct willful and wanton." *Winfrey v. Chicago Park District*, 274 Ill. App. 3d 939, 943 (1995). "Conclusional statements of fact or law will not suffice to state a cause of action regardless of whether they succeed in generally informing the defendant of the nature of the claim against him or her." *Id.*

¶ 52 Here, plaintiff has not alleged an actual or deliberate intention to cause harm, or that defendant acted with the complete and utter disregard for Lewis's life. "A nonintentional willful or wanton act is committed under circumstances showing a reckless disregard for the safety of others such as, for example, when a party fails, after knowledge of an impending danger, to exercise ordinary care to prevent the danger or fails to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care." *Vilardo v. Barrington Community School Dist. 220*, 406 Ill. App. 3d 713, 724 (2010). " ' "More than mere inadvertence or momentary inattentiveness which may constitute ordinary negligence is necessary for an act to be classified as wilful and wanton misconduct." ' " *Id.* (quoting *Oelze v. Score Sports Venture, LLC*, 401 Ill. App. 3d 110, 122 (2010), quoting *Stamat v. Merry*, 78 Ill. App. 3d 445, 449 (1979)).

¶ 53 Plaintiff's willful and wanton counts of the complaint make the same allegations as the negligence counts about Lewis's hospitalization more than a year earlier and defendant's knowledge of this hospitalization. Plaintiff does not plead any facts suggesting that Lewis was exhibiting mental health problems at school and defendant consciously ignored these problems. The acts and omissions alleged by plaintiff fail to set forth a course of action by defendant that showed a conscious disregard for Lewis's safety. The complaint asserted that defendant failed to inform his teachers of his mental health history, failed to observe him at all appropriate times,

failed to keep track of his whereabouts, made no effort to discover his whereabouts when it was observed that he was not with his class, made no effort to observe the boys restroom before taking the class to the gym, failed to find him in a timely manner, failed to initiate a search in a timely fashion, failed to recognize that he left class at an earlier pint in time, failed to adequately supervise him, failed to get another teacher to watch the class while Matthews searched for Lewis, and failed to search for Lewis after dropping class off at the gym. None of these alleged acts and/or omissions support a claim of willful and wanton conduct when only 10 minutes passed before the teacher went searching for Lewis.

¶ 54 Plaintiff relies on *Murray v. Chicago Youth Center*, 224 Ill. 2d 213 (2007), to support her argument that her complaint pleads sufficient facts to establish willful and wanton conduct. In that case, the plaintiffs brought an action against the Chicago Board of Education and other defendants after the minor plaintiff was injured during a tumbling class. The minor attempted a forward flip from a mini-trampoline and was seriously injured. *Id.* at 218-20. The trial court granted the defendants' motion for summary judgment, finding that the defendants were immune from liability under sections 2-201 and 3-108(a) of the Tort Immunity Act, which the appellate court affirmed. *Id.* at 224-25. The supreme court reversed, concluding that the claim of willful and wanton conduct survived the summary judgment motion in light of the well known risk of spinal cord injury using a mini-trampoline and the defendants' admission that they did not provide trained instructors, trained spotters, or other safety equipment for the minor plaintiff. *Id.* at 246. The court held that the allegations presented a triable issue of material fact as to whether the defendants engaged in willful and wanton conduct. *Id.* at 246.

¶ 55 *Murray* is distinguishable on its facts. In *Murray*, the facts established that the defendants created the danger to the minor plaintiff. They provided the tumbling class and

equipment, but failed to provide training and any safety precautions around equipment, such as the mini-trampoline, which can cause serious injuries. Here, plaintiff's allegations amount to a claim that defendant and its employees failed to supervise Lewis and search for him faster. None of the allegations suggest that defendant engaged in a course of conduct exhibiting a reckless disregard for Lewis's safety. Plaintiff's addition of the phrase "with a complete and utter disregard for the life of Aquan Lewis" is not enough to show that defendant actually engaged in willful and wanton conduct. Plaintiff failed to set forth well-pled facts detailing willful and wanton conduct by defendant. Accordingly, the trial court properly dismissed the willful and wanton counts of plaintiff's second amended complaint with prejudice.

¶ 56 However, even if we had not concluded that dismissal of plaintiff's complaint was proper under section 2-615 of the Code for failure to state a cause of action, we find that dismissal would also have been proper under section 2-619 of the Code.

¶ 57 Defendant also argued in its motion to dismiss that it had immunity under the Tort Immunity Act (745 ILCS 10/1-101 *et seq.* (West 2012)). Immunity under the Tort Immunity Act is properly raised in a section 2-619(a)(9) motion to dismiss. *Arteman v. Clinton Community Unit School Dist. No. 15*, 198 Ill. 2d 475, 479 (2002). A motion for involuntary dismissal pursuant to section 2-619(a) admits the legal sufficiency of the complaint, but raises defects, defenses, or other affirmative matter which avoids the legal effect or defeats a plaintiff's claim. 735 ILCS 5/2-619(a) (West 2010). An "affirmative matter" under section 2-619(a)(9) is "something in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint." *In re Estate of Schlenker*, 209 Ill. 2d 456, 461 (2004).

¶ 58 The Tort Immunity Act "serves to protect local public entities, including school boards and school districts (745 ILCS 10/1-206 (West 1998)), and public employees from liability arising from the operation of government (745 ILCS 10/1-101.1(a) (West 1998)). By providing immunity, the General Assembly sought to prevent the dissipation of public funds on damage awards." *Id.*

¶ 59 Defendant first contends that it is immune under section 2-201 of the Tort Immunity Act. Section 2-201 provides:

> "Except 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 2012).

¶ 60 "Section 2-201 of the Act offers the most significant protection afforded to public employees under the Act." *Arteman*, 198 Ill. 2d at 484. Section 2-201 offers immunity for both negligence and willful and wanton conduct. See *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 196 (1997). The supreme court has held that "section 2-201 immunity is concerned with both the position held by the municipal employee and the action performed by that employee." *Arteman*, 198 Ill. 2d at 484. "That is, the employee's position may involve either determining policy or exercising discretion, but the employee's 'act or omission must be both a determination of policy and an exercise of discretion.' " *Id*. (quoting *Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill. 2d 335, 341(1998)).

¶ 61 Illinois courts "have recognized a distinction between 'discretionary duties, the negligent performance of which does not subject a municipality to tort liability, and ministerial duties, the negligent performance of which can subject a municipality to tort liability.' " *Harrison v. Hardin County Community Unit School Dist. No. 1*, 197 Ill. 2d 466, 472 (2001) (quoting *Snyder v. Curran Township*, 167 Ill. 2d 466, 473 (1995)). The supreme court "has held that 'discretionary acts are those which are unique to a particular public office, while ministerial acts are those which a person performs on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, and without reference to the official's discretion as to the propriety of the act.' " *Id.* (quoting *Snyder*, 167 Ill. 2d at 474).

¶ 62 Defendant asserts that both of its decisions regarding the appropriate way to address Lewis's mental health issues from November 2007, and how to look for Lewis on February 3, 2009, involved discretionary policy decisions and it is immune under section 2-201.

¶ 63 Plaintiff maintains that defendant cannot be immune under section 2-201 because its actions were ministerial, not discretionary. Plaintiff argues that the alleged negligent acts were the result of "defendant's ministerial failure to institute a federal and state mandated programs-namely an IEP or 504 plan and its failure to disseminate mental health records of a student." However, as we have previously held, plaintiff forfeited any argument related to an IEP or 504 plan by failing to raise these claims in her second amended complaint. Plaintiff fails to cite to any other statute or legal authority that mandated defendant's actions in this case.

¶ 64 Further, the cases relied on by plaintiff are distinguishable because both involved a statute that mandated compliance by the defendant school district. In *Mueller by Math v. Community Consolidated School Dist. No. 54*, 287 Ill. App. 3d 337, 339 (1997), a student was sexually assaulted by the wrestling coach and filed a lawsuit against the school district. The

reviewing court held that the school district was not entitled to immunity under section 2-201 because it failed to comply with a statute requiring mandatory criminal background checks for employees. *Id.* at 346. In *Hill v. Galesburg Community Unit School Dist. 205*, 346 Ill. App. 3d 515, 517 (2004), the plaintiff suffered an eye injury when a glass beaker exploded during an experiment in chemistry class. The plaintiff was not wearing any eye protection at the time of the explosion. The Third District declined to find that the defendant school district was immune from liability under section 2-201 because the Eye Protection in the School Act (105 ILCS 115/1 (West 2002)) required the plaintiff student to wear eye protection during certain activities, including experiments with caustic or explosive chemicals or hot liquids, and the teacher had no discretion not to follow the statutory mandate. *Id.* at 520.

¶ 65 Here, unlike *Mueller* and *Hill*, plaintiff has failed to allege any statutory mandate that required defendant to act in ministerial manner in response to Lewis's previous mental health issues. Rather, the allegations of the complaint focus on defendant's discretionary decisions, specifically that defendant was "uniquely aware" of Lewis's mental health issues and failed to disseminate this information, including to his teachers, after Lewis's medical records were obtained. Plaintiff further alleged that defendant did not provide suicide prevention training for its employees and failed to protect Lewis, based on his prior mental health history. Nothing in plaintiff's complaint suggests that defendant failed to act in a ministerial capacity as required by a legal authority. Defendant's decisions on how to respond to Lewis's mental health history from the previous school year was an exercise of discretion. Defendant's acts or omissions related to its policy decisions regarding Lewis's mental health and its exercise of that policy. Accordingly, defendant is entitled to immunity under section 2-201of the Tort Immunity Act.

¶ 66 Although section 2-201 immunizes both negligent and willful and wanton conduct, defendant also argues that it is also shielded from negligence claims on another ground. Section 3-108 provides:

> "(a) Except as otherwise provided in this Act, neither a local public entity nor a public employee who undertakes to supervise an activity on or the use of any public property is liable for an injury unless the local public entity or public employee is guilty of willful and wanton conduct in its supervision proximately causing such injury.
>
> (b) Except as otherwise provided in this Act, neither a local public entity nor a public employee is liable for an injury caused by a failure to supervise an activity on or the use of any public property unless the employee or the local public entity has a duty to provide supervision imposed by common law, statute, ordinance, code or regulation and the local public entity or public employee is guilty of willful and wanton conduct in its failure to provide supervision proximately causing such injury." 745 ILCS 10/3-108 (West 2012).

¶ 67 " Section 3-108(a) '*** bars plaintiffs' claims against local government units for their failure to supervise the activities of others.' " *Dixon v. Chicago Board of Education*, 304 Ill. App. 3d 744, 748 (1999) (quoting *Epstein v. Chicago Board of Education*, 178 Ill. 2d 370, 379 (1997)). "The term 'supervision' includes coordination, direction, oversight, implementation, management, superintendence, and regulation." *Id.*

¶ 68 Plaintiff contends that section 3-108 is inapplicable in this case because her claims against defendant do not involve an activity, asserting that cases involving section 3-108 "typically deal with adult leaders overseeing after-school programs; lifeguards supervising swimming pools; and teachers supervising physical education classes. See *Longfellow v. Corey*, 286 Ill. App. 3d 366 (1997); *Barnett v. Zion Park District*, 171 Ill. 2d 378 (1996); and *Henrich v. Libertyville High School*, 186 Ill. 2d 381 (1998). However, none of these cases limited the application of section 3-108 to the context of a physical activity. As defendant notes, section 3-108 has been applied for activities inside and outside of the classroom, including alleged improper supervision of students in a classroom (*Hill*, 346 Ill. App. 3d at 521; *Jackson v. Chicago Board of Education*, 192 Ill. App. 3d 1093, 1099 (1989)); and alleged improper supervision of students in a lunch line (*Edmonson v. Chicago Board of Education*, 62 Ill. App. 3d 211, 214 (1978)). We point out that in *Hill*, the reviewing court found that while the failure to follow the statute requiring eye protection did not offer immunity under section 2-201, the defendant school district was immune from negligence allegations under a failure to supervise under section 3-108. *Hill*, 346 Ill. App. 3d at 521. "Violating the Eye Protection Act may be inadequate supervision, but under section 3-108 it is irrelevant whether the teacher properly supervised the class. The quality or level of the teacher's supervision of the class is irrelevant to a section 3-108 analysis." *Id.*

¶ 69 In this case, plaintiff's complaint makes allegations involving Matthews's supervision of the classroom. Specifically, when the teacher saw Lewis in class and when he noticed Lewis was not present when the class lined up to go to gym. Further, plaintiff alleges that defendant failed to properly inform faculty and staff about Lewis's mental health history, which related to a focused supervision of Lewis. To the extent that plaintiff alleges negligent supervision by

defendant's faculty and staff, section 3-108 applies and provides immunity from counts I and II alleging negligence against defendant.

¶ 70 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 71 Affirmed.