2015 IL App (1st) 142029-U

FIRST DIVISION
March 30, 2015

No. 1-14-2029

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BRIAN KILL, a minor, by and through his father and next friend, James Kill, and JAMES KILL, individually,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	No. 13 L 1990
v.	)	
LEISERV, INC., a Delaware corporation,	)	Honorable Jeffrey Lawrence, Judge Presiding.
Defendant-Appellee.	)	

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 ***Held:*** The trial court erred in dismissing plaintiff's personal injury claim on the basis that the his sole remedy was to file a worker's compensation claim against his employer because plaintiff's first amended complaint alleged sufficient facts which, if proven, could establish that he was not acting "out of and in the course of his employment" when his injury occurred. We affirm the court's dismissal of certain claims for failure to state a cause of action, but modify the dismissal order to reflect the dismissal is without prejudice and with leave to amend.

¶ 2 The plaintiff, Brian Kill, was injured on the premises of his employer, defendant Leiserv, Inc. (Leiserv) by the action of another employee. The trial court granted Leiserv's combined

motion to dismiss Kill's first amended complaint under section 2-619.1 of the Illinois Code of Civil Procedure (Code), 735 ILCS 5/2-619.1 (West 2012), primarily on the basis that Kill was acting "out of and in the course of his employment" when he was injured, such that his only recourse against Leiserv was to pursue a claim for worker's compensation benefits. The court also dismissed Kill's claims against Leiserv under *respondeat superior* for the intentional tort of the other employee under section 2-615 of the Code.

¶ 3 Contrary to the trial court, we find that Kill alleged sufficient facts which, if proven, could demonstrate that he was not acting "out of or in the course of his employment" at the time he was injured. We therefore reverse the dismissal of the negligence claims against Leiserv and remand for further proceedings.

¶ 4 BACKGROUND

¶ 5 We draw the facts largely from the allegations contained in Kill's first amended complaint, which for purposes of this appeal we accept as true. *Wackrow v. Niemi*, 231 Ill. 2d 418, 422 (2008). According to the first amended complaint, Kill was working as an employee at the Brunswick Zone recreational facility in Algonquin, Illinois on January 14, 2012. He "clocked out" at the end of his shift at 11:58 p.m. However, he remained on the premises in the game room waiting for another employee whose shift ended at 2:00 a.m. to give him a ride home. While in the game room, at approximately 12:15 a.m. on January 15, Shawn Haslet, another employee, kicked the chair on which Kill was sitting. Kill fell, hit his head on the wall or floor and was rendered unconscious. Kill suffered severe head injuries which required over a week of hospitalization. He continues to experience epileptic seizures, has been diagnosed with a seizure disorder, and faces life-long medical management with anti-seizure medications.

¶ 6 Also according to the first amended complaint, at the time of the accident, Kill was in a public area of the facility, was not performing any of the duties of his job, and was not wearing a uniform or employee identification. Further, he did not ask for permission to remain on the premises and no superior gave him permission to remain on the premises. The game room was open to the public at the time of the accident. Although Leiserv policy prohibited employees from loitering on the premises for more than five minutes after their shifts, its customary practice was to permit employees to remain on the premises after their shifts to use the "recreational facilities as paying customer[s] of the general public."

¶ 7 After Kill filed his original complaint below, Leiserv moved to dismiss it pursuant to section 2-619(a)(9) of the Code, arguing that the Workers' Compensation Act, 820 ILCS 305 (West 2012), barred his common law action because he was injured out of and in the course and scope of his employment. After full briefing and presentation of competing affidavits by each side, the court granted the motion without prejudice.

¶ 8 Kill then filed an amended complaint, which Leiserv moved to dismiss under section 2-619(a)(9) on grounds virtually identical to its previously granted motion to dismiss. The court granted Leiserv's motion to dismiss the amended complaint with prejudice as to all parties. It seems that Kill's attorneys may not have appeared at the hearing on the motion to dismiss the amended complaint, and the record contains no response from Kill to that motion. In any event, after receiving order dismissing the amended complaint with prejudice, Kill filed a motion to reconsider. On reconsideration and after full briefing by both parties, the court entered an order (1) denying Kill's motion to reconsider; (2) granting Kill leave to file a first amended complaint; and (3) setting a status date to determine if he did so and "if necessary a finding that the court's [dismissal with prejudice] order is final and appealable under Illinois Supreme Court Rule

304(a)." On the status date, the court granted a short additional extension of time for Kill to file his first amended complaint.

¶ 9 At the hearing on the motion to reconsider, there was an extensive colloquy during which the able trial judge pointedly expressed his firm belief that Kill's injuries were only compensable through workers' compensation. In so doing, he also intimated that the amended complaint was flawed because it did not, among other things, allege any intentional tort by Haslet. The court offered Kill a chance to file another amended complaint. After the court formally denied the motion to reconsider, the following discussion ensued:

> "[KILL'S ATTORNEY:] Okay. Your Honor, could we maybe – I don't know if I want to stand on the record as it is or maybe try and file an amended complaint. Could we come back–.
>
> THE COURT: I'll give you 30 days to file an amended complaint.
>
> [KILL'S ATTORNEY:] Could we have a date [sic] we come back, and then we can advise the Court at that time what I'm going to do, and then you could enter – because we would need 304(a) language, I believe, at that point.
>
> THE COURT: * * * So what I will do when you come back is – well, there's two possibilities: One that – okay. One that you can successfully plead a claim. If that happens, I will vacate the technical defaults [against Brunswick] and allow them –
>
> I believe there's additional defendants – to file their appearance.

* * *

THE COURT: On the other hand, if it turns out I am unable to accommodate your client, I'll give you 304(a) language, and you can appeal it.

[KILL'S ATTORNEY:] Okay."

¶ 10 Kill then filed a first amended complaint, which was actually his third complaint. The first amended complaint added the other employee, Shawn Haslet, as a defendant. Other than the new tort allegations against Haslet and Leiserv as his employer, it was functionally identical to the earlier complaints. It contained seven counts, as follows:

Count	Claim	Defendant(s)
1	Negligence	Leiserv
2	Negligence, *respondeat superior*	Leiserv and Haslet
3	Wilful and wanton misconduct, *respondeat superior*	Leiserv and Haslet
4	Battery, *respondeat superior*	Leiserv and Haslet
5	Assault, *respondeat superior*	Leiserv and Haslet
6	Negligence	Brunswick (Leiserv's parent company)
7	Family Expense Act	Leiserv

¶ 11 Leiserv moved to dismiss the first amended complaint by filing a combined motion to dismiss under 735 ILCS 5/2-619.1. The motion was divided into separate parts identifying which arguments were brought under section 2-615 and which were brought under section 2-619(a)(9). The portion under section 2-619(a)(9) again raised the issue of the primacy of the Workers' Compensation Act and contended that Kill was acting "out of and in the course of his

employment" at the time of the accident. This portion primarily relied on the court's earlier dismissal rulings on the section 2-619(a)(9) motion to dismiss the original and amended complaints. The portion under section 2-615 was new, as it addressed claims against Haslett which were not contained in the amended complaint. It argued that the court should dismiss "the intentional tort" claims against Leiserv under *respondeat superior* because Kill failed to allege sufficient facts to support an allegation that Haslett was acting within the scope of his employment" when he kicked the chair. The section 2-615 portion stated that the first amended complaint only conclusorily pled that, at the time of the accident, Haslet was a Leiserv employee "acting within the course and scope of his employment," and provided no additional required detail to "establish the existence of an agency relationship." While this portion of the motion did not deny that Haslet was on duty at the time, it contended that the *respondeat superior* claims failed because there were no facts pled that Leiserv authorized Haslet, as its employee, to commit a tort by kicking a chair out from under Kill.

¶ 12 On April 1, 2014, the court set a briefing schedule on the motion and set a hearing date of June 3. The court entered a separate order voluntarily dismissing Brunswick from the case by stipulation – that order disposed of count 6. Nothing in the record shows that Kill filed anything in response to this particular motion, but he had filed voluminous responses to the section 2-619(a)(9) portion of the motion as part of the briefing of the motion to dismiss the original complaint and the motion to reconsider the dismissal of the second complaint.

¶ 13 On June 3, the court entered an order dismissing count 1 with prejudice and counts 2, 3, 4, 5, and 7 with prejudice with respect to Leiserv. The order does not specify whether the dismissals were pursuant to section 2-615 or 2-619, or both. The court made order the order final and appealable under Ill. S. Ct. R. 304(a). Kill filed a timely notice of appeal on July 3,

2014. The notice of appeal indicated that Kill was only appealing the trial court's dismissal of counts 1, 2 and 7 of his first amended complaint. Accordingly, the trial court's dismissal of counts 3, 4, 5, and 6 are not before us.

¶ 14 ANALYSIS

¶ 15 On appeal, Kill contends that the Workers' Compensation Act does not apply to his claims because (1) his injury did not arise out of his employment with Leiserv; (2) his injury did not occur within the course of his employment with Leiserv; and (3) there is a genuine issue of material fact precluding dismissal on a 2-619 motion. Kill's appellate brief does not directly raise any arguments regarding the dismissal of claims under section 2-615. Before we consider these arguments, however, we must address the issue of forfeiture.

¶ 16 In its brief, Leiserv argues that Kill forfeited his entire argument on appeal because he did not respond to its section 2-619.1 motion to dismiss the first amended complaint below. Kill did not file a reply brief. Recognizing that the forfeiture issue was potentially dispositive, this court *sua sponte* ordered Kill to file a reply memorandum addressing the forfeiture issue, which he filed on March 20, 2015.

¶ 17 Upon review of the record, it appears that Kill did not file a response to Leiserv's motion to dismiss his first amended complaint in the trial court. Ordinarily, issues or arguments not presented to the trial court are forfeited on appeal. *Johnson Press of America, Inc. v. Northern Insurance Co. of New York*, 339 Ill. App. 3d 864, 874 (2003). Illinois courts have long held, however, that forfeiture is "a limitation on the parties and not on the courts." *In re Madison H.*, 215 Ill. 2d 364, 371 (2005); *People ex rel. Resnik v. Curtis & Davis, Architects & Planners, Inc.*, 78 Ill. 2d 381, 384 (1980); see also *Goral v. Illinois State Board of Education*, 2013 IL App (1st) 130752, ¶ 16. A reviewing court may look beyond considerations of waiver in order to maintain

a sound and uniform body of precedent or where the interests of justice so require. *In re Estate of Funk*, 221 Ill. 2d 30, 96-97 (2006). The colloquy quoted above in ¶ 9 demonstrates the court had reached a firm conclusion regarding the viability of the negligence claims against Leiserv when it denied the motion to reconsider the dismissal of the amended complaint. Whether a dismissed claim has been preserved for review is strictly a question of law, which we review *de novo*. *Bonhomme v. St. James*, 2012 IL 112393, ¶ 17. By repeating these counts in the first amended complaint, it appears that Kill intended to rest on them as originally pled, preserve them for appeal, and continue the case with new claims against Haslet. Under those circumstances, a reviewing court may decline to invoke forfeiture. See, *e.g.*, *Vilardo v. Barrington Community School District*, 406 Ill. App. 3d 713, 717 (2010)(to avoid forfeiture, plaintiff may file an amended complaint realleging, incorporating by reference, or referring to dismissed claims set forth in the prior complaint).

¶ 18 In addition to the reasons stated above, based upon our review of the record, and in light of the facts that (1) this case involves a serious life-altering injury to a minor and (2) we review orders granting or denying relief pursuant to section 2-619.1 *de novo* (see *Morris v. Harvey Cycle and Camper, Inc.*, 392 Ill. App. 3d 399, 402 (2009) (standard of review); *Goral*, 2013 IL App (1st) 130752, ¶ 16 (fact that *de novo* standard of review applied to issue purportedly forfeited militated against finding of forfeiture), we decline to find forfeiture in this case and will consider Kill's appeal on the merits.

¶ 19 Because this case comes before us on dismissal pursuant to 735 ILCS 5/2-615 and 735 ILCS 5/2-619, we must take the well-pleaded facts in the complaint as true, interpret all pleadings and supporting documents in the light most favorable to the plaintiff, and take all reasonable inferences therefrom. *Wackrow*, 231 Ill. 2d at 422. A court cannot grant a motion to

dismiss under these sections unless the plaintiff can prove no set of facts that would support a cause of action. *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 8.

¶ 20 A motion to dismiss based on section 2-615 admits all well-pleaded facts and attacks the legal sufficiency of the complaint; a motion to dismiss under section 2-619 admits the legal sufficiency of the complaint and raises defects, defenses or other affirmative matter which appear on the face of the complaint or are established by external submissions which act to defeat the plaintiff's claim. *Neppl v. Murphy*, 316 Ill. App. 3d 581, 584.

¶ 21 The Workers' Compensation Act is designed to provide financial protection to workers for accidental injuries arising out of and in the course of employment. *Meerbrey v. Marshall Field & Co.*, 139 Ill. 2d 455, 462 (1990). It "imposes liability without fault upon the employer and, in return, prohibits common law suits by employees against the employer." *Meerbrey*, 139 Ill.2d at 462. "[A]n employer-employee relationship is a prerequisite for an award of benefits under the Act." *Keating v. 68th & Paxton, L.L.C.*, 401 Ill. App. 3d 456, 462 (2010). Section 5(a) of the Workers' Compensation Act provides:

> "No common law or statutory right to recover damages from the employer, his insurer, his broker, any service organization that is wholly owned by the employer, his insurer or his broker and that provides safety service, advice or recommendations for the employer or the agents or employees of any of them for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act." 820 ILCS 305/5(a) (West 2012).

¶ 22 Our supreme court recently summarized the applicable standards as follows:

> "To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he has suffered a disabling injury which arose out of and in the course of his employment. 'In the course of employment' refers to the time, place and circumstances surrounding the injury. That is to say, for an injury to be compensable, it generally must occur within the time and space boundaries of the employment. It is not enough, however, to simply show that an injury occurred during work hours or at the place of employment. The injury must also 'arise out of' the employment. The 'arising out of' component is primarily concerned with causal connection. To satisfy this requirement it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. Stated otherwise, 'an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties. A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties.' " *Sisbro, Inc. v. Indus.*

Comm'n, 207 Ill. 2d 193, 203-04 (2003) (internal citations omitted.)

¶ 23 The issues presented before us fall only within the "causal connection" part of the *Sisbro* analysis. It is undisputed that, at the time of the accident, Kill was not performing acts he was instructed to perform by his employer, nor acts which he had a common law or statutory duty to perform. That leaves us to determine whether, based on the record before us, Kill was performing an act which he might "reasonably be expected to perform incident to his assigned duties," where "incident" is defined as "belongs to or is connected with" what Kill had to do in fulfilling his duties.

¶ 24 There is an extensive body of case law interpreting this standard. Employees are frequently injured under circumstances which cannot be neatly compartmentalized as clearly falling within the scope of their official duties or some function belonging to or connected with those duties. Because the causal connection standard is fact-based and lacks a bright line of jurisprudential demarcation, each party has found cases supporting their respective positions which bear some resemblance to the facts now before us.

¶ 25 Almost 100 years ago, our supreme court explained that whether an employee exiting from the place of employment remains in the "course of employment" depends largely on the facts and circumstances of the case, stating: "[w]hether an employee in going to or from the place of his employment is in the line of his employment will depend largely on the particular facts and circumstances of each case. There must necessarily be a line beyond which the liability of the employer cannot not continue, and the question where that line is to be drawn has been held to be usually one of fact." *Wabash Ry. Co. v. Indus. Comm'n*, 294 Ill. 119, 123 (1920). This highly-fact based analysis is still present in modern times. "The question of whether an

injury arose in the course of employment is a question of fact." *Aaron v. Indus. Comm'n*, 59 Ill. 2d 267, 269 (1974).

¶ 26 In *Caterpillar Tractor Co. v. Indus. Comm'n*, 129 Ill. 2d 52, 62 (1989) our supreme court summarized the case law in the following terms and explained why the mere fact that the injury occurred on the employer's premises is not enough:

> "While the broad language of these [prior cited] cases might appear to imply that any accidental injury sustained on the employer's premises is compensable, that is not the law in this State. An examination of the cases indicates this court's continued adherence to the maxim that an injury is not compensable unless it is causally connected to the employment. Where liability has been imposed, the injury occurred either as a direct result of a hazardous condition on the employer's premises * * * or arose from some risk connected with, or incidental to, the employment * * *. (Citations omitted.)

The *Caterpillar Tractor* court gave examples of situations where a workers' compensation claim was determined to be valid because of it was incidental to employment, including a worker injured while pushing a vehicle which was blocking entrance to parking lot and another injured "during a mass and speedy exodus of employees from the parking lot." *Id*.

¶ 27 It is well established that "a personal deviation by an employee can break the link with his employment." *Aaron v. Indus. Comm'n*, 59 Ill. 2d 267, 269 (1974); *C. Iber & Sons, Inc. v. Indus. Comm'n*, 81 Ill. 2d 130, 135 (1980). Whether the link has been broken involves application of a highly-fact based test. The applicable standards for review of section 2-619

dismissals are so generous to plaintiffs that dismissal of employee's personal injury complaints against employers on section 2-619 motions must be done with the greatest of care. This is especially true if, as here, they are resolved before any discovery has been taken. In fact, our supreme court has emphasized the "all or nothing" quality of a section 2-619(a)(9) motion to dismiss, stating:

> [T]he "standard articulation of 'affirmative matter' is: '[a] type of defense that either negates an alleged cause of action *completely* or refutes crucial conclusions of law or conclusion of material fact unsupported by allegations of specific fact contained or inferred from the complaint * * * [not] merely evidence upon which defendant expects to contest an ultimate fact stated in the complaint.' 4 R. Michael, Illinois Practice § 41.7 at 332 (1989)." *Smith v. Waukegan Park Dist.*, 231 Ill. 2d 111, 121 (2008), as modified on denial of reh'g (Sept. 22, 2008) (emphasis added).

¶ 28 The record, as we must construe it for the purpose of this appeal, contains a number of facts favorable to Kill. First, his complaint, which we must take as true, contains several well-pled allegations of fact which indicate that his injury did not occur "in and out of the course of employment." These include: (1) the accident occurred after Kill's shift had ended; (2) he was not wearing a uniform; (3) he was in an area of the bowling alley open to the public at the time and engaging in the same activities as a member of the public would; (4) he had clocked out of his shift at least 20 minutes before the accident; (5) he made a personal decision to go to the public game room to wait for a ride home and avoid the outside weather, a decision which was not typical because he usually left the premises right away; and (6) the room in question was a

game room, where one would engage in recreational, and not work, activities. These allegations refute defendant's argument that Kill "did nothing prior to or at the time of the incident to convert himself to a customer of Brunswick Zone."

¶ 29 Emphasizing the 18-minute time period between the end of Kill's shift and his injury, defendant claims that our supreme court "has already determined that 30 minutes before and after a work shift is a 'reasonable' time frame to still remain within the course of one's employment," citing *Mid-City Architectural Iron Co. v. Indus. Comm'n*, 83 Ill. 2d 34, 37 (1980). However, that case does not so hold. The case involved a worker who suffered a heart attack walking in a blizzard from a parking lot to his job site at about 7:00 a.m. and who normally arrived at the job site early for his 7:30 a.m. shift to enter a shack in which employees changed into their work clothes. Nothing in *Mid-City* supports the thesis that there is a hard and fast rule that injuries occurring within 30 minutes of a shift are automatically covered by workers' compensation.

¶ 30 We agree with defendant that the allegations that Kill was acting outside the scope of his employment are legal conclusions, and we do not take those into account in our disposition. Nonetheless, we cannot agree with Leiserv that this case, at this stage, is as clear-cut as it contends. As our supreme court noted in *Waukegan Park District*, a case cannot be dismissed under section 2-619 unless the record facts *completely* obliterate the cause of action. We acknowledge that whether Kill broke the causal link between the employment and his injury is a close question. Even so, we cannot find as a matter of law that Kill's negligence claims are absolutely and completely barred. His actions arguably fall within the ambit of cases holding that an employee is not eligible for workers' compensation. Indeed, the closeness of the issue requires us to reverse the dismissal so as to permit the parties to develop a fuller record and, if

necessary, reserve the factual dispute to be resolved by the finder of fact at trial. See *Kedzie & 103rd Currency Exch., Inc. v. Hodge*, 156 Ill. 2d 112, 115 (1993) (holding that a section 2-619 motion is a mechanism for a summary disposition of issues of law or of "easily proved issues of fact, with a reservation of jury trial as to disputed questions of fact.").

¶ 31 Accordingly, we reverse the trial court's dismissal of counts 1 and 2 of Kill's first amended complaint insofar as they were dismissed pursuant to section 2-619(a)(9). In addition, because it was derivative of counts 1 and 2, we also reverse the dismissal of Kill's claim under the Family Expense Act contained in count 7.

¶ 32 However, because Kill did not present any argument in his brief before this court regarding the section 2-615 dismissal, we must affirm those dismissals. See *Vancura v. Katris*, 238 Ill. 2d 352, 369 (2010) (failure to argue point in the appellant's opening brief results in forfeiture of the issue). Neither the court order nor the record clearly delineate whether counts 1, 2 and 7 were dismissed pursuant to section 2-615 or 2-619 (or both). Given the unclear record and our disposition of the section 2-619 dismissals, we believe that the better course is to affirm the portion of the order which dismissed counts under section 2-615 but to modify that order to reflect that it is without prejudice to amendment after remand. See Ill. S. Ct. R. 366(a) (eff. Feb. 1, 1994). We instruct the trial court on remand to identify which counts it dismissed on which bases and enter the appropriate orders consistent with our mandate.

¶ 33 CONCLUSION

¶ 34 For these reasons, we reverse the order of the circuit court dismissing counts under section 2-619. We affirm the order dismissing counts under section 2-615 but modify it to reflect that the dismissal is without prejudice. We remand the case for further proceedings consistent with this order.

¶ 35 Affirmed in part as modified, reversed in part, and remanded with instructions.