2015 IL App (3d) 140411-U

Order filed April 8, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

RYAN BECK,	)	Appeal from the Circuit Court
	)	of the 9th Judicial Circuit,
Plaintiff-Appellant,	)	Knox County, Illinois,
	)	
v.	)	Appeal No. 3-14-0411
	)	Circuit No. 12-L-56
	)	
CITY OF GALESBURG,	)	Honorable
	)	Scott Shipplett,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice McDade and Justice Wright concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court properly dismissed plaintiff's complaint where: (1) plaintiff's negligence claim against municipal defendant was barred by the Tort Immunity Act; and (2) plaintiff failed to state a cause of action for willful and wanton conduct.

¶ 2 Plaintiff, Ryan Beck, appeals the circuit court's dismissal of his two-count complaint against defendant, City of Galesburg, seeking damages for personal injuries he sustained at a pool owned and operated by defendant. We affirm the dismissal of plaintiff's complaint because we find that: (1) count 1 of the complaint alleging that defendant is liable in negligence for

plaintiff's injuries is barred by the Local Governmental and Governmental Employees Tort Immunity Act (Immunity Act) (745 ILCS 10/1 *et seq.* (West 2012)); and (2) count 2 of the complaint failed to state a cause of action for willful and wanton conduct.

¶ 3 FACTS

¶ 4 In his complaint, plaintiff sought damages for personal injuries that he allegedly sustained at the Hawthorne Municipal Pool (Pool), which was owned, managed, maintained, and controlled by defendant, a municipal corporation. The complaint asserted that a large flotation device was moored within the Pool. Prior to plaintiff's usage of the Pool's diving board, the flotation device was "near the side of the pool and not in a position to cause hazard to users of the diving board." During plaintiff's usage of the diving board, the flotation device "was caused or allowed to move into the vicinity of the diving board, unbeknownst to [p]laintiff." Plaintiff dove from the diving board, struck the flotation device, and sustained severe injuries. There were multiple employees of defendant who were or should have been monitoring the Pool at this time. The complaint alleged that defendant was liable for his injuries on theories of negligence (count 1) and willful and wanton conduct (count 2).

¶ 5 Count 1 alleged that defendant knew or should have known that "causing or allowing" the flotation device to be positioned under the diving board was a "dangerous and hazardous condition," and defendant had ample time to correct the condition as the flotation device was under the diving board for "an extensive period of time." It also alleged that defendant failed to properly repair, maintain, and/or monitor the Pool and/or flotation device and/or failed to correct the dangerous condition or warn plaintiff of it. As a proximate result of the foregoing acts or omissions, plaintiff sustained personal injury.

¶ 6 Count 2 contained substantially the same factual allegations found in count 1; however, they were set forth under a theory of willful and wanton conduct.

¶ 7 Defendant filed a combined section 2-615 and 2-619 motion to dismiss plaintiff's complaint pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2012)). The trial court dismissed count 1 on the merits, reasoning that plaintiff's negligence claim was barred by section 3-108(a) of the Immunity Act (745 ILCS 10/3-108(a) (West 2012)). The trial court found that count 2 failed to adequately allege willful and wanton conduct but granted plaintiff leave to replead count 2 "setting forth allegations of specific behavior indicative of willful and wanton conduct."

¶ 8 Plaintiff filed an amended complaint repleading count 2. The amended count 2 alleged that defendant knew the flotation device was in the water at the time the Pool and diving boards were being used by the public. Defendant, through its agents and employees, knew that the flotation device was large, rigid, not securely moored to the side of the Pool, and posed a hazard to those using the Pool and diving board. The flotation device was allowed to drift for a long enough period of time that it went from the side of the pool to the point that it was under the diving board, and it remained under the diving board "for an extensive period of time." The amount of time that the flotation device was allowed to drift into the diving area demonstrated utter indifference or conscious disregard for the safety of those using the Pool. Despite "knowledge of the dangerous condition" and having time to remedy it, defendant took no corrective action. The complaint further alleged that defendant failed to: properly maintain, repair, and/or monitor the Pool and/or flotation device; secure the flotation device to the side of the Pool; or warn plaintiff of the dangerous condition. As proximate result of one or more of the foregoing acts or omissions of defendant, plaintiff sustained personal injury.

¶ 9 Defendant filed a motion to dismiss plaintiff's amended count 2 pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)). The circuit court granted defendant's motion. The court reasoned:

> "[T]he problem that I see with the case from the pleading standpoint is that it is a negligence case and the City of Galesburg has sovereign immunity granted by the legislature *** unless there's willful or wanton acts, and I gave the plaintiff a chance to make those allegations of willful and wanton acts, and in reading over the amended complaint, I still don't see it. I just see passive voice that would rise to an inference.
>
> *** [T]he passive voice of this object being attached to the side of the pool and then being unattached is a supervision issue which I've already addressed in the first motion. I don't see anything in here that would by the simple facts of this case res ipsa make this a matter that would show actual or deliberate intention to cause harm or a conscious disregard for the safety of others."

¶ 10 ANALYSIS

¶ 11 I. Negligence (Count 1)

¶ 12 On appeal, plaintiff argues that the circuit court erred in dismissing his negligence claim pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2012)). Because we find that plaintiff's negligence claim was barred under sections 3-106 and 3-108(a) of the Immunity Act (745 ILCS 10/3-106, 108(a) (West 2012)), we affirm the circuit court's dismissal of count 1.

¶ 13 A section 2–619 motion to dismiss admits the sufficiency of the complaint, but asserts a defense outside the complaint that defeats it. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. Immunity from a lawsuit is an "affirmative matter" properly raised under section 2–619(a)(9). *Epstein v. Chicago Board of Education*, 178 Ill. 2d 370, 383 (1997). We review the trial court's dismissal of count 1 of plaintiff's complaint pursuant to section 2-619 of the Code *de novo*. *Patrick Engineering, Inc.*, 2012 IL 113148, ¶ 31.

¶ 14 When ruling on a trial court's dismissal of a complaint under section 2-619 of the Code, we "must accept as true all well-pleaded facts, as well as any reasonable inferences that may arise from them." *Patrick Engineering, Inc.*, 2012 IL 113148, ¶ 31. We consider whether "the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law. *Kedzie and 103rd Currency Exchange, Inc., v. Hodge*, 156 Ill. 2d 112, 116-17 (1993). We are not bound by the reasoning given for the trial court's judgment and may affirm on any basis supported by the record. *Gunthorp v. Golan*, 184 Ill. 2d 432, 438 (1998).

¶ 15 A. Immunity Under Section 3-108(a) of the Immunity Act

¶ 16 First, we address defendant's immunity under section 3-108(a) of the Immunity Act (745 ILCS 10/3-108(a) (West 2012)). The trial court found that count 1 alleged that plaintiff's injuries were caused by defendant's negligent failure to adequately supervise the Pool and, consequently, was barred by section 3-108(a) of the Immunity Act. Section 3-108(a) provides:

> "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." 745 ILCS 10/3-108(a) (West 2012).

"The word *supervision* includes coordination, direction, oversight, implementation, management, superintendence, and regulation." (Emphasis in original.) *Spangenberg v. Verner*, 321 Ill. App. 3d 429, 432 (2001).

¶ 17 Among the allegations in count 1 of plaintiff's complaint were that: (1) defendant had multiple employees who were or should have been monitoring the Pool area; (2) "there was ample time to have corrected the dangerous and hazardous condition" of the flotation device drifting under the diving board; and (3) defendant "[f]ailed to properly monitor the [P]ool and/or flotational device so that the flotational device would not be positioned under the diving board." These allegations all fall within the scope of section 3-108(a) and are therefore barred.

¶ 18 In coming to this conclusion, we reject plaintiff's reliance on *Arteman v. Clinton Community Unit School District No. 15*, 198 Ill. 2d 475 (2002). *Arteman* involved the defendant's failure to provide safety equipment rather than failure to supervise. *Id.* at 483-84. The instant case does not involve a failure to provide safety equipment but rather involves a claim that defendant's employees failed to adequately supervise the Pool and/or flotation device so as to ensure that the flotation device did not drift underneath the diving board.

¶ 19 B. Immunity Under Section 3-106 of the Immunity Act

¶ 20 We find that the remaining allegations of negligence in count 1 are barred by section 3-106 of the Immunity Act, as they base defendant's liability on the existence of the condition of the flotation device being positioned under the diving board. Section 3-106 provides:

> "Neither a local public entity nor a public employee is liable for an injury where the liability is based on the existence of a condition of any public property

> intended or permitted to be used for recreational purposes *** unless such local entity or public employee is guilty of willful and wanton conduct proximately causing such injury." 745 ILCS 10/3-106 (West 2012).

¶ 21 Immunity under section 3-106 extends to movable conditions of public property. *Moore v. Chicago Park District*, 2012 IL 112788, ¶¶ 20, 21. In determining whether something constitutes a "condition" of public property within the meaning of section 3-106, courts consider "whether a plaintiff's injury was caused by the property itself or by an activity conducted on the property." *Id.* ¶ 15. "[S]ection 3-106 immunizes a defendant from liability in negligence where the property itself is unsafe, but that section does not immunize the defendant from unsafe activities conducted upon otherwise safe property." *Id.*

¶ 22 Plaintiff's remaining allegations all involve the "condition" of the flotation device and its position underneath the diving board. Specifically, plaintiff's complaint alleged that "causing or allowing" the flotation device to be positioned under the diving board was a "dangerous and hazardous condition" and that defendant failed to correct the dangerous condition or warn plaintiff of it. The complaint further alleged that defendant failed to properly repair and/or maintain the Pool and/or flotation device. Section 3-106 expressly immunizes defendant from liability resulting from these allegations.

¶ 23 In coming to this conclusion, we reject plaintiff's reliance on *McCuen v. Peoria Park District*, 163 Ill. 2d 125 (1994), in support of his position. In *McCuen*, the plaintiffs were riding a mule-drawn hayrack ride at a park owned and operated by the municipal defendant. *McCuen*, 163 Ill. 2d at 126. One of the defendant's employees slapped a strap over the body of a mule, which caused the mules to bolt with the driverless hayrack. *Id.* at 126-27. The plaintiffs were injured when they were thrown from the hayrack, and they sued the defendant for negligence.

Id. at 127. The *McCuen* court held that the plaintiffs' negligence claim was not barred by section 3-106 of the Immunity Act because their injuries were not caused by a condition of public property but rather by the employee's handling of the mule team. *Id.* at 129. The court reasoned:

> "[The p]laintiffs [did] *** not claim that the hayrack itself was dangerous, defective or negligently maintained, only that the mule team was not handled properly by the park district employee. *** If otherwise safe property is misused so that it is no longer safe, but the property itself remains unchanged, any danger presented by the property is due to the misuse of the property and not to the condition of the property." *Id.*

¶ 24 The Illinois Supreme Court subsequently clarified its holding in *McCuen*. See *Moore*, 2012 IL 112788. The *Moore* court explained: "*McCuen* illustrates that section 3-106 immunizes a defendant from liability in negligence where the property itself is unsafe, but that section does not immunize the defendant from unsafe activities conducted upon otherwise safe property." *Id.* ¶ 15. In *Moore*, an elderly woman was injured when she slipped while attempting to step over a pile of snow that had been collected at the edge of the parking lot owned and operated by the municipal defendant due to plowing. *Id.* ¶ 3. The *Moore* court held that section 3-106 of the Immunity Act barred the plaintiff's negligence claim, reasoning that "the existence of snow and ice was not an activity conducted on defendant's property, but rather a condition of the property." *Id.* ¶ 16. The court reasoned that it was the unsafe condition of the property itself that caused the injury rather than the defendant's actions in using snow removal equipment, unlike in *McCuen* where the plaintiffs' injuries were caused by the negligent action of the defendant's employee in improperly handling a mule team. *Id.*

¶ 25 Like in *Moore*, plaintiff's negligence claim alleges that the flotation device itself—positioned under the diving board—caused plaintiff's injury. Plaintiff's injury was not caused by a dangerous activity conducted by defendant's employees like in *McCuen*. The "activity" of defendant's employees alleged by plaintiff is that they "caused or allowed" the "dangerous and hazardous *condition*" (emphasis added) of the flotation device being positioned under the diving board to exist without correcting it. This is not sufficient activity to remove plaintiff's claim from the purview of section 3-106 of the Immunity Act.

¶ 26 Plaintiff argues that his case is distinguishable from *Moore* because his injury was not caused by a passive characteristic of property like the pile of snow and ice. We find this difference to be inconsequential; the drifting of the flotation device was not an activity of defendant's employees, like in *McCuen*. Because we find that plaintiff's negligence claim is barred by sections 3-108(a) and 3-106 of the Immunity Act, we affirm the circuit court's dismissal of count 1 of the complaint.

¶ 27 II. Willful and Wanton Conduct (Count 2)

¶ 28 Next, plaintiff argues that the circuit court erred in dismissing his willful and wanton conduct claim pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)). Because we find that plaintiff's complaint does not allege sufficient facts to show that defendant acted with utter indifference to or conscious disregard for the safety of others, we affirm the circuit court's dismissal of count 2.

¶ 29 "While the issue of whether a defendant's actions amounted to willful and wanton conduct is usually a question of fact for a jury to determine, a court may decide as a matter of law whether a plaintiff's allegations of willful and wanton conduct are sufficient to state a cause of action." *Leja v. Community Unit School District 300*, 2012 IL App (2d) 120156, ¶ 11. We

review *de novo* the circuit court's dismissal of count 2 pursuant to section 2-615 of the Code (735 ILCS 5/2–615 (West 2012)). *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). "A section 2-615 motion to dismiss [citation] challenges the legal sufficiency of a complaint based on defects apparent on its face." *Id.* In reviewing the sufficiency of count 2 of plaintiff's complaint, we accept as true all well-pleaded facts and reasonable inferences that may be drawn from the facts and construe the allegations in the light most favorable to the plaintiff. *Id.*

¶ 30 The Immunity Act defines "willful and wanton conduct" as follows:

> " 'Willful and wanton conduct' as used in this Act means 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. This definition shall apply in any case where a 'willful and wanton' exception is incorporated into any immunity under this Act." 745 ILCS 10/1-210 (West 2012).[1]

¶ 31 At the outset, we reject plaintiff's argument that he adequately pled willful and wanton conduct under a common-law standard found in *Schneiderman v. Interstate Transit Lines*, 394 Ill. 569, 583 (1946) and subsequently quoted in *Murray v. Chicago Youth Center*, 224 Ill. 2d 213 (2007). This court addressed and rejected defendant's argument that common-law definitions of "willful and wanton conduct" apply in cases governed by the Immunity Act in our holding in *Bielema*, 2013 IL App (3d) 120808. In *Bielema*, we held that the *Schneiderman* definition for "willful and wanton conduct" does not apply to cases governed by the Immunity Act because

[1] We have held that the Act's definition of "willful and wanton conduct" applies to cases governed by the Immunity Act to the exclusion of common law definitions. *Bielema ex rel. Bielema v. River Bend Community School District No. 2*, 2013 IL App (3d) 120808, ¶ 17.

"the legislature clearly intended for the statutory definition to exclusively apply in cases involving the Tort Immunity Act" when it amended section 1-210 in 1998. *Bielema*, 2013 IL App (3d) 120808, ¶¶ 15-17. See also *Tagliere v. Western Springs Park District*, 408 Ill. App. 3d 235, 243 (2011); *Thurman v. Champaign Park District*, 2011 IL App (4th) 101024, ¶ 13.

¶ 32 Therefore, we apply the definition of willful and wanton conduct articulated in section 1-210 of the Immunity Act (745 ILCS 10/1-210 (West 2012)) to plaintiff's claim. Since plaintiff does not allege that defendant actually or deliberately intended to cause him harm, he was required to plead facts sufficient to establish that defendant engaged in "a course of action which *** shows an utter indifference to or conscious disregard for the safety of others." 745 ILCS 10/1-210 (West 2012).

¶ 33 Plaintiff fails to allege sufficient facts to support its allegation that defendant knew that the flotation device had drifted under the diving board plaintiff was using. Beyond the "extensive" amount of time that the flotation device was permitted to drift, plaintiff makes no nonconclusory factual allegations that would tend to establish that defendant knew that the flotation device was underneath the diving board while plaintiff was using it. Plaintiff did not allege that, either on the date of the incident or on prior occasions, defendant had received complaints that the flotation device had floated underneath the diving board or that defendant knew that others had been injured on the flotation device after it had drifted underneath the diving board, situations in which courts have found willful and wanton conduct to exist. See *Thurman*, 2011 IL App (4th) 101024, ¶ 10. Without alleging specific facts tending to show that defendant knew that the flotation device had drifted under the diving board, or that it had in the past, plaintiff's complaint failed to show that defendant knew or should have known that its

actions or inactions posed a danger to those present at the Pool. Plaintiff's allegations do not rise to the level of willful and wanton conduct.

¶ 34 We find plaintiff's cited cases—*Murray*, 224 Ill. 2d 213, and *Doe ex rel. Ortega-Piron v. Chicago Board of Education*, 213 Ill. 2d 19 (2004)—to be factually distinguishable. In *Murray*, the minor plaintiff was rendered quadriplegic when he attempted to do a forward flip off of a mini-trampoline at a tumbling class sponsored by the defendants and landed on his shoulders. *Murray*, 224 Ill. 2d at 217. The court held that summary judgment was inappropriate where the plaintiffs presented evidence that: (1) it is well known that the use of mini-trampolines is associated with the risk of spinal cord injury from improperly executed somersaults; (2) the plaintiff 's tumbling class was not supervised by an instructor with professional preparation in teaching trampolining; (3) trained spotters and safety equipment were not provided at all times; and (4) none of the United States Gymnastic Federation Safety Manual guidelines were followed. *Id.* at 246.

¶ 35 In *Doe*, the court found that the plaintiff's complaint adequately alleged willful and wanton conduct where the complaint alleged that the plaintiff's ward, a mentally handicapped child, was sexually assaulted by another child on a bus taking them to school. *Doe*, 213 Ill. 2d at 22, 29. No attendant was present on the bus on the day of the assault. *Id.* The child who assaulted the plaintiff's ward had a deviant sexual history, had been declared a sexually aggressive child and youth ward (SACY), and was under a protective plan requiring that he never be left unsupervised among other children. *Id.*

¶ 36 Both *Murray* and *Doe* involve specific factual allegations regarding the defendants' knowledge and foreseeability of harm to the plaintiffs that are not present in this case. Unlike in *Murray*, plaintiff does not allege that he was participating in a structured, instructor-led activity

that was not conducted in accordance with established safety guidelines, that safety equipment was not provided, and that it was well known that a specific type of injury could occur if precautions were not taken. In *Doe*, the plaintiff alleged specific facts regarding defendant's knowledge and foreseeability of harm to the plaintiff—*e.g.*, plaintiff's ward's disability, the assailant's SACY status, and the requirements of the assailant's protective plan. In this case, however, plaintiff alleges no specific facts that would tend to establish defendant knew or should have known that the flotation device—which was typically moored to the side of the pool—had drifted under the diving board. In the absence of such allegations, plaintiff fails to establish that defendant acted with "conscious disregard" or "utter indifference" to the safety of others. Therefore, we affirm the circuit court's dismissal of count 2.[2]

¶ 37 CONCLUSION

¶ 38 The judgment of the circuit court of Knox County is affirmed.

¶ 39 Affirmed.

[2] We note that defendant additionally argued on appeal that defendant owed no duty of care to plaintiff. In light of our holdings in this case, we need not address said arguments in this order.