2015 IL App (3d) 140792-U

Order filed August 13, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

JAMES HOGAN and MARIA HOGAN,	)	Appeal from the Circuit Court
	)	of the 13th Judicial Circuit,
Plaintiffs-Appellants,	)	Grundy County, Illinois,
	)	
v.	)	Appeal No. 3-14-0792
	)	Circuit No. 13-L-32
MINOOKA COMMUNITY HIGH	)	
SCHOOL DISTRICT 111 and CHANNAHON	)	
SCHOOL DISTRICT 17,	)	Honorable
	)	Robert C. Marsaglia,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Carter and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: Defendants were immune from liability under section 3-106 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/3-106 (West 2012)). The trial court's dismissal of plaintiffs' complaint is affirmed.

¶ 2 Plaintiffs, James Hogan and Maria Hogan, filed an amended complaint alleging defendants, Minooka Community High School District 111 (Minooka) and Channahon School District 17 (Channahon) engaged in willful and wanton conduct by failing to fully extend the telescoping bleachers at a wrestling match. The complaint further alleged that as a result of

defendants' conduct, the bleachers' steps had a reduced depth, which caused James to fall and suffer injuries as he descended them. Defendants filed a joint motion to dismiss under sections 2-615 and 2-619(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-615, 2-619(9) (West 2012)). The court granted defendants' motion, finding that defendants' conduct was not willful and wanton. Plaintiffs appeal. We affirm, holding that plaintiffs' complaint failed to sufficiently plead willful and wanton conduct.

¶ 3 FACTS

¶ 4 On January 12, 2013, James Hogan, was injured when he fell while descending the bleachers at a wrestling match located at Minooka Community High School South Campus.

¶ 5 Plaintiffs filed a two-count complaint against defendants Minooka and Channahon. Count I of the complaint alleged premises liability in that Minooka failed to properly lock the bleachers into place, causing James's injuries. Count II alleged loss of consortium on behalf of Maria, James's wife.

¶ 6 Channahon moved to dismiss the complaint with prejudice pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)). The motion argued that under section 3-106 of the Local Governmental and Governmental Employees Tort Immunity Act (Act) (745 ILCS 10/3-106 (West 2012)), plaintiffs were required to establish that defendants engaged in willful and wanton conduct, while plaintiffs' complaint alleged only negligence. The court granted the motion to dismiss, finding that section 3-106 applied and that plaintiffs had failed to allege willful and wanton conduct. The trial court granted plaintiffs 28 days to replead.

¶ 7 Plaintiffs filed an amended complaint, which added a new count alleging willful and wanton conduct on behalf of both defendants. The original two counts remained unchanged and continued to rely on a theory of negligence. Plaintiffs also filed a motion to reconsider the

court's prior decision finding that section 3-106 provided the school immunity from plaintiffs' claims. The court denied the motion to reconsider. In addition, the court dismissed plaintiffs' premises liability count without leave to refile and dismissed the loss of consortium count with leave to refile within 30 days.

¶ 8 Plaintiffs filed a second amended complaint. Count I of the complaint again alleged premises liability based on a theory of negligence. Count II alleged that defendants engaged in willful and wanton conduct by failing to fully extend the bleachers and failing to lock them into place. Count III alleged loss of consortium, incorporating the allegations of counts I and II.

¶ 9 Defendants filed a joint motion to dismiss under sections 2-615 and 2-619(9) of the Code (735 ILCS 5/2-615, 2-619(9) (West 2012)). It alleged that counts II and III did not contain facts that would establish willful and wanton conduct. As a result, it argued that defendants were entitled to immunity under section 3-106 of the Act (745 ILCS 10/3-106 (West 2012)).

¶ 10 The court dismissed the complaint with prejudice, citing sections 2-615 and 2-619 of the Code. The court found that the complaint failed to establish defendants engaged in willful and wanton conduct.

¶ 11 ANALYSIS

¶ 12 On appeal, plaintiffs argue the complaint should not have been dismissed, as defendants are not entitled to benefit from immunity under section 3-106 of the Act (745 ILCS 10/3-106 (West 2012)). According to plaintiffs, two independent grounds preclude immunity: (1) the bleachers were not a "condition" of the property; and (2) defendants engaged in willful and wanton conduct.

¶ 13 When ruling on a motion to dismiss under section 2-619 of the Code, the court must accept all well-pleaded facts as true and draw all reasonable inferences therefrom in favor of the

moving party. *Chicago Title Insurance Co. v. Teachers' Retirement System*, 2014 IL App (1st) 131452, ¶ 13. Review of the trial court's grant of a motion to dismiss is reviewed *de novo*. *Edelman, Combs and Latturner v. Hinshaw and Culbertson*, 338 Ill. App. 3d 156, 164 (2003).

¶ 14 Section 3-106 of the Act grants immunity from liability for local public entities where the injury was based on the "existence of a condition of any public property intended or permitted to be used for recreational purposes," and the local entity did not engage in willful and wanton conduct. 745 ILCS 10/3-106 (West 2012).

¶ 15 A. Whether the Bleachers Were a Condition of the Property

¶ 16 At the outset, defendants claim plaintiffs have forfeited any argument that the bleachers were not a condition of defendants' property because that argument was never raised in the proceedings below. The case law provides that issues not raised in the trial court are deemed forfeited and may not be raised for the first time on appeal. *Cambridge Engineering, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437, 453 (2007). However, in this case, there was extensive argument in the trial court about whether the bleachers constituted a "condition" of the property. This issue was addressed in the pleadings and during the hearing on Channahon's initial motion to dismiss. We therefore conclude that forfeiture does not apply and turn to the merits of this issue.

¶ 17 In order for section 3-106 to confer immunity upon a defendant, the alleged injury must be based on "the existence of a condition of any public property." 745 ILCS 10/3-106 (West 2012)). If liability is not based on a condition of the property, section 3-106 does not apply. *McCuen v. Peoria Park District*, 163 Ill. 2d 125, 128 (1994).

¶ 18 Plaintiffs argue that the bleachers were not a condition of the property because it was defendants' misuse of the bleachers that made them unsafe. In support of that argument,

plaintiffs cite *McCuen*, 163 Ill. 2d at 128. In *McCuen*, one of the plaintiffs was intending to take a mule-drawn hayrack ride operated by the Peoria Park District. *Id.* at 126. As the plaintiff waited on the hayrack for the ride to begin, a park employee caused the mule team to bolt by slapping a strap on one of the mules. *Id.* As a result, the plaintiff was thrown from the hayrack and suffered injuries. *Id.* at 127.

¶ 19 On appeal, the *McCuen* court held that section 3-106 did not provide immunity because the driverless hayrack was not a condition of the public property. Rather, it was the handling of the hayrack by the park employee that caused the plaintiff's injuries. The court explained, "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." *McCuen*, 163 Ill. 2d at 129. In the present case, plaintiffs argue that it was defendants' misuse of the bleachers that caused James's injuries; therefore, the bleachers were not a condition of defendants' property.

¶ 20 Our supreme court recently discussed *McCuen* in *Moore v. Chicago Park District*, 2012 IL 112788. In *Moore*, the decedent was injured when she attempted to step over a pile of snow and ice that accumulated due to plowing by park district employees. The question on appeal was whether the accumulation of snow and ice was a "condition" of the public property. The *Moore* court interpreted *McCuen* as establishing that "the relevant inquiry in determining whether something is a 'condition' within the meaning of section 3-106 is whether the plaintiff's injury was caused by the property itself or by an activity conducted on the property." *Id.* ¶ 15. The *Moore* court went on to hold that the presence of the snow and ice was a condition of the property, even though that condition was created by the defendant's plowing: "immunity applies

here where it was not the actions of defendant's employee in using snow removal equipment, but the allegedly unsafe condition of the property itself which caused injury." *Id.* ¶ 16.

¶ 21 Likewise, in the present case, it was the condition of the bleachers that allegedly caused James's injuries. Here, the bleachers had been extended and were fixed in place to allow seating for the sporting event. The bleachers, as extended on that date, became a condition of the property. This is similar to *Moore*, where the decedent was injured not by the act of removing snow but by the fixed condition present on the property created by that snow removal. *Moore*, 2012 IL 112788, ¶ 16. We hold that the bleachers were a condition of defendants' property.

¶ 22 B. Whether Plaintiffs Sufficiently Pled Willful and Wanton Conduct

¶ 23 Plaintiffs argue they sufficiently pled willful and wanton conduct by alleging defendants failed to fully extend the bleachers and failed to utilize the locking system that would lock the bleachers into place. Defendants respond that plaintiffs make a bare allegation of willful and wanton conduct insufficient to meet the pleading requirements.

¶ 24 The 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 2012). When a plaintiff alleges that a defendant has committed willful and wanton conduct, such conduct must be established through well-pled facts and not merely by labeling the conduct willful and wanton. *Winfrey v. Chicago Park District*, 274 Ill. App. 3d 939, 943 (1995). "The plaintiff must show that after knowledge of impending danger, defendant failed to exercise ordinary care to prevent it or failed to discover the danger through recklessness or carelessness when it should have been discovered." *Straub v. City of Mt. Olive*, 240 Ill. App. 3d 967, 977

(1993). "Inadvertence, incompetence, or unskillfulness does not constitute willful and wanton conduct." *Floyd v. Rockford Park District*, 355 Ill. App. 3d 695, 701 (2005).

¶ 25 In the present case, plaintiffs have not alleged defendants had any knowledge that the bleachers presented an impending danger. Nor does the complaint establish the danger posed by the bleachers could have been discovered by defendants. Rather, the failure to fully extend the bleachers to allow more room for the sporting event does not rise to the level of willful and wanton conduct. *Floyd*, 355 Ill. App. 3d at 701.

¶ 26 Plaintiffs focus on the language that willful and wanton conduct may be established where defendant "intentionally removed a safety device or feature from property used for recreational purposes." *Winfrey*, 274 Ill. App. 3d at 945. The complaint alleged that the bleachers had a mechanism that would lock the bleachers in place and defendants failed to use that locking mechanism. However, the complaint fails to plead facts that would show that any failure to engage the locking mechanism caused James's injuries. The complaint does not allege that James's injuries occurred because the bleachers shifted or moved while James was descending the bleachers, rather, it alleges that a decreased step depth caused the injuries. The complaint therefore failed to plead sufficient facts to establish that any misuse of the locking mechanism caused James's injuries.

¶ 27 The complaint failed to sufficiently plead that defendants engaged in willful and wanton conduct that caused plaintiffs' injuries. Therefore, because the pleadings also established that the bleachers were a condition of defendants' property, defendants are entitled to immunity under section 3-106 of the Act, and the court properly dismissed the complaint.

¶ 28 CONCLUSION

¶ 29 The judgment of the circuit court of Grundy County is affirmed.

¶ 30 Affirmed.