2016 IL App (1st) 150989-U

No. 1-15-0989

FIFTH DIVISION
January 22, 2016

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PATRICIA RENKIEWICZ, as Mother and Next Friend of Cody Nicholson, a Minor, Plaintiff-Appellant, v. TOWNSHIP HIGH SCHOOL DISTRICT 211, Defendant-Appellee.	)))))))))	Appeal from the Circuit Court of Cook County. No. 13 L 9008 The Honorable Kathy M. Flanagan, Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes concurred in the judgment.
Justice Gordon specially concurred.

O R D E R

¶ 1 *HELD*: Plaintiff's second amended complaint sounding in negligence based on willful and wanton conduct was properly dismissed where plaintiff failed to establish defendant voluntarily undertook a duty of care to supervise plaintiff's son while off-campus during an after-school event.

¶ 2 Plaintiff, Patricia Renkiewicz, as mother and next friend of Cody Nicholson, a minor, appeals the dismissal of her second amended complaint pursuant to section 2-615 of the Code of

Civil Procedure (Code) (735 ILCS 5/2-615 (West 2012)) in which she alleged defendant, Township High School District 211, violated the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) by willfully and wantonly failing to supervise her son. Plaintiff contends the circuit court erred in dismissing her second amended complaint because it sufficiently stated a cause of action where defendant voluntarily undertook a duty to safeguard her son during an after-school event yet willfully and wantonly failed to do so, resulting in her son's injury. Based on the following, we affirm.

¶ 3 FACTS

¶ 4 On May 20, 2011, Cody Nicholson, was a 14-year-old freshman enrolled at James B. Conant High School (Conant) located at 700 E. Cougar Trail in Hoffman Estates, Illinois. Conant was owned, operated and/or controlled by defendant. On that date, Nicholson attended an after-school event held at Conant called the International Fair. The event was held from 7:30 p.m. until 9:30 p.m. During the event, Nicholson left Conant and walked to a McDonald's restaurant located approximately one block away from the high school at the intersection of Higgins Road and Plum Grove Road. The intersection contained six lanes of traffic for each road. During his return trip to Conant, Nicholson was struck by a vehicle traveling eastbound while he crossed southbound on Plum Grove Road across Higgins Road. Nicholson suffered injuries.

¶ 5 On December 8, 2014, plaintiff filed her second amended complaint against defendant alleging willful and wanton failure to supervise Nicholson and requesting damages for his medical care pursuant to the Family Expense Act. In the second amended complaint, plaintiff alleged defendant voluntarily undertook the responsibility to supervise various streets and intersections near Conant by hiring crossing guards, traffic control officers, and/or officers from

the Village of Hoffman Estates during other unnamed after-school events. The second amended complaint further alleged that defendant had a duty to provide uniform guidelines, rules, and procedures to safeguard students from nearby traffic hazards while entering and exiting curricular and extracurricular events "pursuant to the Illinois School Code and fundamental school safety guidelines and practices." In addition, according to plaintiff's second amended complaint, defendant had a duty to provide guidelines, rules, and procedures to frequently communicate with parents and members of the community regarding student safety. Plaintiff also alleged that defendant provided "some limited rules relating to leaving campus in a District School Handbook but [those rules] were not applied to after-school events" such as the International Fair on the date in question, namely, requiring parent-signed permission slips allowing junior and senior students to leave campus for lunch. The second amended complaint further alleged that defendant provided adult supervision for the International Fair, but failed to provide "traffic patrol" for students entering and leaving Conant and at the intersection of Higgins Road and Plum Grove Road. According to the second amended complaint, defendant had knowledge that approximately 50 Conant students traveled to the same McDonald's restaurant for lunch on a daily basis. Moreover, the second amended complaint alleged that defendant had notice of "numerous accidents, some of which involved student-pedestrians of [Conant], including a student who sustained a traumatic brain injury approximately one year before this occurrence which occurred at the intersection of Higgins Road and Plum Grove Road." Plaintiff finally alleged that defendant did not provide parents of the children attending the International Fair any notice that the students would be free to leave Conant during the event without supervision.

¶ 6 According to plaintiff's second amended complaint, defendant "with an utter indifference and conscious disregard for the safety of others, was willful and wanton" in failing to implement uniform guidelines and rules to protect students from nearby traffic hazards, namely, at the McDonald's restaurant in question. Plaintiff alleged defendant intentionally provided substandard guidelines and rules by failing to have a sign-in sheet at the event and failing to notify, communicate, and inform parents that the students were free to leave the event. Plaintiff further alleged defendant ignored the hazard posed by the McDonald's restaurant located at Higgins Road and Plum Grove Road and failed to provide safeguards in the form of traffic patrol at the busy intersection despite having provided traffic control at other after-school events. Finally, plaintiff alleged defendant willfully and wantonly violated the Illinois School Code, its own school policies, and the Fundamentals of Basic School Safety Practices by failing to provide proper supervision and safety for the students. In her second amended complaint, plaintiff concluded by stating that Nicholson was struck by a vehicle as a proximate result of the aforesaid willful and wanton acts.

¶ 7 Defendant filed a motion to dismiss the second amended complaint pursuant to section 2-615 of the Code. In a March 18, 2015, written order, the circuit court granted defendant's motion and dismissed plaintiff's second amended complaint.

¶ 8 This appeal followed.

¶ 9 ANALYSIS

¶ 10 Plaintiff contends the circuit court erred in dismissing her second amended complaint where she pled sufficient facts to establish defendant violated its duty to supervise Nicholson during the after-school event by engaging in willful and wanton conduct which led to the accident that caused Nicholson's severe injuries.

¶ 11 A motion to dismiss pursuant to section 2-615 challenges the legal sufficiency of a complaint as having failed to state a cause of action upon which relief may be granted. 735 ILCS 5/2-615 (West 2010). A section 2-615 motion to dismiss should be granted only if it is clearly apparent from the pleadings that no set of facts can be proven that would entitle the plaintiff to recovery. *In re Estate of DiMatteo*, 2013 IL App (1st) 122948, ¶ 56. When considering a section 2-615 motion to dismiss, a court must construe the allegations of the complaint in a light most favorable to the plaintiff, as well as accept as true all well-pleaded facts in the complaint and any reasonable inferences that may arise therefrom. *DeHart v. DeHart*, 2013 IL 114137, ¶ 18. A plaintiff need not set forth evidence in his or her complaint; however, because Illinois is a fact-pleading jurisdiction, a plaintiff must set forth sufficient facts to bring his or her claim within a legally recognized cause of action. *Marshall v. Burger King Corp*., 222 Ill. 2d 422, 429 (2006); *In re Estate of Baumgarten*, 2012 IL App (1st) 112155, ¶ 11. Moreover, "[i]n ruling on such a motion, only those facts apparent from the face of the pleadings, matters of which the court can take judicial notice, and judicial admissions in the record may be considered." *Mount Zion State Bank & Trust v. Consolidated Communications, Inc.*, 169 Ill. 2d 110, 114 (1995). We review the dismissal of a complaint based on section 2-615 of the Code *de novo*. *Marshall*, 222 Ill. 2d at 429.

¶ 12 Section 3-108(b) of the Tort Immunity Act (745 ILCS 10/3-108(b) (West 2010)) states:

> "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(b) (West 2010).

Defendant school district falls within the statutory definition of a "local public entity." 745 ILCS 10/1-206 (West 2010). The Illinois Supreme Court has instructed that there is no separate, independent tort of willful and wanton conduct; instead, willful and wanton conduct is considered an aggravated form of negligence. *Jane Doe-3 v. McLean County Unit District No. 5 Board of Directors*, 2012 IL 112479, ¶ 19. The supreme court further instructed:

> "In order to recover damages based on willful and wanton conduct, a plaintiff must plead and prove the basic elements of a negligence claim—that the defendant owed a duty to the plaintiff, that the defendant breached that duty, and that the breach was a proximate cause of the plaintiff's injury. [Citation.] In addition, a plaintiff must allege either a deliberate intention to harm or a conscious disregard for the plaintiff's welfare. [Citation.]" *Id.*

¶ 13 Plaintiff contends the circuit court erred in finding her second amended complaint failed to establish the requisite elements of a negligence claim as well as demonstrating defendant engaged in willful and wanton conduct. We turn first to a discussion of whether plaintiff alleged sufficient facts, which, if proven, established a duty of care owed to her by defendant.

¶ 14 I. Duty of Care

¶ 15 The Tort Immunity Act does not impose new duties on municipalities but, rather, codifies those duties existing at common law. *Barnett v. Zion Park District*, 171 Ill. 2d 378, 386 (1996). Whether a duty exists is a question of law to be determined by the court. *Jane Doe-3*, 2012 IL 112479, ¶ 20. The supreme court has long recognized that " 'every person owes a duty of care to all others to guard against injuries which naturally flow as a reasonably probable and foreseeable

consequence of an act, and such a duty does not depend upon contract, privity of interest or the proximity of relationship, but extends to remote and unknown persons.' " *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 19 (quoting *Widlowski v. Durkee Foods*, 138 Ill. 2d 369, 373). In order to determine whether the defendant, by his act or omission, contributed to a risk of harm to the plaintiff, courts generally rely on the following four factors: (1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing that burden on the defendant. *Simpkins*, 2012 IL 110662, ¶ 21; *Brooks v. McLean County Unit District No. 5*, 2014 IL App (4th) 130503, ¶ 27.

¶ 16 Plaintiff concedes that there is no general common law duty to protect a minor from being struck by a car while crossing the street. Plaintiff, however, argues that her second amended complaint pled sufficient facts demonstrating that defendant voluntarily assumed a duty and, therefore, her claim should have survived.

> "Generally, pursuant to the voluntary undertaking theory of liability, 'one who undertakes, gratuitously or for consideration, to render services to another is subject to liability for bodily harm caused to the other by one's failure to exercise due care in the performance of the undertaking.' " *Wakulich v. Mraz*, 203 Ill. 2d 223, 241 (2003) (quoting *Rhodes v. Illinois Central Gulf R.R.*, 172 Ill. 2d 213, 239 (1996)).

By undertaking to act, a defendant becomes subject to a duty with respect to the manner of his performance. *Id*. at 242 (citing *Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69, 85 (1964)). A duty imposed based on a voluntary undertaking, however, is limited to the extent of the undertaking. *Id*. at 242-43.

¶ 17 Plaintiff alleged defendant voluntarily undertook a duty to supervise Nicholson at the subject intersection by providing crossing guards for after-school events at intersections surrounding Conant on prior occasions. Moreover, plaintiff alleged defendant had knowledge of previous accidents at the subject intersection, one of which involved a Conant student. In addition, plaintiff alleged defendant provided adult supervision at the International Fair, but did not notify plaintiff that Nicholson would be free to leave the school while the event was in progress.

¶ 18 After reviewing the allegations of plaintiff's second amended complaint, we conclude that she failed to provide sufficient facts that, if true, demonstrated defendant voluntarily undertook a duty of care. Plaintiff agrees that a voluntary undertaking is limited to the extent of the undertaking. *Wakulich*, 203 Ill. 2d at 242-43. In her second amended complaint, plaintiff alleged that defendant had used crossing guards at intersections surrounding Conant on prior occasions for after-school events. Plaintiff did not, however, include facts demonstrating which intersections surrounding the school were assigned crossing guards; the history or frequency of using crossing guards at after-school events; or whether there was a requisite attendance size for the after-school event before crossing guards were used (*i.e.*, were crossing guards only used on occasions as those listed in plaintiff's brief like football games, theatrical performances, and graduation ceremonies, which included large numbers of students, parents, and the public?). In fact, plaintiff did not allege that the intersection in question was ever within the parameters of "surrounding" intersections for which crossing guards were assigned during Conant after-school events. Accordingly, plaintiff did not establish defendant's undertaking to provide crossing guards in the past for after-school events ever extended to an event like the International Fair or to the intersection in question at Higgins Road and Plum Grove Road.

¶ 19 Plaintiff additionally alleged defendant voluntarily undertook a duty to supervise Nicholson during the hours of the International Fair, which included requiring Nicholson to remain at Conant while the event took place. Plaintiff cited the school policy of requiring parental permission to allow junior and senior students to leave campus for lunch during school hours. Plaintiff additionally cited the school code and a textbook entitled Fundamentals of Basic School Safety Procedures to demonstrate that defendant's voluntary undertaking to keep Nicholson safe at the International Fair extended to ensuring he remained under the adult supervision provided at the event. Plaintiff, however, failed to provide any language in the school policies, school code, or the referenced textbook to support her allegations. Moreover, the policy plaintiff cited requiring parental permission to leave Conant for lunch applied to school hours. The International Fair was held after school. A student's school attendance is compulsory, while his or her after-school event attendance is optional. Without some facts demonstrating that the school had a closed-campus policy for after-school events such as the International Fair, the allegations of the second amended complaint failed to demonstrate defendant's undertaking to ensure Nicholson's safety while on campus at the event extended to defendant having a duty to restrict Nicholson from leaving Conant during the event.

¶ 20 In sum, we find plaintiff's second amended complaint failed to state sufficient facts establishing a duty on defendant based on a theory of voluntary undertaking. Because we found the facts did not demonstrate defendant voluntarily undertook a duty to supervise Nicholson at the subject intersection, we need not address whether such a duty resulted in defendant's nonfeasance or misfeasance. Furthermore, where a plaintiff fails to establish a duty, he or she cannot establish a negligence cause of action based on willful and wanton conduct. *Jane Doe-3*,

2012 IL 112479, ¶ 19. We, therefore, find the dismissal of plaintiff's second amended complaint was proper.

¶ 21 CONCLUSION

¶ 22 We affirm the dismissal of plaintiff's second amended complaint pursuant to section 2-615 of the Code.

¶ 23 Affirmed.

¶ 24 JUSTICE GORDON, specially concurring:

¶ 25 I agree with the majority's result, but I write separately to bring out facts that were not discussed by the majority. The trial court found that, in addition to the fact that plaintiff did not allege sufficient facts to show a duty, plaintiff also failed to allege sufficient facts to show causation and willful-wanton conduct. The trial court stated in its written decision that:

> "In addition to lacking allegations to support a duty, the instant pleading also lacks the factual allegations necessary to establish a causal nexus between the acts or omissions of the Defendant and the Plaintiff's injury. Therefore, proximate cause has, again, not be [*sic*] sufficiently pled. Moreover, the Second Amended Complaint fails to allege a course of conduct which demonstrates an utter indifference to or conscious disregard for the safety of the Plaintiff. Therefore, willful and wanton conduct has also not been sufficiently pled."

¶ 26 Once the majority found that the allegations in plaintiff's complaint failed to establish a duty, they were not required to address the other elements in a negligence claim. *Varela ex rel. Nelson v. St. Elizabeth's Hospital of Chicago, Inc.*, 372 Ill. App. 3d 714, 723 (2006). However, that was not explained in the majority decision.

¶ 27 In addition, plaintiff did not request this court to provide them another opportunity to replead and premised their appeal only on the claim that the trial court erred in dismissing their complaint.