2017 IL App (3d) 160230-U

Order filed January 30, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

GENTRY SHORT, a minor, by KARLA GOSS individually and as biological mother and next friend, Plaintiffs-Appellants, v. JERRY STALLINGS, RYAN BURKES, TAMMY RAHN, ANDREA BURKES, MIDWEST CENTRAL C.U.S.D. 191 and the BOARD OF EDUCATION OF MIDWEST CENTRAL C.U.S.D. 191, Defendants-Appellees.	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Tazewell County, Illinois, Appeal No. 3-16-0230 Circuit No. 15-L-27 Honorable Michael Risinger, Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Lytton and McDade concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in dismissing plaintiffs' complaint for failure to sufficiently plead a cause of action against defendants.

¶ 2 Plaintiffs, Karla Goss and her minor son, Gentry Short, appeal the dismissal of their third amended complaint (complaint) on the ground it failed to plead a valid cause of action. We affirm.

¶ 3 FACTS

¶ 4 Plaintiffs filed an action against defendants, Jerry Stallings, Ryan Burkes, Tammy Rahn, Andrea Burkes, Midwest Central C.U.S.D. 191 (Midwest Central), and the Board of Education of Midwest Central C.U.S.D. 191 (Board of Education), seeking compensation from defendants for injuries sustained by Karla's minor son, Gentry, while engaging in a supervised activity on the premises of Midwest Central. After a series of amendments, plaintiffs filed their complaint, which contained 18 counts. The 18-count complaint is the subject of the instant appeal.

¶ 5 The complaint is based on the allegation that on May 21, 2014, Gentry was a student at Midwest Central, and received chemical burns and injuries while playing on a "slip and slide" created on the grounds of the school. Count I of the complaint alleged that Jerry Stallings, an employee of Midwest Central, helped create a "slip and slide" at an event taking place at the school. Stallings poured a chemical cleaner known as "HDQ Neutral" on the "slip and slide" to make the surface slicker for when the students slid across. Every container of HDQ Neutral allegedly comes with a warning label and brochure, which states that HDQ Neutral can cause eye damage, skin burns, and respiratory problems and protective gear should be worn when handling the product.

¶ 6 The complaint further alleged that after Stallings poured the HDQ Neutral on the "slip and slide" surface, Gentry slid across the slide and received chemical burns. The complaint alleged that Stallings knew or should have known of the hazard involved in pouring HDQ Neutral on the "slip and slide." It also asserted Stallings committed willful and wanton

misconduct by pouring HDQ Neutral on the "slip and slide" given the hazards posed by HDQ Neutral.

¶ 7 Counts II, III, and IV alleged that Ryan Burkes, Andrea Burkes, and Tammy Rahn, employees of Midwest Central, assisted or approved of Stallings pouring HDQ Neutral on the "slip and slide." Like count I, counts II, III, and IV alleged that Ryan Burkes, Andrea Burkes, and Rahn committed willful and wanton misconduct in assisting or approving of pouring HDQ Neutral on the "slip and slide."

¶ 8 Counts V, VII, and VIII, alleged claims of vicarious liability against defendants Midwest Central and the Board of Education on the ground that "through [their] agents/employees, had a duty not to engage in willful and wanton conduct for the safety of the Plaintiff and others." Counts VI and IX are also based on the same allegations of willful and wanton misconduct, but sought recovery directly against Midwest Central and the Board of Education as a result of its actions in purchasing or obtaining a chemical cleaner for the "slip and slide" and ordering its agents to pour chemical cleaner on the "slip and slide."

¶ 9 The remaining counts (X, XI, XII, XIII, XIV, XV, XVI, XVII, and XVIII) are also based upon the same allegation of willful and wanton misconduct. Each of these remaining counts sought recovery to Karla, for medical costs incurred as a result of Gentry's injury.

¶ 10 Defendants filed a combined motion to dismiss pursuant to section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2014)). The section 2-615 portion of the motion was on behalf of all defendants. The section 2-615 motion argued that the Local Governmental and Governmental Employees Tort Immunity Act (Act) (745 ILCS 10/1-101 *et seq*. (West 2014)) applied to each count of the complaint. Specifically, the section 2-615 portion of the motion alleged that section 3-106 of the Act, which applies to the use of public properties for

recreational purposes applied to plaintiffs' claims. 745 ILCS 10/3-106 (West 2014). As a result, defendants argued that plaintiffs were required to allege defendants engaged in willful and wanton misconduct in order to properly state a cause of action. Since plaintiff did not plead sufficient facts to establish willful and wanton misconduct, defendants requested dismissal on section 2-615 grounds.

¶ 11 Alternatively, the section 2-619 portion of the motion filed on behalf of the Board of Education focused on a question of law. The motion requested dismissal on section 2-619 grounds because plaintiffs lacked standing to bring a claim against the Board of Education.

¶ 12 Ultimately, the trial court granted the section 2-615 portion of defendants' motion to dismiss (immunity under section 3-106 of the Act). Plaintiffs appeal from this order.

¶ 13 ANALYSIS

¶ 14 Plaintiffs argue that the trial court erred "in granting the [defendants'] 2-615 motion to dismiss." In response, defendants assert dismissal was proper because plaintiffs did not allege sufficient facts to establish defendants' actions constituted willful and wanton misconduct.

¶ 15 In ruling on a section 2-615 motion, a trial court must determine whether the allegations in the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. *Vitro v. Michelcic*, 209 Ill. 22 76, 81 (2004). We review *de novo* the trial court's dismissal pursuant to section 2-615. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006).

¶ 16 Defendants' 2-615 motion cited section 3-106 of the Act as its basis for immunity. Section 3-106 of the Act 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 2014).

¶ 17 When considering whether to dismiss the complaint, the trial court found defendants qualified as either a public entity or a public employee and were entitled to immunity under the Act. *Id.* ("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 ***."). Mindful that immunity does not apply, however, to the willful or wanton misconduct of a public entity or public employee, the trial court next considered whether plaintiffs alleged sufficient facts to establish the willful and wanton exception to immunity. *Id.* ("unless such local entity or public employee is guilty of willful and wanton conduct proximately causing such injury."). Ultimately, the trial court concluded that the allegations of the complaint were insufficient to establish willful and wanton misconduct.

¶ 18 On appeal, plaintiffs do not challenge whether the trial court correctly found defendants as either a public entity or a public employee. Instead, the focus of this appeal is plaintiffs' challenge to the trial court's conclusion that the complaint failed to allege sufficient facts to establish the willful and wanton exception.[1] While we would normally consider whether the Act applies to plaintiffs' claims before considering the exception, we limit the scope of our review to the specific issue raised by plaintiffs. See *People v. Givens*, 237 Ill. 2d 311, 323-24 (2010) (observing the principle that a reviewing court should honor the parties' presentation of the issue on appeal and should not raise new issues).

[1]We note the sole basis for recovery in each count of plaintiffs' complaint is that defendants' actions constituted willful and wanton misconduct.

¶ 19 Willful and wanton misconduct is defined under the Act 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 2014).

¶ 20 The complaint at issue generally alleges that defendants "knew or should have known of the hazard involved in pouring HDQ Neutral on a slip and slide where it would come in contact with the skin of the Plaintiff and/or other children." Beyond plaintiffs' conclusory allegation that defendants acted willfully and wantonly, plaintiffs' complaint lacks any *factual* allegations suggesting any named defendant knew a *chemical* cleaner was being used, was aware of the risk associated with the use of the chemical cleaner or, disregarded the known risk of pouring the chemical cleaner on the "slip and slide." The complaint in the instant case does not plead any facts establishing "an utter indifference to or conscious disregard" for Gentry's safety.

¶ 21 Consequently, plaintiffs alleged no facts, which, if proved, would permit the inference that defendants' conduct was willful and wanton, as opposed to merely negligent. "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 labeling the conduct willful and wanton." *Winfrey v. Chicago Park District*, 274 Ill. App. 3d 939, 943 (1995). On this basis, the trial court properly dismissed plaintiffs' complaint.

¶ 22 In reaching this conclusion, we reject plaintiffs' argument that the trial court erred in dismissing their complaint because the trial court's decision: (1) "implies that there are facts that could be proven that would entitle Plaintiffs-Appellants to recovery," (2) "remarks that its decision would have been different if it had known the occupations of the parties, although this information was already contained in the record," and (3) "considers information not before it."

We acknowledge the accepted principle that "[t]he question presented by a motion to dismiss a complaint for failure to state a cause of action is whether sufficient facts are contained *in the pleadings* which, if established, could entitle the plaintiff to relief." (Emphasis added.) *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 86 (1996). As previously explained, the operative *pleading* (the complaint) failed to allege any facts which, if proved, would permit the inference that defendants' actions constituted willful and wanton misconduct. Plaintiffs' three assertions above do not change this legal conclusion.

¶ 23 CONCLUSION

¶ 24 The judgment of the trial court of Tazewell County is affirmed.

¶ 25 Affirmed.