2015 IL App (1st) 141981-U

SECOND DIVISION
September 8, 2015

No. 1-14-1981

LINDA BRAUN, as Mother and Next Friend of Eliana Braun, Minor,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellant,	)	
v.	)	
SKOKIE PARK DISTRICT,	)	No. 11 L 2771
Defendant-Appellee	)	
(THE ACROFABULOUS CIRCUS, LLC,	)	Honorable Eileen Mary Brewer
Defendant).	)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Hyman concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court properly entered summary judgment in favor of defendant Skokie Park District.

¶ 2 BACKGROUND

¶ 3 This lawsuit arises from an injury[1] sustained by Eliana Braun, the minor daughter of plaintiff Linda Braun, while she was attending a summer camp program organized by defendant,

[1] In their briefs, the parties do not identify the extent of Eliana's injury. However, the record includes the transcript of Eliana's deposition where she testified that as a result of falling off the "cloud swing" she knocked out a tooth and split her lip. Her injuries required a root canal, surgery to replace the tooth and stitches to close the lip wound, which left a visible scar.

Skokie Park District (Skokie). In July of 2009, Skokie, through The Acrofabulous Circus, LLC (Acrofabulous), operated a circus camp for approximately 40 children, between the ages of 8 and 12. On July 7, 2009, the camp had an "open gym" session, where campers could practice an activity of their choice at various activity stations in preparation for an upcoming parent night. The camp had 7 to 8 staff members present. A staff member supervised the children at each activity station. Park district employee, Kacin Menendez, was assigned to and present at the "cloud swing" station.

¶ 4 According to the camp director, James Schubert, a "cloud swing" is a rope made of polyester fabric hung in the shape of the letter "U." At Skokie's camp, the "cloud swing" was hung from "still" rings that were fastened to the ceiling. The swing was attached to a pulley system such that it could be brought down to the camper's eye level for easy use and then pulled back up. The camp staff set up the equipment every morning, and placed gym mats on the floor to cushion the campers' landings. On July 7, 2009, two mats were placed and centered directly under the "cloud swing."

¶ 5 The injury in question occurred when Eliana was attempting to perform a "hip pull-over" exercise on the "cloud swing." Eliana was being supervised by Kacin, who told Eliana to step backwards and then take a few swift steps forward to gain momentum in order to lift her legs up. Eliana slipped from the swing, missed the mats and fell face first onto the floor. Although Kacin was within arm's length of Eliana while spotting her, she was unable to stop Eliana from falling.

¶ 6 On March 14, 2011, Braun filed this personal injury action on Eliana's behalf alleging that the use of a "cloud swing" is a hazardous activity that Skokie operated in a negligent manner with willful and wanton disregard for the safety of others resulting in Eliana's injury. The second

amended complaint alleged one count of negligence against the Acrofabulous Circus (count I)[2]; and two counts against Skokie: negligence (count II) and willful and wanton conduct (count III).

¶ 7 Skokie moved to dismiss the complaint, arguing that section 2-201 and section 3-108 of the Local Government Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/2-201, 3-108 (West 2010)) barred Braun's claims. On November 6, 2012, the circuit court granted the motion in part and dismissed portions of the negligence allegations contained in count II, specifically paragraph 25(c), (e), and (f). However, the circuit court denied the motion as to the willful and wanton claim, finding that there was an issue of material fact as to whether Skokie's actions rose to the level of willful and wanton conduct, which might preclude immunity, and allowed plaintiff discovery on her claims.

¶ 8 Following the partial dismissal of certain allegations of negligence against Skokie, the remaining allegations of negligence in count II, contained in paragraph 25, were: (a) that Skokie "failed to provide the proper type and/or amount of padding on the floor surface for protection of persons being trained on a cloud swing several feet above the floor surface"; (b) that Skokie "failed to properly warn participants and/or their legal guardians of the risk of injury"; and (d) that Skokie "failed to provide safety harnesses and/or other proper forms of fall protection to prevent a fall or minimize injury in the event of a fall." In count III, plaintiff alleged that Skokie's conduct in this regard was willful and wanton.[3]

¶ 9 After discovery, Skokie moved for summary judgment on counts II and III arguing that the claims were barred either by section 2-201, 3-106 or 3-108 of the Tort Immunity Act and that

[2] Defendant, The Acrofabulous Circus, LLC has answered count I of the second amended complaint. On June 19, 2014, the circuit court stayed the action against Acrofabulous pending the outcome of this appeal.

[3] There is "[n]o separate and independent tort of willful and wanton conduct" in Illinois. *Brooks v. McLean County Unit District No. 5*, 2014 IL App (4th) 130503, ¶ 20. Instead, "it is viewed as an aggravated form of negligence." *Id.* Thus, in our view, count III is not alleged as an independent cause of action, but rather it functions to further allegations that Skokie's negligent acts were willful and wanton and therefore, constituted an actionable form of aggravated negligence.

there was no evidence to support the allegation that Skokie's conduct was willful and wanton.

¶ 10 Section 2-201 of the Tort Immunity Act (745 ILCS 10/2-201 (West 2010)) bars personal injury claims against a "public employee serving in a position involving the determination of policy or the exercise of discretion *** when acting in the exercise of such discretion even though abused." Section 3-106 of the Act (745 ILCS 10/3-106 (West 2010)) bars claims against a public entity or public employee for an injury "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." Section 3-108 of the Act (745 ILCS 10/3-108 (West 2010)) bars claims against a public entity or public employee who supervises an activity on public property, unless the entity or employee is "guilty of willful and wanton conduct in its supervision proximately causing such injury."

¶ 11 Plaintiff responded and argued that section 3-109 (745 ILCS 3-109 (West 2010)) is the appropriate section of the Act to consider when determining whether Skokie is immune from plaintiff's claims because "cloud swinging" is a hazardous activity. Section 3-109 bars claims against a public entity or public employee for an injury sustained through the participation in a "hazardous recreational activity." However, section 3-109 "does not limit liability which would otherwise exist" due to the public entity or employee's failure to "guard or warn of a dangerous condition of which it has actual or constructive notice and which the participant does not have nor can be reasonably expected to have had" or if the public entity or employee's conduct was willful and wanton and was the proximate cause of the injury. 745 ILCS 10/3-109 (West 2010).

¶ 12 Plaintiff argued that because "cloud swinging" is a hazardous activity under section 3-109 and because she had sufficient evidence to support her allegation that Skokie's employees'

conduct was willful and wanton, a question of fact exists to preclude summary judgment. Attached to her response was the affidavit of Donald McPherson who attested that: (1) he reviewed relevant deposition testimony as well as a "YouTube" video showing the use of a "cloud swing"; (2) he has owned and operated a gymnastics school for over 36 years; (3) in his opinion Skokie's supervising staff should have known that their setup was reckless because it caused the "swing to swing bigger"; (4) based on his "YouTube" research, the way Skokie intended for its participants to use the swing can only be done by an experienced performer; (5) the staff was not properly trained; (6) Kacin did not inform Eliana of the proper grip to use when using the swing; (7) Kacin could have but did not make an attempt to grab the swing to immediately stop it from swinging before Eliana lost her grip; (8) the safety mats were not properly placed because the area directly under the swing was covered by the connecting seam of two 4x8 mats and not cushioned; (9) "it is obvious within a reasonable degree of professional certainty" that had the panel mats been extended Eliana would not have struck the gym floor; and (10) he opined that the defendants "were reckless" in their setting up the swing, spotting, supervision, and instruction and that "[t]hese reckless acts and overt disregard for safety measures *** are what caused Eliana's injuries."

¶ 13 On February 20, 2014, the circuit court granted Skokie's motion for summary judgment as to the negligence and willful and wanton claims. The circuit court first rejected plaintiff's argument that section 3-109 of the Tort Immunity Act was the proper section to consider in determining whether Skokie is immune from liability. The circuit court found that section 3-109 of the Act does not apply to the use of a "cloud swing," specifically finding, there is no evidence that "cloud swinging" is a hazardous recreational activity because the "potential injuries [here] are analogous to potential injuries related to gymnastics" which does not constitute a hazardous

recreational activity, relying on *Grandalski v. Lyons Township High School District 204*, 305 Ill. App. 3d 1 (1999) (basic gymnastic activities do not constitute a hazardous recreational activity under section 3-109 of the Tort Immunity Act).

¶ 14 The circuit court granted defendant's motion for summary judgment on paragraphs 25(a) (failure to provide proper type or amount of padding on the floor for Eliana's protection) and 25(d) (failure to provide safety harnesses or other forms of fall protection or minimize injury in the event of a fall) of count II for negligence under section 2-201 of the Act. Specifically, finding that under section 2-201, a public employee is immune from liability for an injury resulting from "his act or omission in determining policy when acting in the exercise of *** discretion" (745 ILCS 10/2-201 (West 2010)), therefore, "defendant is entitled to immunity based on the fact that their agent had immunity *** for the selection of mats and safety equipment as it is discretional as a policy choice that defendant has made."

¶ 15 The circuit court also entered summary judgment in favor of defendant on paragraphs 25(a) and (d) of count II under section 3-106 of the Act and on the remaining claim contained in paragraph 25(b) (failure to warn participant of risk of injury) of count II, under section 3-108 of the Act. Section 3-106 immunizes a public entity or employee from liability for an injury where liability is based on the condition of public property. 745 ILCS 10/3-106 (West 2010). Section 3-108 immunizes a public entity or employee from liability for injuries arising from the entity or employee's supervision of a recreational activity. 745 ILCS 10/3-108 (West 2010). The immunity provided under sections 3-106 and 3-108 does not attach for injury arising from the public entity or public employee's willful and wanton conduct. Here, the circuit court found that the claims against Skokie are barred under sections 3-106 and 3-108 because "[p]laintiff has proffered no evidence that the defendant acted willfully and wantonly in the instruction or

training of plaintiff on the cloud swing." In reviewing the affidavit of plaintiff's expert, the circuit court found it lacking stating that "[p]laintiff's reliance on reckless acts are grounded in conclusory facts." The court concluded that "plaintiff produce[d] no evidence that the defendant acted [with] anything but a conscious regard for the child's safety."

¶ 16 On June 4, 2014, Braun moved to reconsider summary judgment. Braun attached a second affidavit by McPherson, as well as other supporting documents, such as Wikipedia articles, claiming that camp staff had acted recklessly in their supervision and instruction of Eliana. The circuit court struck the McPherson affidavit and the other exhibits offered on the basis that they were not in conformity with Illinois Supreme Court Rule 191(a) (eff. July 1, 2002) and therefore, were improperly attached to the motion. The circuit court denied Braun's motion to reconsider, reiterating that the use of a "cloud swing" was not a hazardous recreational activity as defined in section 3-109 of the Act and that Braun had failed to adduce any evidence of willful and wanton conduct such to create a question of fact that would defeat summary judgment.

¶ 17 On June 19, 2014, the circuit court entered an order pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) finding that there was no just reason to delay enforcement or appeal of the orders granting defendant summary judgment. Thereafter, Braun timely filed this appeal.

¶ 18 ANALYSIS

¶ 19 Because this appeal is from the circuit court's entry of summary judgment, our review is *de novo*. *Evans v. Brown*, 399 Ill. App. 3d 268, 244 (2010). Summary judgment is appropriate " 'if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a

judgment as a matter of law.' " *Irwin Industrial Tool Co. v. Illinois Department of Revenue*, 238 Ill. 2d 332, 339-40 (2010) (quoting 735 ILCS 5/2-1005(c) (West 2010)).

¶ 20 The purpose of the Tort Immunity Act is to protect local public entities and public employees from liability arising from the operation of government. 745 ILCS 10/1-101.1(a) (West 2010). "In promulgating the Tort Immunity Act, the legislature 'sought to prevent the dissipation of public funds on damage awards in tort cases.' " *Kevin's Towing, Inc. v. Thomas*, 351 Ill. App. 3d 540, 544 (2004).

¶ 21 On appeal, plaintiff argues that "cloud swinging" is a hazardous recreational activity under section 3-109 of the Act, and therefore, immunity must be considered *only* under section 3-109.

¶ 22 Section 3-109 provides immunity to a public entity or public employee for an act or omission that proximately caused injury to an individual participating in a hazardous activity. However, immunity is not available where the injury was proximately caused by the entity or employee's willful and wanton acts or omissions, or where the injury resulted from the failure of the entity or employee to warn of a dangerous condition for which it had actual or constructive notice and the participant did not or could not have had reasonable notice of the danger. 745 ILCS 10/3-109 (West 2010).

¶ 23 Willful and wanton conduct is defined 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 2010).

¶ 24 Plaintiff cites to *Murray v. Chicago Youth Center*, 224 Ill. 2d 213 (2007) for the proposition that, where an injury was sustained during a hazardous activity that is part of a public entity's program, section 3-109 is the exclusive section to consider in determining whether tort

immunity is available under the Act. Plaintiff argues that, if "cloud swinging" is a hazardous activity, then a fact question exists concerning whether Skokie's acts or omissions were willful and wanton to defeat the grant of immunity under section 3-109.

¶ 25 In *Murray*, the 13-year-old plaintiff was rendered a quadriplegic from a trampoline accident during an extracurricular lunch period tumbling class. *Id.* at 217. The Illinois Supreme Court considered whether section 3-109 of the Act controlled over other sections of the Act on the question of immunity. The court found that, where a person voluntarily participates in hazardous recreational activities on public property and where the statute specifically listed trampolining as a hazardous activity, section 3-109 prevailed over sections 2-201 and 3-108(a). Thus, because trampolining was specifically listed as a hazardous activity, the *Murray* plaintiffs were entitled to rely on section 3-109's exception for willful and wanton conduct and the public entity could not rely on the immunity provided by sections 2-201 and 3-108(a), because one specific section of the Act addresses the underlying activity and that section controls on whether the public entity has immunity. *Murray*, 224 Ill. 2d at 234.

¶ 26 Plaintiff contends that, under *Murray*, section 3-109 is the appropriate section to consider when deciding whether a public entity or public employee can be liable for an injury arising from plaintiff's participation in a hazardous activity, not sections 2-201, 3-106 and 3-108. However, given that "cloud swinging" is not shown as a hazardous recreational activity and because there is insufficient evidence presented by plaintiff that "cloud swinging" is a hazardous recreational activity, we find that her claims do not fall within the purview of section 3-109.

¶ 27 Section 3-109(a) explicitly immunizes public entities and employees from liability in relation to a person voluntarily participating in hazardous recreational activities:

"(a) Neither a local public entity nor a public employee is liable to any person who

participates in a hazardous recreational activity, including any person who assists the participant, or to any spectator who knew or reasonably should have known that the hazardous recreational activity created a substantial risk of injury to himself or herself and was voluntarily in the place of risk, or having the ability to do so failed to leave, for any damage or injury to property or persons arising out of that hazardous recreational activity." 745 ILCS 10/3-109(a) (West 2010).

Section 3-109(b) provides a broad definition of hazardous recreational activity:

"(b) As used in this Section, 'hazardous recreational activity' means a recreational activity conducted on property of a local public entity which creates a substantial (as distinguished from a minor, trivial, or insignificant) risk of injury to a participant or a spectator." 745 ILCS 10/3-109(b) (West 2010).

Section 3-109(b) further provides an enumerated list of specific hazardous recreational activities:

" 'Hazardous recreational activity' also means:

(1) Water contact activities, except diving, in places where or at a time when lifeguards are not provided and reasonable warning thereof has been given or the injured party should reasonably have known that there was no lifeguard provided at the time.

(2) Diving at any place or from any structure where diving is prohibited and reasonable warning as to the specific dangers present has been given.

(3) Animal racing, archery, bicycle racing or jumping, off-trail bicycling, boat racing, cross-country and downhill skiing, sledding, tobogganing, participating in an equine activity as defined in the Equine Activity Liability Act, hang gliding, kayaking, motorized vehicle racing, off-road motorcycling or four-wheel driving

> of any kind, orienteering, pistol and rifle shooting, rock climbing, rocketeering, rodeo, spelunking, sky diving, sport parachuting, body contact sports (i.e., sports in which it is reasonably foreseeable that there will be rough bodily contact with one or more participants), surfing, trampolining, tree climbing, tree rope swinging where the person or persons furnished their own rope, water skiing, white water rafting, and wind surfing." 745 ILCS 10/3-109(b) (West 2010).

¶ 28 Section 3-109(c) qualifies section 3-109(a)'s liability limitation by adding:

> "(c) Notwithstanding the provisions of subsection (a), this Section does not limit liability which would otherwise exist for any of the following:
>
> (1) Failure of the local public entity or public employee to guard or warn of a dangerous condition of which it has actual or constructive notice and of which the participant does not have nor can be reasonably expected to have had notice.
>
> (2) An act of willful and wanton conduct by a public entity or a public employee which is a proximate cause of the injury." 745 ILCS 10/3-109(c) (West 2010).

¶ 29 As framed by the plaintiff, this appeal turns on whether Skokie's use of the "cloud swing" was a hazardous recreational activity under section 3-109 of the Act, and if so, whether Skokie operated the device in a willful and wanton manner. Section 3-109 defines "hazardous activity" as "a recreational activity conducted on property of a local public entity which creates a substantial (as distinguished from a minor, trivial, or insignificant) risk of injury to a participant or a spectator." 745 ILCS 10/3-109(b) (West 2010). Section 3-109 further identifies specific activities which also "mean" hazardous recreational activity. Use of a "cloud swing" is not included as an activity that means "hazardous recreational activity." However, not being included in section 3-109 as a hazardous recreational activity is not important to our analysis because

there is no legislative intent to provide an exclusive list of activities deemed hazardous. Given the nature of human creativity, new activities, like "cloud swinging," are devised frequently. There is no reasonable expectation that the legislature could keep pace by way of amending the statute, so we look to the statute to compare the listed activities to the activity in question to aid in the determination of what is a hazardous recreational activity. Thus, in determining whether a particular activity is hazardous, this court compares the activity in question to the activities specifically listed in section 3-109.

¶ 30 In *McCuen v. Peoria Park District*, 245 Ill. App. 3d 694 (1993), we considered whether a hayrack ride pulled by two mules was a hazardous recreational activity. There, while defendant's employee attempted to harness the mules, they broke free and ran off with the driverless hayrack, resulting in injuries to several riders who fell or jumped off the hayrack. *Id.* at 695. In discussing whether this constituted a hazardous activity under section 3-109 we explained that:

> "[w]e do not hesitate to agree with the trial court in its decision that the mule-drawn hayrack ride involved in this case is not the type of 'hazardous recreational activity' for which a public entity is granted immunity under section 3-109 of the Act. The risks assumed by participants in animal racing, equestrian competition and rodeos, which the Act specifically enumerates among such activities [citation], cannot rationally be compared to the ride plaintiffs embarked upon in this case." *Id*. at 699.

The *McCuen* court went on to hold that section 3-109 of the Act had no applicability to the recreational activity involved in that case. *Id.* The *McCuen* court reached this conclusion by comparing the injury causing activity to similar enumerated activities under section 3-109(b).

¶ 31 Similarly in *Grandalski v. Lyons Township High School District 204*, 305 Ill. App. 3d 1, 12 (1999), this court considered whether a gymnastics class was a "hazardous recreational

activity." In *Grandalski*, the plaintiff had been injured while trying to perform a "flip-flop" while participating in her physical education class which involved basic gymnastic exercises. *Id.* at 3. The court found that "[a] basic gymnastics class is not the type of activity that falls under section 3-109." *Id.* at 12.

¶ 32 Plaintiffs also rely on *Murray v. Chicago Youth Center*, 224 Ill. 2d 213 (2007) for the proposition that using a "cloud swing" is analogous to trampolining under section 3-109. This reliance is misplaced because *Murray* is readily distinguishable. First, trampolining is specifically enumerated in the Act, and "cloud swinging" is not.[4] See *Id.* at 234 ("[t]rampolining is specifically listed in section 3-109(b)(3) of the Act as a hazardous recreational activity"). Second, and importantly, plaintiff presented no evidence to support her argument that the risks assumed by participants using a trampoline are the same as those regarding use of a "cloud swing." Without evidence that would allow consideration of the nature and extent of the risks involved in the activity there would be no basis to determine whether the activity is hazardous.

¶ 33 Plaintiff also argues that using a "cloud swing" is not similar to basic gymnastics. However, without a record to rely on, our limited view of a gymnastics class and use of a "cloud swing," indicates that similarities can be drawn. Both activities are conducted in a gymnasium with cushioned mats to soften landings. Participants are commonly spotted by supervisors in both gymnastics and the use of a "cloud swing."

¶ 34 The only evidence plaintiff proffered to support her argument that "cloud swinging" is a hazardous recreational activity is her expert's affidavit. In that affidavit, her expert discusses Eliana's use of the swing and what her supervisors should have done to prevent Eliana's injury. Specifically, McPherson opines that: Kacin should have been better trained in how to supervise

[4] We note that the parties have not provided any authority and we have not found any decision by an Illinois court straying from the enumerated list of hazardous recreational activities.

Eliana; Kacin should have informed Eliana of the proper grip to use when swinging; Kacin should have grabbed the swing to stop Eliana before she fell; and Kacin should not have placed the mats with the seam directly under the swing. In fact, the thrust of the affidavit deals with the proper or preferred placement of mats, preparation for use of the swing, supervision of Eliana's use of the swing and how the supervisors' conduct was "reckless." The expert does not opine that "cloud swinging" is a hazardous recreational activity or offer an opinion that would allow us to conclude that "cloud swinging" is an activity "which creates a substantial (as distinguished from a minor, trivial, or insignificant) risk of injury to a participant." Essentially the opinion deals with Kacin's conduct, not that "cloud swinging" is a hazardous recreational activity. In sum, McPherson does not give any opinion and plaintiff does not provide us with any evidence from which to conclude that "cloud swinging" is a hazardous recreational activity**.**

¶ 35 We therefore conclude the circuit court properly found that use of a "cloud swing" is not a "hazardous recreational activity" under section 3-109. Because section 3-109 does not apply to the case at bar, we do not reach plaintiff's arguments that she proffered sufficient evidence to support the willful and wanton exception to immunity under section 3-109(c).

¶ 36 Lastly, we note that plaintiff does not challenge the immunity rulings under sections 2-201, 3-106 and 3-108 of the Act advanced by Skokie in its summary judgment motion. Although we review the grant of summary judgment *de novo*, our review is limited to those issues that are raised in the trial court (*Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 546 (1996)) and the appellate brief; our review cannot be otherwise extended (Ill. S. Ct. Rule 341(h)(7) (eff. Feb. 6, 2013); see *Canel & Hale, Ltd. v. Tobin*, 304 Ill. App. 3d 906, 910 (1999); *Taliani v. Herrmann*, 2011 IL App (3d) 090138, ¶ 23 ("all arguments not raised in an opening appellate brief are forfeited.").

¶ 37 Although defendant argued in its motion for summary judgment and the circuit court held that Skokie is immune from plaintiff's claims under other sections of the Act, plaintiff did not argue at the trial court and does not now argue that Skokie is not immune under those sections, other than to argue that section 3-109 should prevail over all other sections addressing tort immunity. The entire basis of her appeal is: (1) "cloud swinging" is a hazardous activity, thus section 3-109 of the Act is the appropriate section to consider when determining whether Skokie is immune from her claims; and (2) her expert's affidavit created a question of fact as to whether Skokie's conduct was willful and wanton, and therefore, Skokie is not immune under section 3-109 of the Act. Accordingly, we find that because plaintiff failed to raise any argument at the trial court or in her appeal brief that the circuit court erred in finding that sections 2-201, 3-106 and 3-108 of the Act apply and bar plaintiff's claims, we will not address the circuit court's finding that plaintiff's claims are barred under those sections. *Supra*, ¶ 33.

¶ 38 CONCLUSION

¶ 39 For the foregoing reasons, we affirm the circuit court's entry of summary judgment in favor of defendant.

¶ 40 Affirmed.