2019 IL App (1st) 163238-U

SIXTH DIVISION
March 29, 2019

No. 1-16-3238

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BARBARA ANN WHITE, as Guardian of Michael White, Jr., a disabled person, Plaintiff-Appellant, v. WAL-MART STORES, INC., U.S. SECURITY ASSOCIATES, INC., DOROTHY SEXTON, JENNIFER LARD, and WALTER NORMAN, Defendants-Appellees (Clara Jarka and Clara White, Plaintiffs).	)	Appeal from the Circuit Court of Cook County. No. 12 L 8734 Honorable Sheryl Pethers and John Callahan, Jr., Judges Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justice Connors concurred in the judgment.
Justice Harris concurred in part and dissented in part.

ORDER

¶ 1 ***Held:*** The circuit court erred in granting summary judgment on plaintiff's false imprisonment claim and negligent spoliation of evidence claim, and in *sua sponte* dismissing a general negligence claim. The circuit court properly granted defendant's motions for summary judgment and to dismiss on the remaining counts. The circuit court did not err in denying plaintiff's motion to compel asset discovery. Affirmed in part; reversed and remanded in part.

¶ 2 This appeal arises from a personal injury action brought by plaintiffs Michael White, Jr. (Michael) (by his mother and guardian, Barbara Ann White (Barbara)),[1] Clara Jarka (Clara), and Clara White (Clara Jarka's mother) (Mrs. White) against defendants Wal-Mart Stores, Inc. (Wal-Mart), U.S. Security Associates, Inc. (U.S. Security), Dorothy Sexton, Jennifer Lard, and Walter Norman. Michael appeals the circuit court's granting of defendants' motion for summary judgment on certain counts, its dismissal of other counts, and its denial of his motion to compel asset discovery. We affirm in part, and reverse and remand in part.

¶ 3 BACKGROUND

¶ 4 The fourth amended complaint at issue here contains the following general allegations. At around 7:30 p.m. on March 10, 2012, Clara, Michael, Mrs. White, and Clara's daughter (Shannon Jarka), went into a Wal-Mart store in Forest Park, Illinois, and began shopping for various items. Shannon was about 19 years old at the time, and Michael was 23. Michael had been adjudicated a mentally disabled adult pursuant to an order of the Circuit Court of Cook County. When they walked into the store, Clara was wearing a pink, long-sleeved sweater, but at some point she removed it. When they were in the checkout line, Clara put her sweater back on and left the store with Michael. Clara intended to get her car and drive to the front of the store to pick-up her mother (Mrs. White) and her daughter (Shannon), who were at the customer service desk in the store.

¶ 5 Wal-Mart employee Dorothy Sexton notified her coworker Jennifer Lard, and Walter Norman, an employee of U.S. Security (which provided theft prevention services to Wal-Mart), that Clara had stolen a sweater from the store and directed them to apprehend and detain Clara.

[1] We refer to Barbara as plaintiff herein because she, rather than Michael, is the actual plaintiff of record in her representative capacity as guardian. We will refer to Michael when discussing his individual actions.

Norman and Lard walked up to Clara in the parking lot, and Lard told Clara that she and Michael needed to come back into the store. When Clara asked why she was being asked to return to the store, Lard responded that something had been stolen. Clara then asked if she was being accused of theft, but Lard allegedly replied, "You have to go with us right now; you can't go anywhere." Clara and Michael then returned to the store in Norman and Lard's custody.

¶ 6 At about 9:15 p.m., Norman and Lard placed Clara and Michael into a holding room in the store. Clara asked for permission to advise her mother and daughter of her detention because they would be waiting outside for Clara to pick them up. Norman and Lard refused, and Lard accused Clara of stealing the pink sweater that Clara was wearing. Clara denied stealing the sweater and asked Lard to review the security tape of the entrance to confirm that Clara had entered the store wearing the sweater.

¶ 7 Clara also asked Lard and Norman to produce a sweater from the store's floor inventory that was the same design as the sweater Clara had been accused of stealing. Shortly thereafter, Sexton entered the holding room carrying a sweater from the store's inventory, which Sexton asserted was the type of sweater Clara had stolen. Clara, however, alleged that the sweater had an "obvious dissimilarity in style and color to the pink sweater in question."

¶ 8 Clara eventually called Shannon and told her that she and Michael were being detained. Mrs. White and Shannon subsequently arrived at "the area of the holding room." Norman and Lard told them that they could not leave the holding area until their investigation was complete. At some point, the cashier who had checked out Clara told Norman and Lard that the cashier never accused or suspected Clara of shoplifting.

¶ 9 Shortly after 10 p.m., the store manager apologized to Clara and acknowledged that Clara had been erroneously detained. Plaintiff alleged, however, that, despite this acknowledgement,

they were not allowed to leave and were detained for an additional one and one-half hours in an area just outside of the holding room. Norman and Lard stated that the family members were required to sign documents relating to the arrest and detention before being allowed to leave, but they refused to sign any documents. They demanded to be allowed to leave, but their request was denied, and they were detained until 11:45 p.m. to 12 a.m., when the store closed.

¶ 10 In the fourth amended complaint, plaintiffs alleged Wal-Mart, its personnel, and its loss-prevention contractor inflicted various personal injuries on Michael, among others, when defendants detained Clara for suspected shoplifting. In this appeal, only Michael's claims remain. Counts VII through IX alleged false imprisonment against Norman, Lard, and Sexton (count VII), Wal-Mart (count VIII), and U.S. Security (count IX); counts X through XII alleged intentional infliction of emotional distress against all defendants.

¶ 11 Counts XIX and XX, which alleged negligent and intentional spoliation of evidence by Wal-Mart, asserted that, on March 23, 2012, plaintiff's counsel sent a letter to Wal-Mart by facsimile transmission demanding that Wal-Mart preserve "any and all documents, tangible things, electronically stored information and surveillance videos" related to "the detainment and arrest of [Clara] and her nephew, [plaintiff]." Plaintiff, however, noted that, when Wal-Mart produced a compact disc that contained footage of Clara's detention, it did not contain footage of the family (1) shopping; (2) going through the checkout lane; (3) being apprehended in the parking lot; (4) being confined in the customer service area of the store; and (5) leaving the store. Plaintiff alleged that Wal-Mart failed to preserve this additional video footage and also the specific sweater that Sexton showed to Clara during Clara's detention. Count XIX alleged that Wal-Mart was merely negligent in failing to preserve these materials, whereas count XX alleged that Wal-Mart intentionally destroyed these materials "in an effort to thwart Plaintiffs' potential

claims arising from their arrest and detention." Both counts concluded that plaintiff was deprived of evidence that was "probative and necessary" to their claims.

¶ 12 Count XXI alleged negligent hiring and retention by Wal-Mart. Plaintiff explained that Wal-Mart had a policy requiring its Asset Protection Associates (APAs) "to have observed certain elements prior to making a stop of a suspected shoplifter (the 'Four Elements')." Plaintiff claimed, however, that, before Clara's detention, Wal-Mart "knew or should have known that Lard "was no[t] fit for her job as an APA" on the following five grounds: (1) in August 2007, Lard used profanity and argued with another associate on the sales floor at another store; (2) in November 2010, before being rehired by Wal-Mart, Lard was arrested and charged with unlawful use of a credit card; (3) in March 2011, after being rehired by Wal-Mart, Lard pleaded guilty to the offense and was sentenced to probation; (4) Lard made a "bad" stop at another store between February and March 2011 because the stop did not meet Wal-Mart's "Four Elements"; and (5) Lard made another "bad stop" in April 2011 at the store where Clara's detention took place.

¶ 13 With respect to count XXII (general negligence), plaintiff incorporated by reference "the allegations in paragraphs 1 through 37 and 191 through 214." Plaintiff alleged that defendants had the following duties:

> "a. To only detain a customer suspected of shoplifting where it had reasonable grounds to believe such shoplifting had occurred;
>
> b. To follow the Four Elements in conducting any investigation of alleged shoplifting;

c. To only detain a suspected shoplifter for a reasonable time;

d. To immediately release a suspected shoplifter after it determined that the customer had not shoplifted;

e. To only detain the individual who it believed to have committed shoplifting; and

f. Not to pressure a suspected shoplifter to sign a document admitting liability."

Plaintiff argued that defendants breached these duties by (1) detaining the family when there was no reasonable basis to believe any of them committed shoplifting; (2) failing to follow the Four Elements; (3) detaining plaintiffs in excess of one hour; (4) detaining them "even after it [*sic*] determined that [they] had not committed shoplifting"; (5) detaining the family "when it [sic] only believed, albeit erroneously, Clara had committed shoplifting"; and (6) pressuring Clara to sign a document admitting to liability. Plaintiff alleged damages in the form of "emotional distress and freedom of locomotion."

¶ 14 Count XXIII alleged willful and wanton misconduct. As with count XXII (general negligence), plaintiff incorporated precisely the same allegations: "the allegations in paragraphs 1 through 37 and 191 through 214." Plaintiff alleged that defendants had the same duties as alleged in count XXII and breached those duties in the same way. Plaintiff further asserted the same injuries. In count XXIII, however, plaintiff added that defendants breached those duties with "reckless disregard for the safety and wellbeing [*sic*] of Plaintiffs." The case proceeded through discovery which generated the following evidence.

¶ 15 Clara's Deposition

¶ 16 On November 21, 2013, Clara testified at her video deposition that, when the two individuals—one female, one male—approached her outside of the store, "They asked me to come back." Clara could not recall the names of either individual, but she did recall that the female was wearing either a uniform or vest identifying her as a Wal-Mart employee. She explained that, just inside the store to the right was a "holding area" where customers who were shopping could sit, and to the right of that holding area was a small office. Clara and Michael went back into the store with them and went inside the office. Clara agreed that neither she nor Michael were patted down, searched, or handcuffed.

¶ 17 According to Clara, the female Wal-Mart employee who had stopped her outside of the store accused her of stealing a sweater. At that point, the male individual left the room, but Clara could not recall whether he had closed the door behind him or left it open. A second female walked in, also accused Clara of stealing a sweater, and then left the office at the request of the other female to go retrieve the sweater that Clara had allegedly stolen. After the second female left, Clara was told that, since the sweater "was like five dollars or less, I could leave, I won't be arrested." Clara said that she told them they were making a mistake and that she did not steal anything, and she asked them to review their "film" to see what she had been wearing when she first walked into the store.

¶ 18 Clara then stated that the second female returned with a sweater that looked "nothing like" her sweater, and said "[T]his is the f***ing sweater that you stole." Clara said that this second female then threw the sweater on the table. Clara said that, at that point, she was "really upset," and said, "[H]ow dare you say something like that. I didn't steal anything." Clara said she was very upset and emotional because Michael was "crying practically, shaking." The

second female then left, and the first female told Clara and Michael to wait outside the office while she reviewed the video.

¶ 19 Clara agreed that, while she was in the office and before she went into the holding area, she told the female that her mother and daughter were in the store but did not know where she was. Clara stated that she had her cell phone with her and said she had to "text them and tell them what is going on." The employee did not respond, so Clara sent a text message to her daughter stating, "[T]hey told me I stole something. I'm in the office." Clara admitted that she did not tell the female or male security agents that Michael had certain medical issues and needed to go home. Instead, Clara said it was the "female employee manager" whom she told, but she did not know when or where she told her.

¶ 20 Clara said that, while she and Michael were sitting in the holding area, Michael said to her, "They're arresting you, auntie. They're arresting you." She told Michael not to worry and that it was a misunderstanding. Clara's daughter came back into the store with Clara's mother, Mrs. White. Clara said they remained in the holding area for over an hour while the defendants reviewed the video footage.

¶ 21 Clara stated that she also sent a text message to her brother, Tom White, told him that she was at the store "being arrested for stealing," and asked him to come to the store. Although her daughter and mother told Clara that she was being held against her will, Clara conceded that she was not in handcuffs, she was not locked in a room, and the holding area was open to the store. Clara, however, stated that there were a few employees in the front of the store "standing there watching me." Clara said that they did not say anything to her and were only looking at her.

¶ 22 After Tom had arrived, Clara said that she explained to the manager that they had to leave because Clara's mother was in a lot of pain from rheumatoid arthritis and because Michael

had "mental problems," but the manager purportedly responded, "Nobody is going anywhere." Clara admitted that she replied, "Okay." The manager then left the holding area. When asked, Clara could not provide this manager's name or physical description, and could not specify when the conversation with the manager took place. Clara, however, stated that she did not tell the "female and the male security guards" that Michael needed to go home.

¶ 23 According to Clara, the manager went into the security office. The door to the office was open, and Clara could hear the people in the office "screaming back and forth" and arguing. Clara said the manager left the office and was standing near the holding area. Clara and her family called the manager over and told her to call the police. The manager then brought Clara into the security office and told Clara that they made a mistake. The manager asked Clara, "[W]ould you go in the waiting area?" The manager explained that she had to contact "loss prevention, and you have to stay." Clara agreed.

¶ 24 After about half an hour, Clara went to "security" and asked to see the manager. Eventually, the manager arrived and said she could not reach loss prevention, and asked Clara to sign various documents. Clara refused, and the manager said "you're not going to go unless you sign this paper." At that point, Clara demanded that the police be called but agreed that no one physically restrained her and prevented her from leaving. The manager asked Clara to give her a few minutes. The manager returned shortly thereafter and told Clara that she could leave.

¶ 25 Lard's Deposition

¶ 26 Lard testified at her deposition that, when she stopped Clara outside of the store, she did not suspect Michael of doing anything improper. Lard further noted that Clara "insisted" that Michael accompany her back into the store. Lard testified that she had asked her whether there was anyone whom Michael could be with, but that Clara said no, and that "right now my mom is

still over there." Lard then replied, "[I]f you insist that he comes, that's fine, he can come with you." Lard later reiterated that Michael did not do anything that she observed was suspicious.

¶ 27 Plaintiffs' Motion to Compel

¶ 28 On June 30, 2014, plaintiffs filed a motion to compel Wal-Mart's and U.S. Security's discovery responses, or in the alternative, for leave to include a prayer for punitive damages pursuant to section 2-604.1 of the Code of Civil Procedure (Code) (735 ILCS 5-2-604.1 (West 2014)). Specifically, plaintiffs sought various documents related to Wal-Mart's and U.S. Security's assets and net worth, which both defendants refused to produce based upon an asserted privilege. On July 10, 2014, following a hearing, the circuit court denied plaintiffs' motion. On August 8, 2014, plaintiffs filed a "renewed motion to compel Wal-Mart's discovery responses [to plaintiffs' request for asset and net worth documents] and for an in camera inspection of certain documents in Wal-Mart's "amended privilege log." Plaintiffs noted that, in their initial motion to compel, defense counsel had argued at a hearing that the motion seeking asset and net worth information was premature because plaintiffs' motion for leave to file their fourth amended complaint was still pending. On August 18, 2014, following a hearing, the court again denied plaintiffs' renewed motion to compel Wal-Mart to produce its asset and net worth information, but granted plaintiff's motion for an in camera inspection.

¶ 29 Summary Judgment and Dismissal

¶ 30 On August 29, 2014, U.S. Security and Norman (the "U.S. Security defendants") filed a motion to dismiss counts XXII and XXIII of plaintiffs' complaint pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2014)). On October 6, 2014, Wal-Mart, Sexton, and Lard (collectively, the "Wal-Mart defendants") joined this motion. In addition, Wal-Mart moved to dismiss count XX of plaintiffs' complaint (intentional spoliation of evidence) pursuant to section

2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2014)). Wal-Mart argued that Illinois law does not recognize such a cause of action.

¶ 31 Also on October 6, 2014, the Wal-Mart defendants filed a motion for summary judgment on counts VII, VIII, X, and XI, which alleged false imprisonment of Michael (VII and VIII) and intentional infliction of emotional distress upon Michael (X and XI). The U.S. Security defendants joined this motion on October 14, 2014. The Wal-Mart defendants' summary judgment motion, which referenced a video surveillance recording that was attached as an exhibit, first argued that Michael lacked standing to prosecute a false imprisonment claim because the undisputed facts were that he was never subject to arrest. The motion further argued that Michael's detention was not due to any actions by defendants; rather, they argued that it was Clara who insisted that Michael remain by her side despite the fact that Clara's mother and daughter were still in the store. As to the intentional infliction of emotional distress counts, the Wal-Mart defendants argued that their actions did not amount to extreme and outrageous conduct, and in any event there was no evidence of intent of their part to cause emotional distress to Michael. The Wal-Mart defendants further noted that, although Clara asserted that Michael was crying and shaking, "video footage confirm[ed] that Michael [was] neither crying nor shaking during his time inside of the surveillance room." The Wal-Mart defendants' summary judgment motion included a transcript of the deposition of Michael's mother, Barbara White, who stated that Michael had a cognitive impairment since he was about three years old, and that Michael's learning level is "at probably Pre-K, pre-kindergarten."

¶ 32 On December 18, 2014, the circuit court granted defendants' motions in part. The court granted the motions as to counts XX (intentional spoliation of evidence) and XXIII (wilful and

wanton conduct), dismissing those counts, but it denied the motions as to count XXII (general negligence). The court granted defendants time to respond to count XXII.

¶ 33 On January 20, 2015, the circuit court granted summary judgment as to counts VII, VIII, X, and XI. The court further granted summary judgment in favor of the U.S. Security defendants on counts IX and XII. The case was then transferred from the Law Division to the First Municipal Division, based on the Law Division judge's conclusion that the potential remaining damages no longer met the Law Division's jurisdictional requirement.

¶ 34 On July 12, 2016, the Wal-Mart defendants filed a motion seeking summary judgment on counts XIX (Negligent Spoliation of Evidence), XXI (Negligent Hiring), and XXII (General Negligence). The Wal-Mart defendants argued that, since Michael was never detained but instead voluntarily accompanied his aunt Clara to the security office, Wal-Mart had no duty to preserve any evidence for him. In addition, the defendants argued that, "as evident from the deposition testimony and video footage produced herewith," Lard had no interactions with Michael on the day of incident and he remained in the store voluntarily, so therefore allegations concerning Lard's past or employment history were irrelevant. Finally, with respect to count XXII, Wal-Mart argued that it did not owe a duty to Michael because "he was neither detained nor questioned by Wal-Mart."

¶ 35 Also on July 12, 2016, the U.S. Security defendants filed a motion for summary judgment on count XXII of the complaint, which alleged "Negligence by all Defendants." The motion argued that, of the six duties asserted in the count, all but one referred to duties to a suspected shoplifter, which the U.S. Security defendants argued was only Clara and not Michael. The U.S. Security defendants added that the only remaining duty arguably applicable to Michael, namely, to "only detain the individual who is believed to have committed shoplifting," was tantamount to

the dismissed false arrest and imprisonment claim, and was thus subject to summary judgment in favor of defendants. Finally, the motion asserted that there was no evidence that the U.S. Security defendants detained Michael or that Michael had a reasonable fear for his own safety requiring recovery for damages under a negligent infliction of emotional distress theory of recovery.

¶ 36 On August 16, 2016, the circuit court entered a written order granting Wal-Mart's motion for summary judgment as to counts XIX (negligent spoliation) and XXI (negligent hiring & retention). In addition, the court *sua sponte* dismissed count XXII (general negligence by all defendants) "pursuant to section 2-615 [of the Code], as reflected on the record." The court granted plaintiffs 28 days to replead count XXII in a fifth amended complaint. On November 1, 2016, however, the court granted plaintiffs' motion to dismiss count XXII with prejudice, noting that plaintiffs elected to stand on the count so that the court's dismissal with prejudice would constitute a final and appealable order. This appeal followed.

¶ 37 ANALYSIS

¶ 38 Standards for Motions for Summary Judgment and Motions to Dismiss

¶ 39 Barbara (Michael's guardian), the only plaintiff appealing here, challenges the circuit court's granting of defendants' summary judgment motions and motions to dismiss. Summary judgment is appropriate if the pleadings, depositions, admissions, and affidavits 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." 735 ILCS 5/2-1005(c) (West 2014). Summary judgment is a drastic measure and should only be granted when the moving party's right to judgment is "clear and free from doubt." *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). "Where a reasonable person could draw divergent inferences from undisputed facts, summary

judgment should be denied." *Id.* To determine whether a genuine issue as to any material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. *Id.* at 131-32. However, unsupported conclusions, opinions, or speculation are insufficient to raise a genuine issue of material fact. *Id.* at 132.

¶ 40 A motion to dismiss under section 2-615 of the Code challenges the legal sufficiency of a complaint. *Kanerva v. Weems*, 2014 IL 115811, ¶ 33. The critical inquiry is whether the allegations of the complaint, when construed in the light most favorable to the nonmoving party, are sufficient to establish a cause of action upon which relief may be granted. *Id.* A complaint should not be dismissed under section 2-615 unless it is clearly apparent from the pleadings that no set of facts can be proven that would entitle the plaintiff to recover. *Id.*

¶ 41 In contrast, section 2-619 of the Code provides for involuntary dismissal based upon certain defects or defenses. 735 ILCS 5/2-619 (West 2012). Section 2-619(a)(5) of the Code permits dismissal if the suit was not "commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2016).

¶ 42 When ruling on a motion to dismiss under either section 2-615 or section 2-619, a court must accept all well-pleaded facts in the complaint as true and draw all reasonable inferences from those facts in favor of the nonmoving party. *Edelman, Combs & Latturner v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156, 164 (2003). Therefore, a motion to dismiss under either section cannot be granted unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006) (section 2-615); *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 8 (section 2-619).

¶ 43 " 'To survive a motion to dismiss pursuant to section 2–615, a complaint must be both legally and factually sufficient.' " *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 22 (quoting *Edelman, Combs & Latturner*, 338 Ill. App. 3d at 167). Moreover, Illinois is a fact-pleading jurisdiction, and although both sections 2–603(c) and 2–612(b) of the Code (735 ILCS 5/2–603(c), 2–612(b) (West 2016)) mandate the liberal construction of pleadings, these provisions do not authorize notice pleading. *Id.* (citing *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 426–27 (1981)). Rather, under Illinois fact pleading, the pleader must set out ultimate facts that support his cause of action. *Id.* (citing *People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill. 2d 300, 308 (1981)). Therefore, conclusory factual allegations unsupported by specific facts are not deemed admitted for the purposes of a section 2–615 motion to dismiss. *Id.* ¶ 35.

¶ 44 We review *de novo* the trial court's decision on motions for summary judgment as well as motions to dismiss brought under both sections 2-615 and 2-619. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008) (motions for summary judgment); *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006) (motions to dismiss). Finally, we review the judgment, not the reasoning, of the trial court, and we may affirm on any grounds in the record, regardless of whether the trial court relied on those grounds or whether the trial court's reasoning was correct. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 97 (1995).

¶ 45 *False Imprisonment and Intentional Infliction of Emotional Distress*

¶ 46 Plaintiff first contends that the circuit court erred in granting summary judgment in favor of defendants on counts VII through IX (false arrest and false imprisonment), and counts X through XII (intentional infliction of emotional distress).

¶ 47 The common law tort of false imprisonment is "an unreasonable restraint of an individual's liberty, against his will, caused or procured by the defendant." *Meerbrey v.*

Marshall Field & Co., 139 Ill. 2d 455, 474 (1990). The essential elements of false imprisonment are (1) the plaintiff was restrained by the defendant and (2) the defendant acted without having reasonable grounds to believe that an offense was committed by the plaintiff. *Id.* Although actual force is unnecessary to establish a false imprisonment claim and may be accomplished by "words alone," the alleged submission must nonetheless be to a "threatened and reasonably apprehended force." *Marcus v. Liebman*, 59 Ill. App. 3d 337, 339 (1978).

¶ 48 For a valid claim of intentional infliction of emotional distress, a plaintiff must prove (1) the defendant's conduct was "truly extreme and outrageous," (2) the defendant either intended that the conduct would cause severe emotional distress or knew that there was a high probability that severe emotional distress would result, and (3) the defendant's conduct did in fact cause severe emotional distress. *Schweihs v. Chase Home Finance, LLC*, 2016 IL 120041, ¶ 50 (citing *McGrath v. Fahey*, 126 Ill. 2d 78, 86 (1988)). Whether conduct is extreme and outrageous is determined using an objective standard based upon all of the facts and circumstances in a particular case. *Id.* ¶ 52. "It is clear that the tort does not extend to 'mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.' " *Id.* ¶ 51 (quoting Restatement (Second) of Torts § 46, cmt. d (Am. Law Inst. 1965)). Rather, the nature of the defendant's conduct must be so extreme as to go beyond all possible bounds of decency and to be regarded as intolerable in a civilized community. *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 270 (2003). However, behavior that is merely rude, abrasive, or extremely inconsiderate, which would not otherwise be actionable in a claim for intentional infliction of emotional distress, may be deemed extreme and outrageous conduct if the defendant knows that the plaintiff is particularly susceptible to emotional distress. *McGrath*, 126 Ill. 2d at 89-90.

¶ 49 As for severity, infliction of emotional distress alone is not sufficient to give rise to a cause of action; rather, the plaintiff must have suffered "severe" emotional distress. *Public Finance Corp.*, 66 Ill. 2d at 90. In particularly, while fright, horror, grief, shame, humiliation, worry, and other such mental conditions may fall within the scope of a general definition of the term "emotional distress," they alone are not actionable. *Id.* Instead, to be actionable, the distress inflicted must be so severe that no reasonable person could be expected to endure it. *McGrath*, 126 Ill. 2d at 86. The intensity and the duration of the distress are factors to be considered in determining the severity of the distress. *Id.*

¶ 50 In this case, Wal-Mart's motion relied in part upon video footage of the "surveillance room" where Lard initially interviewed Clara and Michael. The motion stated that Clara and Michael entered the surveillance room at around 9:13 p.m. and left it at around 9:22 p.m. According to the motion, Sexton and Tenesha Barron (a Wal-Mart employee) speaks with Clara "while Michael *** sits beside [her] and looks around the room." Wal-Mart's motion further states, "At no time is *** Michael White, Jr. seen shaking or crying." Wal-Mart's motion indicates that a copy of the video was attached to a "courtesy copy provided to the Court." No copy of this video is contained in the record.

¶ 51 In addition, plaintiff has failed to provide either a report of proceedings (or an acceptable substitute) for the hearing on the combined motion. Illinois Supreme Court Rules 321 and 324 require an appellant to provide a complete record on appeal, including a certified copy of the report of proceedings. See Ill. S. Ct. R. 321 (eff. Feb. 1, 1994); Ill. S. Ct. R. 324 (eff. July 1, 2017). If a verbatim transcript is unavailable, the appellant may file an acceptable substitute, such as bystander's report or an agreed statement of facts, as provided for in Rule 323. See Ill. S. Ct. R. 323 (eff. July 1, 2017). The burden of providing a sufficient record on appeal rests with

the appellant (here, plaintiff). *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156 (2005); *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). In the absence of such a record, we must presume the trial court acted in conformity with the law and with a sufficient factual basis for its findings. *Foutch*, 99 Ill. 2d at 392. Furthermore, any doubts arising from an incomplete record will be resolved against the appellant. *Id.* This is particularly true "when the judgment order states that the court is fully advised in the premises." *Dell'Armi Builders, Inc. v. Johnston*, 172 Ill. App. 3d 144, 149 (1988). With these limitations in mind, we consider plaintiff's claim.

¶ 52 With respect to Michael's false imprisonment claim, we are reviewing the circuit court's entry of summary judgment in favor of defendants. Accordingly, we must construe the pleadings and supporting documents in the light most favorable to the nonmoving party (Michael's guardian, the plaintiff). See *Outboard Marine*, 154 Ill. 2d at 131-32. Under this standard, we hold that the circuit court erred in granting summary judgment on plaintiff's false imprisonment claim. Clara's deposition revealed that, after her brother (Tom) arrived at the store while she, Michael, and other family members were waiting in the security area, Clara testified that she told a manager (but not Norman or Lard) that they had to leave because Clara's mother was in pain and because Michael had "mental problems." According to Clara, however, the manager responded that no one—including Michael—was allowed to go anywhere. Although Clara could not recall precisely when she alerted the manager of Michael's particular handicap, that ambiguity does not alter the fact that Wal-Mart's employee prevented Michael (who was never suspected of shoplifting at all) from leaving the store even after having been advised that his fragile mental state required that he be allowed to leave. Construing this in the light most favorable to plaintiff, and taking into account Michael's status as a mentally disabled adult, there

is at least a genuine issue of material fact that would preclude summary judgment in favor of Wal-Mart on count VII, plaintiff's false imprisonment claim.

¶ 53 Plaintiff's allegation of intentional infliction of emotional distress, however, fails for lack of support in the record. Clara stated in her deposition that Michael was "crying practically, shaking," which contradicts Wal-Mart's characterization that video footage of the surveillance room revealed that, "[a]t no time is [p]laintiff *** seen shaking or crying." Since plaintiff (the appellant) has failed to include this in the record, we must presume that the footage supports the circuit court's judgment. See *Foutch*, 99 Ill. 2d at 392. Consequently, the court properly granted summary judgment on this claim. One of the elements to an intentional infliction of emotional distress claim that plaintiff had to show is that "the defendant's conduct did in fact cause severe emotional distress." *McGrath*, 126 Ill. 2d at 86. Due to its absence, we are compelled to presume that the surveillance room video established that Michael did not suffer severe emotional distress, and his comment to Clara that "they" were arresting her—but not him—fatally weakens her intentional infliction of emotional distress claim for this reason alone.

¶ 54 Moreover, the facts establish that, at Clara's insistence, Michael entered the surveillance room with her at around 9:13 p.m. and left it at around 9:22 p.m. At that point, he, Clara, his grandmother, and his adult cousin (and later two additional family members), waited in an open area of the store near the surveillance room while Lard reviewed the store video to confirm Clara's innocence despite Lard's statement to her that Clara would not be arrested and could leave the store. The tort of intentional infliction of emotional distress "does not extend to 'mere *** indignities, threats, annoyances, petty oppressions, or other trivialities.' " *Id.* at 86 (quoting Restatement (Second) of Torts § 46, cmt. j (Am. Law Inst. 1965)). In our view, this detention

amounted to little more than the mere indignities, annoyances, petty oppressions, or other trivialities that this tort excludes.

¶ 55 Furthermore, Clara's initial detention was predicated upon a Wal-Mart employee suspecting Clara of shoplifting after witnessing Clara remove the price tag from a sweater, albeit from a sweater that Clara's mother had previously purchased at Wal-Mart. A claim of intentional infliction of emotional distress concerns conduct that is either "wholly lacking in social utility" (*Knierim v. Izzo*, 22 Ill. 2d 73, 85 (1961)) or "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (Restatement (Second) of Torts § 46, cmt. d (Am. Law Inst. 1965)). Wal-Mart's investigation of a possible act of retail theft cannot reasonably be described as wholly lacking in social utility, nor can its behavior during the detention and subsequent investigation be properly characterized as utterly intolerable in a civilized community. Therefore, the circuit court did not err in granting summary judgment in favor of defendants on this claim.

¶ 56 General Negligence and Willful and Wanton Conduct

¶ 57 Plaintiff next contends that the circuit court erroneously dismissed counts XXII (alleging general negligence) and XXIII (alleging willful and wanton conduct). Plaintiff notes that defendants moved to dismiss both counts pursuant to section 2-619 of the Code as barred by the statute of limitations and not subject to the relation-back doctrine. Plaintiff recounts that the circuit court (Law Division) granted defendants' motion with respect to count XXIII but denied it with respect to count XXII, but following the transfer of the cause to the Municipal Division of the circuit court, that court then dismissed count XXII *sua sponte* pursuant to section 2-615. Plaintiff argues that she has been "forced to speculate" as to the basis of the dismissal of both

counts but insists (under the presumption that the basis for both dismissals was the statute of limitations and the relation-back doctrine) that the counts "clearly grew out of the same occurrence identified in the original complaint; namely, the arrest and detention" at Wal-Mart.

¶ 58 Plaintiff's protest about having to speculate as to the basis of both dismissals is due to her own error. The Law Division of the circuit court issued its order dismissing count XXIII following a "hearing." In addition, the Municipal Division issued its order dismissing count XXII *sua sponte* after being "fully advised in the premises" and stated that the dismissal was "reflected on the record." Plaintiff, the appellant in this case, has not provided a report of proceedings (or acceptable substitute) of those hearings, despite the fact that she is obligated to do so pursuant to supreme court rule. See Ill. S. Ct. Rs. 321 (eff. Feb. 1, 1994), 324 (eff. July 1, 2017), 323 (eff. July 1, 2017); see also *Corral*, 217 Ill. 2d at 156 (it is the appellant's burden to provide a sufficient record on appeal). Although we review the court's judgment and not reasoning, and we may affirm on any basis in the record irrespective of whether the circuit court relied upon that basis (*Leonardi*, 168 Ill. 2d at 97), our review is hindered by the lack of complete record. Under such circumstances, we must presume the court's judgment was supported by a sound factual and legal basis in the absence of a complete record on appeal (*Foutch*, 99 Ill. 2d at 392). See also *Taliani v. Resurreccion*, 2018 IL App (3d) 160327, ¶ 20 (affirming the trial court's granting of a 2-615 motion to dismiss "because of the lack of a sufficient record on this issue"). We now turn to plaintiff's substantive contention.

¶ 59 The elements of a cause of action for negligence are (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) an injury proximately caused by the breach, and (4) damages. *Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188, 194-95 (1995). A claim of willful and wanton misconduct must allege "not only duty, breach, and proximate cause, but also

that defendants either intentionally injured plaintiff or acted in reckless disregard for his safety." *Scarano v. Town of Ela*, 166 Ill. App. 3d 184, 187 (1988). There is a "qualitative difference" between negligence and willful and wanton misconduct. *Campbell v. A.C. Equipment Services Corp.*, 242 Ill. App. 3d 707, 715 (1993) (citing *Burke v. 12 Rothschild's Liquor Mart, Inc.*, 148 Ill. 2d 429, 448-50 (1992)). "Plaintiffs may not merely reallege a negligence count and add a conclusory statement that the defendants' actions amounted to wil[l]ful and wanton misconduct." *Id.* at 715-16. Instead, a plaintiff must allege facts in the complaint that support "the allegations' willfulness and wantonness." *Id.* at 716.

¶ 60 Counts XXII and XXIII both alleged that defendants had the following duties: (1) to only detain a customer suspected of shoplifting upon reasonable grounds to believe that shoplifting had occurred; (2) to follow the Four Elements in conducting any investigation of alleged shoplifting; (3) to only detain a suspected shoplifter for a reasonable time; (4) to immediately release a suspected shoplifter upon determination that the customer had not shoplifted; (5) to only detain the individual it believed shoplifted; and (6) not to pressure a suspected shoplifter to sign a document admitting liability. There is no dispute that Michael himself was not a suspected shoplifter. Therefore, five of the six asserted duties, (1) through (4) and (6), do not apply to him, and plaintiff's claim cannot survive. *Beal by Hicks v. Kuptchian*, 164 Ill. App. 3d 191, 193 (1987) ("If no duty is found to exist, no recovery is possible as a matter of law, and summary judgment in favor of the defendant is proper.").

¶ 61 As a result, the only duty arguably applicable to Michael is (5), the purported duty to only detain individual(s) suspected of shoplifting. The injuries alleged, however, were "freedom of locomotion" and "emotional distress." It thus appears that plaintiffs were merely realleging false imprisonment and intentional infliction of emotional distress claims as general negligence. Since

we have already held, *supra*, that the circuit court did not err in granting summary judgment on the intentional infliction of emotional distress claim, plaintiff's contention partially fails for the same reason. As it relates to false imprisonment-related injuries, however, plaintiff's claim would survive a motion to dismiss for the same reasons that the false imprisonment count survives Wal-Mart's motion for summary judgment. Again, Clara's deposition indicated that, although she told a manager that they had to leave because Michael had "mental problems," the manager refused to allow *any* of them to leave. Since it is not clearly apparent from the pleadings that no set of facts can be proven that would entitle plaintiff to recover, dismissal under section 2-615 was unwarranted. See *Kanerva*, 2014 IL 115811, ¶ 33. As such, the circuit court erroneously dismissed count XXII.

¶ 62 We next consider count XXIII. Again, the asserted duty to only detain individuals suspected of shoplifting is the sole duty arguably applicable to Michael. To maintain a willful and wanton conduct cause of action, plaintiff had to also assert that defendants either intentionally injured Michael or acted in reckless disregard for his safety. *Scarano*, 166 Ill. App. 3d at 187. Here, plaintiff's allegation rests upon the bare assertion that defendants acted "with reckless disregard for the safety and wellbeing [*sic*]" of Michael. Plaintiff, however, failed to plead the ultimate facts in support of this count, which will not defeat a motion to dismiss pursuant to section 2-615. See *Coghlan*, 2013 IL App (1st) 120891, ¶¶ 22, 35. The circuit court was therefore correct to grant the motion to dismiss this count pursuant to section 2-615.

¶ 63 Moreover, construing the allegations of the complaint the facts in the light most favorable to the nonmoving party (plaintiff), as we must (see *Kanerva*, 2014 IL 115811, ¶ 33), dismissal of this count was warranted. In count XXIII, plaintiff alleged precisely the same duties and breaches, and incorporated by reference precisely the same allegations as he did in count XXII,

which alleged mere general negligence. Since there is a qualitative difference between general negligence and willful and wanton misconduct (see *Campbell*, 242 Ill. App. 3d at 715 (citing *Burke*, 148 Ill. 2d at 448-50)), plaintiff's mere realleging of his negligence count and adding a conclusory statement that the defendants' acts were willful and wanton is insufficient (see *id.* at 715-16). Although plaintiff argues that the security staff failed to follow the Four Elements and detained him for an additional one and half hours, those allegations, even taken as true, do not support a willful and wanton misconduct claim. A violation of self-imposed rules or internal guidelines neither imposes a legal duty nor constitutes evidence of even simple negligence. *Shank v. H.C. Fields*, 373 Ill. App. 3d 290, 296 (2007); see also *Fillpot v. Midway Airlines, Inc.*, 261 Ill. App. 3d 237, 244 (1994) (where airline owed no legal duty to remove snow or ice, airline's policy manual requiring the clearing of walkways did not create such a duty). Finally, we reject plaintiff's argument that, in this particular case, a 90-minute delay would constitute the reckless disregard for Michael's safety.

¶ 64 Spoliation of Evidence

¶ 65 Plaintiff also challenges the circuit court's granting of defendant's motion for summary judgment on count XIX (alleging negligent spoliation of evidence).[2] We note that plaintiff "now consents to the dismissal of count [XX] for intentional spoliation" of evidence. Plaintiff argues, however, that counts XIX and XX should be considered as a single claim of general negligence based upon Wal-Mart's alleged breach of the duty to preserve evidence (namely, video footage) where that evidence would be relevant to this litigation. Plaintiff asks that this court vacate the

[2] Wal-Mart's motion was directed at counts XIX (negligent spoliation), XXI (negligent hiring), and XXII (general negligence). The record does not indicate whether plaintiffs responded to Wal-Mart's motion for summary judgment on count XIX. Plaintiffs' response was titled as a response only to Wal-Mart's motion for summary judgment on count XXII, although the response did include arguments opposing summary judgment on count XXI.

circuit court's "dismissal" of both counts, and that this court "consider them as one additional claim under the heading of 'negligence' " based upon the applicable duty.

¶ 66 Since plaintiff concedes count XX was properly dismissed, we affirm the circuit court's dismissal of that count. Puzzlingly, however, plaintiff asks that we nonetheless vacate the "dismissal [*sic*]" of count XX (as well as count XIX), and "consider" both as a single negligence count. We decline plaintiff's invitation. This court is not the proper forum to present a new claim against defendants. Plaintiff had the opportunity in the circuit court to amend the complaint to plead general negligence based upon the alleged spoliation of evidence but failed to do so. As such, we will only determine whether the court below erred in dismissing count XIX, which alleged negligent spoliation of evidence on the part of Wal-Mart.

¶ 67 In *Boyd*, our supreme court held that an action for negligent spoliation of evidence could be stated under existing negligence law. *Boyd*, 166 Ill. 2d at 193. The court noted that, although there is generally no duty to preserve evidence, this duty may nonetheless arise through an agreement, contract, statute, affirmative conduct, or some other "special circumstance." *Id.* at 195. If any of those instances were to occur, a defendant would then owe a duty to preserve evidence "if a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action." *Id.*

¶ 68 With respect to the causation element of this claim, the *Boyd* court held that a plaintiff must allege sufficient facts to support a claim that the loss or destruction of the evidence "*caused the* plaintiff *to be unable to prove*" the underlying lawsuit. (Emphasis in the original.) *Id.* at 196. The court noted, however, that the plaintiff did not have to show that, but for the loss or destruction of the evidence, the plaintiff would have prevailed in the underlying action. *Id.* at 196 n.2. Instead, the plaintiff must establish, but for the defendant's loss or destruction of the

evidence, only "a reasonable probability of succeeding in the underlying suit." *Id.* "In other words, if the plaintiff could not prevail in the underlying action even with the lost or destroyed evidence, then the defendant's conduct is not the cause of the loss of the lawsuit." *Id.*

¶ 69 In this case, the circuit court erred in granting summary judgment in favor of defendants. Plaintiff's complaint alleged that Wal-Mart detained Michael not only in the "holding room" but also in the area just outside of the holding room, which plaintiff termed the "Customer Service area of the store." Since a reasonable person in Wal-Mart's position should have foreseen that the evidence was material to plaintiff's claim, Wal-Mart owed a duty to preserve this evidence. See *Boyd*, 166 Ill. 2d at 195. Plaintiff, however, was denied a relevant piece of evidence to support his claim of false imprisonment.

¶ 70 Plaintiff also established a reasonable probability of success in the underlying lawsuit had the additional video recordings been preserved. The recordings plaintiff sought related to the plaintiffs (1) shopping; (2) going through the checkout lane; (3) being apprehended in the parking lot; (4) being confined in the customer service area of the store; and (5) leaving the store. We note that there is no dispute as to any of those activities except arguably the fourth activity: plaintiffs' alleged confinement in the customer service area of the store. On that matter, however, Clara stated in her deposition that this purported detention took place *after* they were told they could leave and that no one would be arrested. She also conceded that neither she nor Michael were placed in handcuffs, patted down, or searched. She further agreed that the customer service area holding area was open to the rest of the store, and that the "few" employees in the front of the store were merely looking at her and never spoke to her. Viewing these facts in the light most favorable to plaintiff, the non-moving party, as we must (*Outboard Marine*, 154 Ill. 2d at 131-32), we are compelled to hold that, but for the defendant's loss or

destruction of the video, plaintiff had at least a "reasonable probability of succeeding" on this claim. See *Boyd,* 166 Ill. 2d at 196 n.2. The circuit court thus erred in granting summary judgment on count XIX.

¶ 71 Negligent Hiring and Retention

¶ 72 Plaintiff next contends that the circuit court erroneously granted summary judgment in favor of Wal-Mart on count XXI, which alleged negligent hiring and retention. Plaintiff argues that Wal-Mart either knew or should have known that Lard was unfit for her job and that Lard's unfitness created a danger to Michael based upon the following facts: (1) shortly after Walmart hired her, she pleaded guilty to unlawful use of a credit card (and was placed on probation for two years); (2) she made another "bad apprehension" prior to this incident when she failed to follow the "Four Elements"[3]; and (3) prior to this incident she received a "coaching" for using profanity and arguing with one of her coworkers.

¶ 73 A cause of action for negligent hiring or retention of an employee consists of the following elements: (1) the employer knew or should have known that the employee had a particular unfitness for the position so as to create a danger of harm to third persons; (2) the particular unfitness was known or should have been known at the time of the employee's hiring or retention; and (3) this particular unfitness proximately caused the plaintiff's injury. *Van Horne v. Muller*, 185 Ill. 2d 299, 311 (1998). An employer's direct liability for negligent hiring and retention differs from its *respondeat superior* liability for its employees' acts. *Id.* In a negligent hiring or retention claim, the proximate cause of the plaintiff's injury is the employer's negligence in hiring or retaining the employee, rather than the employee's wrongful act. *Id.*

[3] The complaint alleged that Lard had made two "bad" stops, one of which was at the same store as Clara's stop. Lard stated in her deposition, however, that she only had one prior bad stop at another store. Plaintiff does not seem to dispute this statement.

¶ 74 To successfully plead a cause of action for negligent hiring or retention, it is not enough for the plaintiff to simply allege that the employee was generally unfit for employment. *Id.* at 313. Rather, liability arises "when a *particular* unfitness of an employee gives rise to a particular danger of harm to third parties." (Emphasis in the original.) *Id.* The particular unfitness of the employee must have rendered the plaintiff's injury foreseeable to a person of ordinary prudence in the employer's position. *Id.*

¶ 75 Here, the circuit court properly granted summary judgment in favor of defendants. There is nothing in the three asserted grounds for plaintiff's claim that would indicate that Lard had a particular unfitness that gave rise to the particular danger of harm to Michael, or that there was any particular unfitness that would have rendered Michael's injury foreseeable to Wal-Mart. Her guilty plea to unlawful use of a credit card and prior "coaching" related to a profanity-laced argument with a coworker do not exhibit a particular unfitness related to the incident involving Michael. Finally, her prior "bad apprehension" at another store (the only other time this occurred) would not lead a person of ordinary prudence to view Michael's alleged injuries as foreseeable. See *id.* Again, even viewing the facts in the light most favorable to plaintiff, Wal-Mart's right to judgment was "clear and free from doubt." *Outboard Marine*, 154 Ill. 2d at 102. Therefore, the court correctly granted Wal-Mart's motion for summary judgment on this issue.

¶ 76 Plaintiffs' Motion to Compel Asset Discovery

¶ 77 Finally, plaintiff contends that the circuit court erred in denying her motion to compel asset discovery with respect to her punitive damages claim. Plaintiff states that, in the alternative, she had requested a hearing pursuant to section 2-604.1 of the Code (735 ILCS 5/2-604.1 (West 2016)) to add a claim for punitive damages, but the court improperly denied her request. Plaintiff argues that the court's denial of pertinent discovery as a result of its effective

striking of the prayers for punitive damages should not come under its discretion in regulating the conduct of discovery ***." Instead, plaintiff contends that it should be considered an error of law for "striking the plaintiffs' prayers for punitive damages without grounds and without a hearing." Plaintiff thus asserts a *de novo* standard of review applies.

¶ 78 Putting aside the obvious fact that Wal-Mart is a publicly traded company whose financial records are widely available without the need to employ judicial process to compel their release, this claim is unavailing. First, Illinois Supreme Court Rule 341 requires that the argument section of an appellant's brief "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). Although plaintiff recites section 2-604.1, she cites nothing concerning her central challenge: the circuit court's denial of her motion to compel asset discovery. Plaintiff cites neither the appropriate standard of review nor anything else with respect to discovery requirements in support his argument. A reviewing court is not merely "a repository into which an appellant may 'dump the burden of argument and research,' nor is it the obligation of this court to act as an advocate or seek error in the record." *U.S. Bank v. Lindsey*, 397 Ill. App. 3d 437, 459 (2009) (quoting *Obert v. Saville*, 253 Ill. App. 3d 677, 682 (1993)). Failure to comply with Supreme Court Rule 341 results in a waiver of those issues. *Id.* On this basis alone, we affirm the decision of the circuit court.

¶ 79 CONCLUSION

¶ 80 We reverse the judgment of the Circuit Court of Cook County on Wal-Mart's motion for summary judgment on counts VII and XIX, as well as the court's *sua sponte* dismissal of count XXII under section 2-615. We remand this matter for further proceedings. We otherwise affirm the judgment of the circuit court.

¶ 81 Affirmed in part; reversed and remanded in part for further proceedings.

¶ 82 JUSTICE HARRIS, concurring in part and dissenting in part.

¶ 83 I concur with the majority on all issues except for its determination to affirm summary judgment in favor of defendants on plaintiff's intentional infliction of emotional distress claim. The record establishes that Michael has been adjudicated a mentally disabled adult. He has been cognitively impaired for most of his life, and has the learning capacity of a pre-kindergartener. He understood that they were being held because Clara was being arrested, and Clara testified that at some point he was crying and shaking. Although the video purportedly shows that Michael was not crying or shaking while on surveillance, that does not necessarily show he did not suffer severe emotional distress. As the majority correctly points out, conduct that is not otherwise actionable in a claim for intentional infliction of emotional distress "may be deemed extreme and outrageous conduct if the defendant knows that the plaintiff is particularly susceptible to emotional distress." Clara testified that she informed a manager about Michael's mental state and medical issues. At the very least, a genuine issue of material fact exists and I would therefore reverse summary judgment on this claim as well.