2018 IL App (1st) 170916-U

FIRST DIVISION
March 30, 2018

No. 1-17-0916

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IVAN FERNANDEZ, by his mother and next friend OFELIA LUNA, JONATHAN HERNANDEZ, by his mother and next friend ISIS CARABALLO, and RYAN WALLACE,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	
v.	)	No. 2016 L 009786
ANGEL PAGAN and NOBLE NETWORK OF CHARTER SCHOOLS, an Illinois Not-For-Profit Corporation,	)	Honorable James N. O'Hara,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Pierce and Justice Harris concurred in the judgment.

O R D E R

¶ 1 *Held*: Court reverses the dismissal of plaintiff students' claims against defendant charter school because the trial court incorrectly construed the complaint as alleging the school's liability for defendant teacher's sexual misconduct with students on a *respondeat superior* basis, when the complaint actually alleged that the school was directly liable for its own willful and wanton failure to review the teacher's criminal background, supervise the teacher, and respond to credible complaints of misconduct by the teacher against students.

¶ 2 Plaintiffs Ivan Fernandez and Jonathan Hernandez—both suing by their respective mother and next friend—and plaintiff Ryan Wallace appeal from the judgment of the trial court dismissing their claims against defendant Noble Network of Charter Schools (NNCS) for willful and wanton failure to supervise Angel Pagan, a dance and physical education instructor employed by Noble Street College Prep (Noble). In its judgment, the trial court relied on *Doe ex rel. Doe v. Lawrence Hall Youth Services*, 2012 IL App (1st) 103758, in which this court affirmed the dismissal of a complaint for negligent supervision of a teacher's sexual misconduct with a student based on that teacher's agency relationship with the school. In *Lawrence Hall*, we held that "criminal sexual assault, by its very nature, precludes the conclusion that it was committed within the scope of employment under the doctrine of *respondeat superior* and, thus, an employer cannot be responsible" for the employee's sexual misconduct. *Id.* ¶ 28. The trial court applied *Lawrence Hall* by construing the complaint as pleading a *respondeat superior* theory of NNCS's liability and ruling that Mr. Pagan's conduct was necessarily outside the scope of his employment, warranting dismissal under section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2016)). We agree with plaintiffs that the complaint alleged direct liability against the school. We reverse the dismissal and remand for further proceedings on the claims against NNCS.

¶ 3 I. BACKGOUND

¶ 4 This action stems from the sexual misconduct of Mr. Pagan and NNCS's alleged failure to supervise him in his dance and physical education instruction of students at Noble, including the three plaintiffs. The following draws from the factual allegations in the complaint, which are taken as true for purposes of dismissal under section 2-619.

¶ 5 At the time of the misconduct giving rise to this case, plaintiffs were each 17- or 18-year-

old students at Noble. NNCS had employed Mr. Pagan full time as a dance and physical education instructor for eight years. Plaintiffs were students in Mr. Pagan's dance or physical education classes during the 2015–2016 school year.

¶ 6 Plaintiffs alleged that Mr. Pagan began abusing male students on a daily basis in November 2015, including the three plaintiffs. In his coeducational dance class or in physical education class, Mr. Pagan "[held] onto each boy's penis (over the clothing)," ostensibly to check the students' athletic supporters. Mr. Pagan also sent pictures of his genitals to "many if not all members of his dance class including plaintiffs," along with "explicit, sexual text messages." In addition, "during basketball season [Mr. Pagan] would enter the players' (including plaintiffs) shower room naked and stare at the showering players while his own penis was erect." Plaintiffs claimed that Mr. Pagan was indicted for, and pled guilty to, distribution of harmful materials, aggravated criminal sexual abuse, and sexual exploitation of a child.

¶ 7 Plaintiffs also alleged that "[f]or a substantial period of time preceding and at the time of the conduct described above, NNCS's administration knew or should have known about said conduct but deliberately, willfully and wantonly declined to take any action to stop or prevent it."

¶ 8 The complaint contained nine counts—three for each plaintiff—with counts I, IV, and VII alleging intentional infliction of emotional distress against Mr. Pagan, and counts II, V, and VIII alleging battery against him. The claims at issue in this appeal—found in counts III, VI, and IX—were directed by each respective plaintiff at NNCS alleging willful and wanton failure to supervise. These counts were identical and alleged that NNCS "owed a duty to its students including plaintiff to ensure that its employees were properly supervised and monitored in the commission of their duties." Plaintiffs claimed that NNCS breached its duty to them and was

directly liable for willful and wanton failure to properly and adequately (a) "review Pagan's background and qualifications including his prior criminal convictions"; (b) "supervise, monitor and/or train Pagan for his position as a teacher"; and (c) "respond to reliable information concerning Pagan's conduct including but not limited to the imposition of appropriate discipline including but not limited to termination." The complaint does not contain any allegations of "prior criminal convictions."

¶ 9 Plaintiffs filed their complaint on October 4, 2016. On December 5, 2016, NNCS moved to dismiss the three counts levied against it under section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2016)). NNCS argued that (1) the complaint failed to state a claim for willful and wanton failure to supervise under section 2-615 of the Code (735 ILCS 5/2-615 (West 2016)); (2) the claims against NNCS were barred by affirmative matter under section 2-619 of the Code (735 ILCS 5/2-619 (West 2016)) through the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/2-201 (West 2016)); (3) Mr. Pagan's criminal actions were "outside the scope of employment as a matter of law," and "should be dismissed under 2-615"; and (4) plaintiffs' punitive damages claim should be stricken. Plaintiffs withdrew their punitive damages prayer, but contested NNCS's first three arguments.

¶ 10 On March 13, 2017, the trial court granted NNCS's motion and dismissed the claims against it with prejudice, finding that Mr. Pagan's conduct, as pled, was outside the scope of his employment. Although NNCS did not frame the scope of employment argument as an affirmative matter under section 2-619 of the Code (735 ILCS 5/2-619 (West 2016)), the trial court dismissed on this basis and not under section 2-615. The trial court stated that its "analysis is guided by the precedent" of *Lawrence Hall*, 2012 IL App (1st) 103758, and that "Illinois Courts have made clear that acts or allegations of sexual assault are not made within the scope of

employment," citing both *Lawrence Hall* and *Deloney v. Board of Education*, 281 Ill. App. 3d 775 (1996). The instant appeal followed.

¶ 11 II. JURISDICTION

¶ 12 The students filed their notice of appeal on April 6, 2017, appealing the order dated March 21, 2017, in which the trial court ruled under Illinois Supreme Court Rule 304(a) (Ill. S. Ct. R. 304 (eff. March 8, 2016)) that there was "no just reason for delaying either enforcement or appeal of this court's March 13, 2017 order" dismissing the claims against NNCS. We therefore have jurisdiction under Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered by the circuit court in civil cases. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. Jan. 1, 2015).

¶ 13 III. ANALYSIS

¶ 14 The trial court dismissed the counts against NNCS pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2016)) because it construed plaintiffs' claims as pleading *respondeat superior* and held, as a matter of law, that Mr. Pagan's sexual misconduct could not fall within the scope of his employment. In deciding a section 2-619 motion, a court accepts all well-pled facts and their inferences as true and construes all pleadings and supporting documents in favor of the non-moving party. *Estate of Alford v. Shelton*, 2017 IL 121199, ¶ 21. "Under section 2-619(a)(9), a defendant is entitled to a dismissal if 'the claim asserted against the defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim.' " *Id.* (quoting 735 ILCS 5/2-619(a)(9) (West 2016)). "A motion for involuntary dismissal under section 2-619(a)(9) is properly brought to determine questions of employment and the scope of employment." *Houston v. Quincy Post 5129, Veterans of Foreign Wars*, 188 Ill. App. 3d 732, 735 (1989). We review an order granting dismissal under section 2-619 *de novo*. *Shelton*, 2017

IL 121199, ¶ 21.

¶ 15 The trial court dismissed the counts against NNCS by relying on our decision in *Lawrence Hall*, 2012 IL App (1st) 103758, in which a teacher at the residential private school Lawrence Hall Youth Services allegedly engaged in an improper sexual relationship with the minor plaintiff off of school grounds. *Id.* ¶ 3. The plaintiff sued Lawrence Hall for negligent supervision and intentional infliction of emotional distress, alleging that as a direct result of the school's special custodial relationship with the plaintiff, the school had a duty to protect him "from a criminal attack by a third person, its employee and agent." *Id.* ¶ 7. After affirming that Lawrence Hall was immune to the plaintiff's claims through the protection afforded it by the Illinois School Code (105 ILCS 5/34-84a (West 2010)), we reviewed whether the trial court erred in also dismissing the school based on its finding of no *respondeat superior* liability. *Id.* ¶¶ 17-23, 25. We drew on the exhaustive analysis of sexual misconduct/scope of employment cases reviewed in *Deloney* and affirmed the dismissal of Lawrence Hall because "sexual assault by its very nature precludes a conclusion that it occurred within the employee's scope of employment under the doctrine of *respondeat superior*." *Id.* ¶ 30.

¶ 16 Plaintiffs in the instant case concede on appeal that "[i]f this is really a respondeat superior case, defendant is right; it should have been dismissed," but insist that "it isn't and never was." We agree with plaintiffs, both in their concession that they cannot succeed on a *respondeat superior* claim and in their contention that this complaint alleges direct liability.

¶ 17 First, as plaintiffs recognize, the *Deloney* court held:

> "Under the doctrine of *respondeat superior*, an employer may be liable for the negligent, wil[l]ful, malicious or even criminal acts of its employees when such acts are committed in the course of employment and in furtherance of the business of the

> employer; however the employer is not liable to an injured third party where the acts complained of thereby were committed solely for the benefit of the employee." (Internal quotation marks omitted.) *Deloney*, 281 Ill. App. 3d at 784 (1996).

As we made clear in *Lawrence Hall*, this means that sexual misconduct by a teacher cannot give rise to vicarious liability for a school. *Lawrence Hall*, 2012 IL App (1st) 103758, ¶ 30.

¶ 18 But, unlike the complaint in *Lawrence Hall*, plaintiffs here do not allege, in counts III, VI, or IX, a theory of vicarious liability against NNCS. Although plaintiffs alleged that Mr. Pagan was employed by NNCS, they did not at all allege that he performed his sexual misconduct as part of his duties or in furtherance of the business of NNCS. Rather, plaintiffs have alleged direct liability on the basis of NNCS's willful and wanton failure to review Mr. Pagan's background and qualifications, failure to supervise, monitor and/or train Mr. Pagan for his position as a teacher, and failure to respond to reliable information concerning Mr. Pagan's misconduct.

¶ 19 While we do not agree with the trial court that the complaint rests on *respondeat superior*, we point out that plaintiffs could have been clearer in the briefing before the trial court regarding the exact theory on which their complaint was based. Plaintiffs distinguished *Lawrence Hall* in their abbreviated response to NNCS's "scope of employment" argument in that, unlike the off-campus misconduct of that case, "Pagan was acting as a dance teacher and locker room monitor when he engaged in criminal conduct; it was—at least in part—in furtherance of NNCS's business that Pagan perpetrated his misconduct." We understand how the trial court could have taken this as an attempt to distinguish *Lawrence Hall* and proceed on a theory of *respondeat superior* liability. However, the complaint rests on a different theory entirely—one that plaintiffs have emphasized through most of their briefing on the motion to

dismiss in the trial court and which we think is clear in their complaint.

¶ 20 The trial court did not reach NNCS's alternative arguments that this action failed to state a claim for willful and wanton conduct or was barred by the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/2-201 (West 2016)). Of course any claim against NNCS must fall within the exception to immunity for the school under that Act. Under section 3-108(a):

> "Except as otherwise provided in this Act, neither a local public entity nor a public employee who undertakes to supervise an activity on or the use of any public property is liable for an injury unless the local public entity or public employee is guilty of willful and wanton conduct in its supervision proximately causing such injury." 745 ILCS 10/3-108(a) (West 2016).

The Tort Immunity Act defines "willful and wanton conduct" as:

> "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property. This definition shall apply in any case where a 'willful and wanton' exception is incorporated into any immunity under this Act." *Id.* § 1-210.

¶ 21 Willful and wanton conduct is not an independent tort, but rather is "an aggravated form of negligence," requiring a plaintiff to plead "the basic elements of a negligence claim" and "either a deliberate intention to harm or a conscious disregard for the plaintiff's welfare." *Jane Doe-3 v. McLean County Unit District No. 5 Board of Directors*, 2012 IL 112479, ¶ 19. "Illinois courts define willful and wanton conduct, in part, as the failure to take reasonable precautions after knowledge of impending danger." (Internal quotation marks omitted.) *Barr v. Cunningham*, 2017 IL 120751, ¶ 20.

¶ 22 We remand this case to the trial court to allow that court to address in the first instance whether plaintiffs have properly alleged willful and wanton conduct and, if not, whether they should be allowed to amend in order to do so.

¶ 23 IV. CONCLUSION

¶ 24 For the foregoing reasons, the judgment of the trial court is reversed and the cause is remanded for further proceedings.

¶ 25 Reversed and remanded.