No. 2—10—0633
Order filed April 15, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

TREVOR EVANS, a Minor, by his Mother and Next Friend, May Evans,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellant,	)	
v.	)	No. 09—L—656
ANGELINA PETERS,	)	Honorable Raymond J. McKoski,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

ORDER

Held: The trial court properly dismissed plaintiff's complaint for negligent infliction of emotional distress; as plaintiff was a bystander to the incident, he had to allege that he sustained a physical injury or illness as a result of his emotional distress, yet he alleged only emotional and psychiatric injuries.

Plaintiff, Trevor Evans, by his mother and next friend, May Evans, brought suit against defendant, Angelina Peters, alleging that defendant negligently inflicted emotional distress upon him when she struck his grandmother, sister, and dog with her car. The trial court dismissed plaintiff's complaint with prejudice pursuant to section 2—615 of the Code of Civil Procedure (735 ILCS 5/2—615 (West 2008)), finding that plaintiff failed to adequately allege that he was within the "zone

of danger" created by defendant's negligence. Plaintiff now appeals. For the reasons that follow, we affirm.

BACKGROUND

Plaintiff alleged the following in his second amended complaint. On January 31, 2009, defendant was driving her vehicle down Coventry Circle in Vernon Hills. At the same time, plaintiff's grandmother, Nadira Yousif, and plaintiff's 12-year-old sister, Ashley Evans, were walking down Coventry Circle with the family's dog. Due to the lack of sidewalks and the snow on the curbs, Nadira and Ashley were walking on the roadway. Defendant, who was impaired and intoxicated due to her alcohol consumption and who possessed an open container of alcohol in her vehicle, struck Nadira, Ashley, and the dog with her vehicle. As a result of the impact, Nadira was thrown into the street and suffered a broken leg, bleeding, and bruising. Ashley was thrown into a snowbank with the dog. The dog died in Ashley's arms.

Defendant, whose car was partially embedded in a snowbank, attempted to pull Nadira into her car. Ashley yelled at defendant to stop, but defendant told Ashley to shut up and to get into the car. Ashley, carrying the dead dog, ran to Nadira's townhouse, which was approximately 40 feet from the scene of the accident. Ashley pounded on the front door and plaintiff, then nine years old, opened the door to see Ashley covered in blood and holding the dead dog. Ashley told him that someone had hit them and was trying to take Nadira. Defendant, at that time, was outside of the townhouse, outside of her car, and in some unknown location. Plaintiff believed that defendant was pursuing Nadira, Ashley, and possibly him and, thus, feared for his safety and called 911. Ashley ran to seek help from a neighbor, who physically restrained defendant.

Plaintiff alleged that defendant was negligent in one or more of the following respects: she (1) operated a vehicle while intoxicated; (2) operated a vehicle while impaired by alcohol consumption; (3) operated a vehicle at a rate of speed that was too great for traffic and weather conditions; (4) operated a vehicle without keeping a proper and sufficient lookout; (5) failed to drive the vehicle in the marked lane; and (6) failed to yield the right-of-way to pedestrians.

Defendant filed a motion to dismiss, arguing that plaintiff failed to state a cause of action for negligent infliction of emotional distress, because plaintiff failed to adequately allege that he (1) was in the zone of danger created by the accident, (2) feared for his safety due to a high risk of physical impact, and (3) sustained a physical injury or illness as a result of his emotional distress. The trial court granted the motion, finding that plaintiff failed to adequately plead that he was in the zone of danger. The trial court granted plaintiff leave to replead, but shortly thereafter plaintiff requested that the trial court enter its dismissal with prejudice. The trial court granted plaintiff's request, and this timely appeal followed.

ANALYSIS

On appeal, plaintiff argues that the trial court erred in finding that he was not within the zone of danger created by the accident. "A section 2—615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face." *Tedrick v. Community Resource Center, Inc.*, 235 Ill. 2d 155, 160-61 (2009). We accept as true the well-pleaded facts and reasonable inferences in the complaint and construe the allegations in the light most favorable to the plaintiff. *Tedrick*, 235 Ill. 2d at 161. "Given these standards, a cause of action should not be dismissed, pursuant to a section 2—615 motion, unless it is clearly apparent that no set of facts can be proved

that would entitle the plaintiff to relief." *Tedrick*, 235 Ill. 2d at 161. Our standard of review is *de novo*. *Tedrick*, 235 Ill. 2d at 161.

The elements of a cause of action for the negligent infliction of emotional distress depend on whether the plaintiff was a direct victim of the defendant's negligence or was merely a bystander. Where the plaintiff is a direct victim of the defendant's negligence, he must plead and prove the basic elements of a negligence claim: a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by that breach. *Corgan v. Muehling*, 143 Ill. 2d 296, 306 (1991). On the other hand, if the plaintiff is a bystander to the defendant's negligence, the plaintiff must plead and prove that he was in the "zone of danger"; reasonably feared for his own safety; and suffered a physical injury or illness as a result of the emotional distress caused by the defendant's negligence. *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546, 555 (1983). To have been within the "zone of danger," the plaintiff must have been "in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact." *Rickey*, 98 Ill. 2d at 555.

It is apparent that plaintiff was a bystander to, not a direct victim of, defendant's alleged negligence. Plaintiff alleged only that defendant was negligent in the operation of her vehicle, and plaintiff was not a part of the incident until defendant had ceased operating her vehicle. Plaintiff was not struck by defendant's car, was inside the house at the time of the accident, and did not witness the accident. He became aware of the accident only once Ashley knocked on the door. Based on this, plaintiff is properly classified as a bystander rather than as a direct victim. Although plaintiff states in his brief that he believes he was a direct victim, he does so only in a parenthetical, and he does not explain why he should be considered a direct victim or otherwise develop the argument.

Moreover, both on appeal and in the trial court, plaintiff has focused on the elements of a bystander cause of action for negligent infliction of emotional distress. At no point has he mentioned the elements of a cause of action for a direct victim, much less explained how he has adequately pleaded them. Therefore, plaintiff has forfeited any contention that he was a direct victim rather than a bystander. *In re Commitment of Doherty*, 403 Ill. App. 3d 615, 622-23 (2010) (failure to develop an argument results in forfeiture).

Plaintiff argues that the trial court erred in concluding that he failed to adequately allege that he was within the "zone of danger" created by defendant's negligence. We need not address this contention, because, in any case, the dismissal of plaintiff's second amended complaint may be affirmed on the ground that plaintiff failed to allege that he suffered a physical injury or illness as a result of the emotional distress caused by defendant's negligence. See *Kumar v. Bornstein*, 354 Ill. App. 3d 159, 165 (2004) (section 2—615 dismissal of a complaint may be affirmed on any basis supported by the record, regardless of the trial court's reasoning).

In his second amended complaint, plaintiff alleged that as a result of defendant's negligence he "underwent extensive psychological and psychiatric counseling, testing, and therapy":

> "As a direct and proximate result of one or more of the aforesaid negligent acts or omissions of the defendant, the plaintiff, TREVOR EVANS, a minor, by his mother and next friend, MAY EVANS, suffered emotional injuries inflicted by the negligence of the defendant which were and continue to be severe and permanent including emotional and psychiatric injuries, which will in the future cause him great pain and suffering and further psychiatric and emotional injuries and cause him to be permanently disabled and lose future income and

earnings and other gains he otherwise would have made and which will in the future cause him to become liable for medical expenses."

Plaintiff failed to include in this allegation that he suffered any physical injury or illness. Rather, he merely alleged that he suffered severe and permanent emotional and psychiatric injuries. Although he alleged that he will experience pain and suffering, the context of that allegation makes clear that the pain and suffering is of an emotional and psychiatric nature.

Plaintiff argues that emotional and psychiatric injuries are recognized in modern times as constituting physical illnesses and resulting in physical injuries. Plaintiff does not offer any authority for this position. Moreover, the pertinent question here is not whether it is possible for an emotional or psychiatric injury to result in a physical injury or illness, but instead is whether plaintiff pleaded that he actually suffered a physical injury or illness as a result of defendant's negligence. Plaintiff made no such allegation and, thus, failed to adequately plead a cause of action for negligent infliction of emotional distress.

Plaintiff also contends that the discovery he conducted indicates that he suffers physical injuries and illness as a result of the emotional distress caused by defendant's negligence. Again, however, the question is whether plaintiff adequately *pleaded* a cause of action for negligent infliction of emotional distress. Even if the discovery does, as plaintiff promises, indicate that he suffers physical injuries and illness as a result of his emotional distress, he was required to plead as much in his complaint. He did not. Therefore, he has failed to adequately plead a cause of action for negligent infliction of emotional distress, and the trial court did not err by dismissing his second amended complaint.

CONCLUSION

For the reasons stated, the judgment of the circuit court of Lake County is affirmed.

Affirmed.