2014 IL App (4th) 131004-U

NO. 4-13-1004

Order filed October 20, 2014

Modified upon denial of rehearing March 6, 2015

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

JANE DOE-3, a Minor, Through Her Mother and Next Friend, JULIE DOE-3; and JANE DOE-2, a Minor, Through Her Mother and Next Friend, JULIE DOE-2, Plaintiffs-Appellants, v. McLEAN COUNTY UNIT DISTRICT NO. 5 BOARD OF DIRECTORS, ILLINOIS EDUCATION ASSOCIATION, JULIA BASTING, DAVID BOLLMAN, JIM BRAKSICK, ALAN CHAPMAN, COURTNEY FRAME, CATHY GREENE, DALE HEIDBREDER, EDWARD HEINEMAN, REBECCA HENDERSON, SCOTT LAY, JOHN LUTES, CARLA JURGENSON, JOHN PYE, GEOFF SCHOONOVER, BRUCE WELDY, and STEVE WITTINGTON, Defendants-Appellees, and JON WHITE, Defendant.	)	Appeal from Circuit Court of Champaign County No. 08L209 Honorable Michael Q. Jones, Judge Presiding.

PRESIDING JUSTICE APPLETON delivered the judgment of the court.
Justices Harris and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: (1) There is no implied private right of action within the Abused and Neglected Child Reporting Act (ANCRA) (325 ILCS 5/1 to 11.8 (West 2012)), and the trial court did not err in dismissing the allegations alleging a cause of action for damages for defendants' failure to report.

(2) Where plaintiffs have alleged that defendants misrepresented information regarding the former employee's discipline for, or facts related to, the sexual abuse of his students with a conscious disregard for plaintiffs' well-being, they

have alleged a duty of care sufficient to survive dismissal if it is further alleged the future employer received and relied upon that information.

¶ 2 Plaintiffs, Jane Doe-3, a minor, through her mother, Julie Doe-3, and Jane Doe-2, through her mother, Julie Doe-2, appeal from the trial court's dismissal of their fourth amended complaint containing allegations against the named defendants for their failure to comply with their mandatory duty to report abuse under ANCRA, and for the willful and wanton "passing" of defendant, Jon White, a teacher who sexually abused his students, to another school district. We affirm the trial court's judgment, finding (1) no cause of action exists under ANCRA for monetary damages, and (2) plaintiffs failed to sufficiently allege a duty owed by all defendants, except Jane Doe-3's claims against John Pye, individually, and McLean County Unit District No. 5 (McLean), as *respondeat superior*. (We note, it appears from the briefs filed in this appeal that defendant John Pye is not a party to this appeal.) However, we amend the court's dismissal as to the remaining claims as a dismissal without prejudice, allowing plaintiffs the opportunity to further amend their complaint should plaintiffs learn through discovery that Urbana relied upon inaccurate, untruthful, fraudulent, or concealed information provided willfully and wantonly by any other defendant.

¶ 3 I. BACKGROUND

¶ 4 Plaintiffs, Jane Doe-3 and Jane Doe-2, were sexually abused by their teacher, Jon White, at Thomas Paine Elementary School in Urbana. Jane Doe-3 was a student in White's second grade class during the 2005-06 school year. Jane Doe-2 was a student in White's second grade class during the 2006-07 school year until January 31, 2007, when White was arrested for the conduct alleged in this case.

¶ 5 This is the second time this case has been before us. In the first appeal, this court addressed the propriety of the trial court's dismissal of plaintiffs' second amended complaint, in

which plaintiffs had alleged the various named administrators of McLean (where White had taught prior to teaching at Urbana) were aware of White's sexual abuse of minor female students in their district, but never reported the conduct. In fact, plaintiffs alleged McLean, by its various named administrators, intentionally falsified personnel information and "passed" White to Urbana without disclosing White's sexual abuse. The trial court found the named defendants owed no duty to the injured students in Urbana and dismissed with prejudice all counts. Plaintiffs appealed.

¶ 6 On appeal, this court reversed the trial court, finding plaintiffs had adequately alleged defendants had a duty to warn and/or report White's conduct to the Illinois Department of Children and Family Services (DCFS). *Doe-3 v. White*, 409 Ill. App. 3d 1087, 1099 (2011). We found plaintiffs' allegations that the McLean administrators' acts of providing knowingly false information in a letter of recommendation and falsifying Urbana's employment verification form were sufficient to survive defendants' motion to dismiss under a theory of the "voluntary undertaking" doctrine or the law of negligent misrepresentation. *Doe-3*, 409 Ill. App. 3d at 1099. This court remanded for further proceedings. *Doe-3*, 409 Ill. App. 3d at 1101.

¶ 7 Defendants appealed to our supreme court, which affirmed our decision on different grounds. *Doe-3 v. McLean County Unit District No. 5 Board of Directors*, 2012 IL 112479, ¶ 1. The majority held the plaintiffs had sufficiently alleged facts supporting a finding that defendants owed plaintiffs a duty of care based upon four factors: (1) the reasonable foreseeability of the injury; (2) the likelihood of the injury; (3) the magnitude of the burden of guarding against the injury; and (4) the consequences of placing the burden on defendant. *Doe-3*, 2012 IL 112479, ¶ 22. The court remanded for further proceedings. *Doe-3*, 2012 IL 112479, ¶ 47. The only allegation before the supreme court was that defendants acted willfully and

wantonly when they "passed" White to Urbana by misrepresenting White's employment record on an employee verification form. *Doe-3*, 2012 IL 112479, ¶ 19.

¶ 8 On remand, Jane Doe-3, a minor, through her mother, Julie Doe-3, filed a fourth amended complaint in which Jane Doe-2, a minor, through her mother Julie Doe-2, joined in certain claims. They named several defendants, some of whom were different from the previously filed pleadings. In the fourth amended complaint, plaintiffs named McLean; the Illinois Education Association (IEA); and various employees and administrators of McLean and IEA. Jane Doe-3 alleged defendants as a whole willfully and wantonly and with deliberate indifference allowed White to be "passed" to Urbana while concealing knowledge of White's sexual abuse and while willfully and wantonly violating mandatory reporting requirements.

¶ 9 According to plaintiffs, defendants were made aware as early as 2002 that White was using McLean's computers for accessing child pornography. In the 2003-04 school year, parents of three first-graders reported that White had inappropriately touched their daughters. During the 2004-05 school year, defendants were made aware that White was viewing adult and child pornography in the classroom and had also inappropriately touched female students. Defendants were also made aware White would play a "taste test game" with female students, where he would place food items on his penis for the girls to taste while blindfolded. White pleaded guilty to two counts of aggravated criminal sexual abuse of Jane Doe-20 and Jane Doe-21 in McLean County and eight counts of aggravated criminal sexual abuse of Jane Doe-2, Jane Doe-3, and six other minor females in Champaign County.

¶ 10 Plaintiffs further allege that, in October 2004, White met with several named defendants, three of which are mandated reporters, about how best to conceal White's sexual abuse of his students and "pass" White to another school district while avoiding the requirements

of ANCRA. After the meeting, one such defendant and mandated reporter, Edward Heineman, the principal, sent an e-mail to White promising secrecy and support, stating "[t]his is nobody's business." Thereafter, according to plaintiffs, the IEA advised defendants to "pass" White to another school district. Between October 25, 2004, and October 29, 2004, White was removed from the classroom due to his conduct. McLean returned White to the classroom. In the spring semester of 2005, White committed additional acts of sexual abuse, some of which were observed by his teacher's aide in the classroom. McLean and the named employees and administrators were made aware of White's conduct. They again removed him from the classroom in April 2005, but did not report his conduct to DCFS, as required by ANCRA, or by noting the same in his employment file. McLean placed White on emergency leave while allegedly taking steps to pass him.

¶ 11 In the meantime, administrators were receiving personal complaints from parents of victims. Heineman allegedly told White's aide to keep her knowledge of White's behavior to herself. On April 14, 2005, McLean sent a letter of termination to White, which was signed by the then school board president. Between April 14, 2005, and April 27, 2005, McLean replaced the board's president and secretary. On April 27, 2005, the new president entered into a voluntary separation agreement with White, which concealed the known sexual abuse. Plaintiffs alleged the IEA advised McLean to conceal White's known pedophilia from his employment file for the purpose of passing White to another district. In fact, plaintiffs alleged, McLean willfully and wantonly concealed the known abuse from Urbana and falsified information for the purpose of passing White.

¶ 12 In their complaint, plaintiffs' allegations are separated into 13 counts, one count for each plaintiff for the following causes of action: (1) battery (counts I and II), (2) hate crime

(counts III and IV), (3) willful and wanton passing against individual defendants (in count V, Jane Doe-3 sued Basting, Braksick, Chapman, Greene, Heidbreder, Heineman, Henderson, Jurgenson, Lay, Pye, Schoonover, Weldy, and Wittington; in count VI, Jane Doe-2 sued Basting, Greene, Henderson, Jurgenson, Lay, Schoonover, Weldy, and Wittington), (4) willful and wanton passing against McLean under the theory of *respondeat superior* (counts VII and VIII), (5) willful and wanton violation of ANCRA against individual defendants (counts X and XI), (6) willful and wanton violation of ANCRA against McLean under the theory of *respondeat superior* (counts XII and XIII), and (7) one count by both plaintiffs for the willful and wanton passing against IEA under the theory of *respondeat superior* (count IX).

¶ 13 Defendants (with the exceptions of White and Pye, who are not parties to this appeal) filed respective motions to dismiss and motions for sanctions. At a September 19, 2013, hearing, the trial court entertained all pending motions. Before considering arguments from counsel, the court dismissed with prejudice all counts alleging a willful and wanton violation of ANCRA (counts X through XIII). According to the court, there existed no private right of action for a violation of ANCRA to support plaintiffs' allegations of the same.

¶ 14 With regard to the remaining allegations, the trial court stated:

> "Now with regard to the bulk of the motions to dismiss here, once again *** [i]t is my view that the supreme court's opinion in *Doe-3* (*Doe-3*, 2012 IL 112479), being based on a pleading motion, was an opinion which did not necessarily limit what could be pled by *Doe-3* but rather limited what *Doe-3*'s pleadings supported. Having said that, it also made some very definitive holdings which apply in this case.

***

The definition of passing is definitely a problem because it is circular, and what I think, at the risk of speaking for somebody else, what I think it's really kind of getting at, passing refers to the defendants' conduct in allowing somebody else to be hired, and allowing a teacher to be hired who is known to have [*sic*], without reporting or concealing. Well, the first problem is that it's circular, and the second problem is I believe *Doe-3* definitively says you don't have a duty in torts to report someone's conduct, however reprehensible it might be to authorities. And I believe it can—the same can be read into *Doe-3* with regard to concealing.

***

I've already remarked that there is a difference between conduct which arguably should've motivated administrators in Bloomington to fire Mr. White from conduct which supports a duty and therefore a cause of action in tort. And my example is pornography the children weren't aware of, so only a step from thinking vile thoughts. If I knew my employee was thinking vile thoughts, I'd fire him, but he hasn't abused anybody yet. So there is that confusion I think throughout the complaint.

Everyone seems to acknowledge what the plaintiffs are suing the defendants for, which is willful and wanton conduct, and as the supreme court said, that's just another substitute for an

aggravated form of negligence. One still must have the basics of a negligence claim, one must still have a duty, one must still be alleged to have breached that duty, and the plaintiff must have damages proximately caused by that breach. From there, if plaintiffs can show willful and wanton conduct, intentional harm or a conscious disregard for the welfare of the plaintiff, then you have a cause of action for willful and wanton conduct, but as I said before and as the—both the appellate court and the supreme court corrected me on my viewpoint thereof, still this all starts with the concept of duty. Without duty, there is no cause of action. However egregious you might feel the conduct of the defendant is, however willful and wanton, however reprehensible you think it might be, there must be a duty.

The definition of passing cites the defendant's conduct in concealing or failing to report their knowledge of the plaintiff. There is, whether there should be or shouldn't, there is no duty to report. Maybe someday there will be. Similarly there is no duty to warn. Now I know the plaintiff is not suing for violation of some Good Samaritan concept. Concealing is really another way, I think, of not warning someone.

* * *

What I am clear on is there are no allegations I think that anything other than the employment verification form was indeed

transmitted to Urbana, save for apparently Mr. Pye's name was used as a reference. The fact that Mr. Pye's name was used for a reference, I do believe, could support a cause of action, which is exactly why I've asked counsel, can you allege that Mr. Heinemann also had his name used as a reference and then transmitted to him, and the answer I've gotten was at this stage, I don't have that information yet. Well, I'll just point out it has been about five years since this lawsuit was filed. And there aren't any allegations that Mr. Lay was even aware that Urbana was considering hiring this guy.

* * *

Counts V, VI, VII, VIII, and IX, to the extent that any of those counts include John Pye as a defendant, and John Pye's superiors, the school district as *respondeat superior*, to the extent then that any of those counts include those defendants, the motions to dismiss are denied, and the defendants are going to be required to answer.

* * *

So to the extent that the motion to dismiss pertains to defendant John Pye and defendant McLean School District, the motion to dismiss count VII is denied. The motion to dismiss in count V, to the extent that it pertains to John Pye, is denied.

In all other counts, the motions to dismiss are allowed. I've already spoken to counts X, XI, XII, and XIII, and explained the court's reasoning.

Count V [(which addresses allegations by Jane Doe-3)] names as defendants Basting, Braksick, Chapman, Greene, Heidbreder, Heinemann, Henderson, Jurgenson, Lay, Schoonover, Weldy, and Wittington. I find that those defendants that I have just recited, the plaintiff has not pled a duty, and from the interaction that I've had in the courtroom here today, cannot. Those defendants are dismissed from count V.

I'm going to skip—no, I'm not going to skip. Count VI, this is Jane Doe-2. To the extent the motion is based on 2-619 for *res judicata*, the motion is denied. To the extent the motion is based on collateral estoppel, the problem here is a little different because collateral estoppel is a slightly different legal concept from *res judicata*. *** To the extent it is based on collateral estoppel, the motion is denied because I find the issues—the plaintiff has successfully tweaked them—that they're somewhat different. However, count VI, count VI is dismissed because I find the complaint does not state a duty against Basting, Greene, Henderson, Jurgenson, Lay, Schoonover, Weldy, and Wittington.

Count VII, as I've said, the plaintiff or the defendant is going to have to answer.

Count VIII, the motion to dismiss is denied to the extent it is made pursuant to 2-619. On both collateral estoppel and *res judicata*, it is allowed to the extent it is made pursuant to 2-615, and because a duty is not stated.

Now there's something I've not commented on and I've overlooked, and that's tort immunity. If I thought that—the motions to dismiss to the extent they're based on 2-619 and tort immunity are denied, and I'm going to state my reasons for the record. ***

*** To the extent the motions to dismiss are based on 2-619 and premised on tort immunity, the motions to dismiss are denied, and I will state my reasons. If I thought I was left to my own devices, I believe I would allow the motions based on 2-107 and 2-210. I don't think that I am. The supreme court saw fit to address this issue because they were sparked or they were—their interest was—their eye was caught by a footnote, and they commented on it. *** I think that given that the supreme court chose to address this, they did so, they found that [2-]210 didn't apply ***.

So before we go—oh. One large issue that I haven't addressed, and that is the defendants from count V and the entirety of count VI and the entirety of counts VII and counts VIII have been dismissed. The issue then is should I do so with or without

> prejudice. It's obviously a large issue. This court, have heard the argument, bearing in mind the history of this case, bearing in mind the supreme court's opinion in *Doe-3*, bearing in mind the arguments of counsel, the representations of counsel and so forth, bearing all those things in mind, I am dismissing those counts with prejudice."

¶ 15 On November 4, 2013, the trial court entered a written order in accordance with its oral pronouncement. This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 This is an appeal from the trial court's dismissal of plaintiffs' fourth amended complaint. Regardless of whether the court dismissed the complaint pursuant to section 2-615 or section 2-619, or a combination of both sections pursuant to section 2-619.1 (735 ILCS 5/2-615, 2-619, 2-619.1 (West 2012)), our standard of review is *de novo*. In reviewing plaintiffs' complaint, we admit all well-pleaded factual allegations as true and disregard any legal conclusions not supported by factual allegations. *Smith v. Malone*, 317 Ill. App. 3d 974, 979 (2000). However, we will not consider any documents cited on appeal that were not attached or incorporated into the pleading. *Barber-Colman Co. v. A & K Midwest Insulation Co.*, 236 Ill. App. 3d 1065, 1068 (1992). For this reason, we grant defendants' (Basting, Jurgenson, and IEA) motion to strike plaintiffs' reference to a *Chicago Tribune* article which cites statistics of students' risk of exposure to sexual misconduct by school personnel. The content of the article is irrelevant and of no consequence to our decision here.

¶ 18 A. Implied Right of Action Under ANCRA

¶ 19 We first address plaintiffs' claim that ANCRA creates an implied private right of action. Plaintiffs claim the trial court erred in dismissing with prejudice the counts (X, XI, XII, and XIII) alleging a willful and wanton violation of ANCRA. It is plaintiffs' position that the statute implies a claim for damages should a mandatory reporter fail in his duty to report actual or suspected child abuse.

¶ 20 Defendants argue plaintiffs' ANCRA claims are barred by either the law-of-the-case doctrine (based upon the supreme court's finding of waiver) as to Jane Doe-3, or on collateral estoppel/*res judicata* grounds (based on the federal judgment in *Doe-2 v. McLean County Unit District No. 5 Board of Directors*, 593 F.3d 507, 514 (7th Cir. 2010)) as to Jane Doe-2. During the previous appeal, the supreme court found Jane Doe-3's ANCRA claims against McLean and the individual defendants named in the second amended complaint had been waived for her failure to raise the issue in this court. *Doe-3*, 2012 IL 112479, ¶ 25, n.7. A finding that the issue was waived does not constitute a final substantive or conclusive ruling on the ANCRA issue to satisfy the law-of-the-case doctrine. See *Radwill v. Manor Care of Westmont, IL, LLC*, 2013 IL App (2d) 120957, ¶ 8 ("the doctrine bars relitigation of an issue previously decided in the same case").

¶ 21 With regard to Jane Doe-2's ANCRA claims, defendants argue plaintiff cannot escape *res judicata* or collateral estoppel by simply naming different defendants from those named in her federal court case—a case in which she asserted an unsuccessful implied-private-right-of-action ANCRA claim. The Seventh Circuit considered whether the plaintiff had sufficiently alleged that ANCRA imposed upon the defendants a duty to act, which could then translate into the duty element under a willful and wanton tort claim. *Doe-2*, 593 F.3d at 514. Relying on *Cuyler* and *Doe 1*, the court held ANCRA could not support Jane Doe-2's tort claim.

Doe-2, 593 F.3d at 514 (citing *Cuyler v. United States*, 362 F.3d 949 (7th Cir. 2004); *Doe 1 v. North Central Behavioral Health Systems, Inc.*, 352 Ill. App. 3d 284 (2004)). Rather, the court held, the alleged duty must originate under common law. *Doe-2*, 593 F.3d at 514.

¶ 22 Rather than considering whether Jane Doe-2's ANCRA claims against the named defendants here are barred by *res judicata* and/or collateral estoppel (both of which would require an analysis of whether this subsequent action involved the same parties or their privies as her previous federal action), we choose to decide the ultimate issue on the merits. We have no binding authority on this issue. The decision of the appellate court of any district is not binding on other appellate districts. *State Farm Fire & Casualty Co. v. Yapejian*, 152 Ill. 2d 533, 539 (1992). Additionally, the decisions of the United States District Court and the Court of Appeals are not binding upon the state courts and are held to be no more than persuasive authority. *People v. Fields*, 135 Ill. 2d 18, 72 (1990). Accordingly, neither the Third District's decision in *Doe 1* nor the Seventh Circuit's decisions in *Cuyler* and *Doe-2* constitute binding authority on this court for the proposition that ANCRA does not create an implied cause of action. Absent binding authority in the form of case law or specific legislative enactments, we consider these cases persuasive. We also consider persuasive a number of other Illinois cases which have likewise found no such implied private right of action under ANCRA. See, *e.g.*, *Varela v. St. Elizabeth's Hospital of Chicago, Inc.*, 372 Ill. App. 3d 714, 723 (2006) (First District); *Doe ex rel. Doe v. White*, 627 F.Supp.2d 905, 919 (C.D. Ill. 2009); *Doe-20 v. Board of Education of the Community Unit School District No. 5*, 680 F.Supp.2d 957, 990 (C.D. Ill. 2010); *Willis v. Williams*, 2010 WL 4683965 (C.D. Ill. 2010). Nevertheless we conduct our own analysis.

¶ 23 The resolution of this issue involves an interpretation of a statute, and therefore, our review is *de novo*. *Metzger v. DaRosa*, 209 Ill. 2d 30, 34 (2004). "In construing the meaning

of a statute, the primary objective of this court is to ascertain and give effect to the intention of the legislature, and all other rules of statutory construction are subordinated to this cardinal principle. [Citation.] The plain language of the statute is the best indicator of the legislature's intent. [Citation.] When the statute's language is clear, it will be given effect without resort to other aids of statutory construction. [Citation.]." *Metzger*, 209 Ill. 2d at 34-35.

¶ 24 Section 4 of ANCRA provides that all school personnel "having reasonable cause to believe a child known to them in their professional or official capacity may be an abused child or a neglected child shall immediately report or cause a report to be made to [DCFS]." 325 ILCS 5/4 (West 2012). A person who knowingly violates his duty to report is guilty of a Class A misdemeanor for a first violation and a Class 4 felony for any subsequent violation. 325 ILCS 5/4 (West 2012).

¶ 25 ANCRA does not expressly provide for a cause of action for damages brought by a child who is abused as a result of a mandatory reporter's failure to report. "The lack of such explicit language, however, is not necessarily dispositive. A court may determine that a private right of action is implied in a statute." *Fisher v. Lexington Health Care, Inc.*, 188 Ill. 2d 455, 460 (1999). To do so, courts will consider the following four factors: (1) the plaintiff is a member of the class for whose benefit the statute was enacted; (2) the plaintiff's injury is one the statute was designed to prevent; (3) a private right of action is consistent with the underlying purpose of the statute; and (4) implying a private right of action is necessary to provide an adequate remedy for violations of the statute. *Fisher*, 188 Ill. 2d at 460. Plaintiffs' theory is that had defendants reported previous incidents of abuse by White which occurred in McLean, they would not have been abused by him in Urbana. For the following reasons, we align ourselves

with the majority of courts who have addressed this issue previously, specifically with the Third District. That is, we agree with the analysis set forth in *Doe 1*.

¶ 26 Addressing the first two of the *Fisher* factors, we must determine whether plaintiffs are members of the class for whose benefit the statute was enacted and whether the plaintiffs' injuries are of the type the statue was designed to prevent. Our legislature enacted ANCRA in 1975 "to revise the law in relation to personnel administration and to make appropriations in connection therewith." 1955 Ill. Laws 2208 (eff. July 18, 1955). As Justice Garman has stated, ANCRA "is a reporting act [which] requires that certain individuals report suspected child abuse or neglect to DCFS." *Julie Q. v. Department of Children & Family Services,* 2013 IL 113783, ¶ 39. It is rather obvious that plaintiffs are members of the class for whose benefit the statute was enacted. Indeed, this court has previously noted the two purposes of ANCRA are to protect (1) any abused child and (2) any person erroneously accused of abuse. *Kemp-Golden v. Department of Children & Family Services*, 281 Ill. App. 3d 869, 874 (1996).

¶ 27 It is also readily apparent that plaintiffs' claimed injuries, which resulted from sexual abuse, are the kind specifically targeted by ANCRA as the type the statute was designed to prevent. See 325 ILCS 5/2 (West 2012) (DCFS shall protect the health, safety, and best interests of the abused or suspected abused child, offer protective services to prevent any further harm to the child, and provide for the reporting and investigation of child abuse and neglect if suspected in a school setting). The first two factors are clearly met. The other two factors are less clear.

¶ 28 The third factor to be considered is whether a private cause of action is consistent with the underlying purpose of the statute as a whole. *Fisher*, 188 Ill. 2d at 462-63. ANCRA "is designed to enhance the ability of [] DCFS to 'protect the health, safety, and best interests of the

child in all situations in which the child is vulnerable to child abuse or neglect.' " *Doe 1*, 352 Ill. App. 3d at 287 (quoting 325 ILCS 5/2 (West 2002)). Nowhere does ANCRA indicate that its purpose is to compensate the abused child or the child's family. *Doe 1*, 352 Ill. App. 3d at 287. However, recognizing the stated purpose of the statute does not necessarily answer the question of whether civil liability is *consistent* with that purpose. The statutory language indicates that the primary thrust of ANCRA is to authorize DCFS to take action to protect a child who is or is suspected to be abused or neglected. In order to fulfill its duty to protect, DCFS must be made aware of any abused or neglected child. Awareness may come from reports of individuals who (1) have witnessed abuse or neglect, (2) have witnessed injuries sustained by abuse or neglect, or (3) suspect a child has been abused or neglected. Imposing civil liability upon those persons who are required to report, but fail to do so, is not necessarily *inconsistent* with the purpose of the statute. In fact, civil liability "may provide extra incentive for compliance." *Doe 1*, 352 Ill. App. 3d at 287. This factor does not provide a dispositive result.

¶ 29 Moving to the fourth factor, we must determine whether implying a private right of action is *necessary* to provide an adequate remedy for violations of the statute. It is this factor that is an insurmountable hurdle to plaintiffs' claim. As stated above, civil liability may indeed provide an extra incentive to report, but it certainly is not *necessary* when a violation for failing to report is remedied by the imposition of criminal sanctions. The legislature has clearly and explicitly set forth the consequences of initial and subsequent violations of ANCRA. Our supreme court has noted that it has "implied a private right of action under a statute only in cases where the statute would be ineffective, as a practical matter, unless such an action were implied." *Fisher*, 188 Ill. 2d at 464. That is not the case here. Because the legislature expressly provided for the filing of criminal charges against a mandatory reporter who fails to report, it cannot be

said that a civil action for monetary damages is necessary to provide an adequate remedy for a violation. The threat of facing criminal charges for failing to report abuse not only serves as an effective means of enforcement of a reporter's duty, but as a deterrent as well, making an action for civil damages unnecessary for remedial purposes.

¶ 30 As an aside, when researching the legislative history of ANCRA, we discovered that the legislature had considered, but rejected, a provision allowing for a private right of action. In 1975, prior to the passage of the statute, a member of the House of Representatives presented an amendment to the Senate's version of ANCRA. The proposed amendment would have provided for civil liability if someone had failed to report an incident of child abuse. After some debate, the amendment failed to pass.

¶ 31 Though ANCRA provides for criminal liability, to our knowledge, no mandatory reporter in this case has been prosecuted for his or her failure to report the sexual abuse by White. Because criminal charges are the exclusive means of enforcement for a violation of ANCRA, it is important that violations be punished or else the purpose of the statute will remain unfulfilled. This is especially true since the legislature has not expressed an intent to provide that violations are subject to monetary damages.

¶ 32 Our decision finding no implied private right of action is in line with the reported decisions of other Illinois courts, as well as the majority of courts in other states. As a matter of public policy, it is imperative for mandatory reporters to fulfill their reporting duties. In fact, reporting abuse or suspected abuse is the most effective way to protect a child from a cycle of abuse or from a chronic abuser. If it appears criminal charges are inadequate to encourage mandatory reporters to fulfill their duty to report, maybe civil liability is necessary. However, it is not our duty to impose such sanctions or to engage in this policy determination. Only the

legislature can evaluate the epidemic in our society and determine if the language of the statute effectively satisfies the legislative intent. That is not for this court to determine.

¶ 33 From our review of the statutory language, in light of the four-factor test for determining whether a private right of action may be implied, we conclude the legislature did not intend to confer a private right of action for any breach of the duty to report imposed by the statute. Rather, we find the primary thrust of the legislation is to help DCFS identify those children who are abused or neglected so that the agency may establish child-protection services and a method of conducting investigations. While ANCRA imposes a mandatory duty upon certain individuals to make such a report, there is no indication of any legislative intent to impose civil liability for an individual's failure to report. Currently, ANCRA neither expressly nor implicitly provides for a civil remedy. As such, we affirm the trial court's dismissal of counts X, XI, XII, and XIII with prejudice.

¶ 34 B. Willful and Wanton Negligence

¶ 35 Plaintiffs next claim the trial court erred in dismissing the counts alleging willful and wanton negligence against defendants other than Pye and McLean for passing White to Urbana. (Pye as assistant superintendent signed and submitted Urbana's verification form.) They claim defendants concealed and misrepresented White's conduct on Urbana's employee verification form, the voluntary severance agreement, and in a letter of reference. In particular, plaintiffs allege defendants created a risk of harm by falsely representing that White had taught at McLean for the entire 2004-05 school year, when in fact he was removed from the classroom due to sexual abuse of his students. Plaintiffs allege White's teacher-on-student sexual abuse was never reported in the employment verification form, the severance agreement, or the letter of reference.

¶ 36 Newly added to the fourth amended complaint is an allegation that defendants created the false impression that White's severance from McLean was routine by entering into a severance agreement without reference to White's misconduct. This severance agreement was entered into on April 27, 2005, two weeks after White had received a letter of termination from the past president and secretary of the school board. Plaintiffs allege Basting and Jurgenson advised the new president and secretary to enter into the voluntary severance agreement, which effectively concealed White's sexual abuse.

¶ 37 Plaintiffs allege that, during the time White and the McLean defendants were negotiating the separation agreement, White sought certification documents from the Illinois State Board of Education (ISBE). He filed a request for a duplicate certificate on April 14, 2005, the day of his termination letter. His duplicate certificate was issued on May 3, 2005, after the separation agreement was entered. White received an endorsement from ISBE on May 23, 2005. On August 24, 2005, defendant Pye signed the falsified Urbana verification form. Plaintiffs claim these new allegations are sufficient to survive dismissal but admit the claims need support through discovery. Defendants claim, in their fourth amended complaint, plaintiffs removed the only basis for liability recognized by the supreme court in *Doe 3*: that defendants provided false information to Urbana. Instead, according to defendants, plaintiffs now allege defendants produced and maintained false information in White's employment file without an allegation that this false information was given to Urbana.

¶ 38 The trial court dismissed with prejudice all allegations related to the willful and wanton passing of White to Urbana because plaintiffs failed to allege defendants provided false information to Urbana, with the exception of defendants Pye and McLean. The court found Jane Doe-3 sufficiently alleged Pye had provided false information to Urbana by completing and

submitting the employee verification form, with McLean facing potential liability under a *respondeat superior* theory for Pye's conduct.

¶ 39 The trial court dismissed the allegations regarding the willful and wanton passing of White pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2012)). We review *de novo* a section 2-615 dismissal. *Doe-3*, 2012 IL 112479 ¶ 15. Under the *de novo* standard of review for a section 2-615 order of dismissal, we admit all well-pleaded allegations as true and all reasonable inferences garnered from those allegations must be viewed in a light most favorable to the plaintiff. *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 18. "[A] cause of action should not be dismissed pursuant to section 2-615 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). In ruling on a section 2-615 motion, the court only considers (1) those facts apparent from the face of the pleadings, (2) matters subject to judicial notice, and (3) judicial admissions in the record. *Gillen v. State Farm Mutual Automobile Insurance Co.*, 215 Ill. 2d 381, 385 (2005).

¶ 40 In *Doe-3*, the supreme court considered only plaintiffs' allegations against certain named administrators individually and McLean, as *respondeat superior*, that defendants acted willfully and wantonly by providing false information on Urbana's employment verification form. *Doe-3*, 2012 IL 112479, ¶ 19. The court found the duty owed arose from defendants' misstatements of White's employment history on the verification form sent to Urbana. *Doe-3*, 2012 IL 112479, ¶ 27. Plaintiffs had alleged defendants falsely stated White had worked the entire 2004-05 school year for McLean, when, in fact, he had been removed from the classroom and his employment ended prior to the end of the school year. The court found the duty arose because (1) the false statements representing that White worked the entire year implied that the

severance of White's employment was routine, which then resulted in injuries that were reasonably foreseeable; (2) the false statements led to likely injuries where a truthful disclosure would have sent up a "red flag" to Urbana to further investigate White's departure from McLean; (3) defendants could have easily completed the employment form accurately and with reasonable care, making the magnitude of their burden of guarding against injuries light; and (4) there are no apparent adverse consequences in imposing such a light burden on defendants. *Doe-3*, 2012 IL 112479, ¶¶ 31-34. The court concluded, "plaintiffs have sufficiently alleged facts which support the finding that defendants owed plaintiffs a duty of care. Having undertaken the affirmative act of filling out White's employment verification form, defendants had a duty to use reasonable care in ensuring that the information was accurate." *Doe-3*, 2012 IL 112479, ¶ 35.

¶ 41 Using the supreme court's analysis of the allegations in the second amended complaint as guidance, we consider whether the allegations in the fourth amended complaint sufficiently allege a duty owed by these named defendants. The analysis here is not unlike that in *Doe-3* as this case is based on same underlying facts.

¶ 42 In counts V and VI, plaintiffs Jane Doe-3 and Jane Doe-2, respectively, allege certain named defendants (who are not identical in each count) (1) passed White to Urbana without regard to the likelihood that White's sexual abuse would continue, (2) produced and maintained false employment information in White's file, and (3) concealed information from Urbana, causing "highly foreseeable" injuries to Jane Doe-3 and Jane Doe-2, respectively. In counts VII and VIII, plaintiffs allege McLean is liable to Jane Doe-3 and Jane Doe-2, respectively, through the doctrine of *respondeat superior*, based upon the named employees' conduct performed in the scope of their employment. In count IX, plaintiffs together allege IEA

is liable through the doctrine of *respondeat superior*, based upon the conduct of Basting and Jurgenson, which was allegedly performed in the scope of their employment.

¶ 43 After a careful review of the supreme court's opinion in *Doe-3*, we find plaintiffs' allegations that any particular named defendant, including McLean under *respondeat superior* theories, who willfully and wantonly produced false information to Urbana, or who willfully and wantonly concealed truthful information from Urbana upon Urbana's request for information, owed a duty of care under the circumstances of this case. The supreme court made clear that a duty arose only if plaintiffs alleged that Urbana received false information. *Doe-3*, 2012 IL 112479, ¶ 26.

¶ 44 Plaintiffs' allegations that defendants produced and maintained false information in White's employment file would only give rise to a duty if the false information was submitted to Urbana. It may not be known to plaintiffs at this point in the litigation what information Urbana received and relied upon when hiring White. The allegations regarding White's computer use do not support a duty on defendants' behalf. The foreseeability of injury element is lacking between White's viewing of pornography and sexually abusing his students. The conduct which gives rise to a duty in this case is any act performed by any defendant with a conscious disregard of plaintiffs' well-being which misstated or concealed his or her knowledge of White's sexual abuse and was provided to Urbana. We agree with the trial court that Jane Doe-3's allegations against defendant Assistant Superintendent Pye, who allegedly knew of White's sexual misconduct, that he had provided false information about White to Urbana were sufficient to survive dismissal, as were the allegations against McLean under *respondeat superior* for Pye's conduct performed in the scope of his employment.

¶ 45 However, plaintiffs did not allege any other defendant provided false information to Urbana either directly or indirectly. Plaintiffs allege certain defendants willfully and wantonly "agreed to conceal" reports of sexual abuse from White's employment file. Plaintiffs do not provide any allegations regarding the significance of the employment file, and if or how the alleged false or concealed information in that file affected Urbana's decision to hire White. At this stage of the proceedings, plaintiffs need not demonstrate sufficient facts pertaining to the alleged breach and causation, as those are issues for the trier of fact. If plaintiffs are able to allege, after conducting discovery, that Urbana received false information from any other defendant through its receipt of the separation agreement, White's employment or personnel file, the employment verification form, a letter of reference, or White's IEA certification, then plaintiffs should be allowed to amend their complaint.

¶ 46 To be clear, defendants did not have an affirmative duty to warn Urbana of White's misconduct. Rather, defendants had a duty of ordinary care, if Urbana sought information from the various individuals at McLean and/or IEA, to provide Urbana with accurate information. If plaintiffs can allege any defendant who knew of White's sexual abuse misstated information, with a conscious disregard for plaintiffs' welfare, regarding the sexual abuse and provided the same to Urbana, then they have successfully alleged a cause of action. In her fourth amended complaint, Jane Doe-3 was successful in doing so only with regard to Pye and McLean. Because similar allegations against other individuals have not been established, though they may come to fruition through discovery, they are now dismissed. However, we find plaintiffs should be allowed the opportunity to amend. Thus, we reverse the trial court's dismissal with prejudice and enter the dismissal against all defendants, except Pye and McLean, without prejudice.

¶ 47 In *Doe-3*, the supreme court clearly found section 2-210 of the Local Governmental and Governmental Employees Tort Immunity Act, which states that " '[a] public employee acting in the scope of his employment is not liable for an injury caused by his negligent misrepresentation,' " does not apply based upon plaintiffs' allegations of willful and wanton conduct, not negligent misrepresentation. *Doe-3*, 2012 IL 112470, ¶ 43 (quoting 745 ILCS 10/2-210 (West 2010)). We are bound by that decision.

¶ 48 Our prior decision in this case mistakenly believed Jane Doe-2 had included defendants Pye and McLean as *respondeat superior* in her willful and wanton state tort claims. Defendants pointed out the falsity of this belief. Thus, we have modified our decision in conformity with the pleadings in the case *sub judice*. Jane Doe-2's willful and wanton claim against McLean as set forth in count VIII is not barred, as her count VI defendants have not been previously sued by her.

¶ 49 C. Summary

¶ 50 Given that, as the supreme court acknowledged, the public policy in this state favors the protection of children (*Doe-3*, 2012 IL 112479, ¶ 36), we align our decision with that policy. " 'This public policy has led our courts to recognize that even parents' rights are secondary to the State's strong interest in protecting children when the potential for abuse or neglect exists.' " *Doe-3*, 2012 IL 112479, ¶ 37 (quoting *American Federation of State, County & Municipal Employees v. Department of Central Management Services*, 173 Ill. 2d 299, 312 (1996)). Specifically, we must protect children from sex offenders. *Doe-3*, 2012 IL 112479, ¶ 37. McLean and every one of its administrators and teachers who knew of White's abuse failed not only plaintiffs and their parents, but every child who had been in White's class in both the McLean and Urbana school districts. We recognize the clarity of Justice Karmeier's dissent in

Doe-3, where he criticized the majority for not addressing ANCRA, which he believed could possibly supply the pertinent duty, as well as resolve the question of immunity. See 325 ILCS 5/9 (West 2012). He referred to ANCRA as "the comprehensive statutory scheme that should be applied in this situation and that the question of immunity should be decided by reference to its provisions." *Doe-3*, 2012 IL 112479, ¶ 118 (Karmeier, J., dissenting).

¶ 51 In light of the stated public policy and the supreme court's decision finding defendants owed plaintiffs a duty, we conclude Jane Doe-3 has alleged sufficient facts to survive a section 2-615 dismissal against defendants Pye and McLean. Whether plaintiffs will successfully prove named defendants breached the duty owed to plaintiffs by acting with conscious disregard for plaintiffs' welfare, and whether the breach proximately caused plaintiffs' injuries, remains to be seen. Further, whether plaintiffs will be able to form legally cognizable causes of action against other defendants also remains to be seen. At this stage of the proceedings, addressing plaintiffs' allegations in their fourth amended complaint, we find those allegations against Pye and McLean are sufficient to proceed further and we dismiss the remaining allegations of willful and wanton tortious conduct against the remaining defendants without prejudice.

¶ 52 With this order, we deny the following pending motions: (1) defendants' petition for rehearing, (2) plaintiffs' motion for sanctions, (3) defendants' motion to make corrections, and (4) plaintiffs' motion to strike.

¶ 53 III. CONCLUSION

¶ 54 For the reasons stated, we affirm the trial court's judgment dismissing counts V, VI, VII, VIII, and IX, but we reverse the court's judgment as to a dismissal with prejudice. We

affirm the dismissal but do so without prejudice. Further, we affirm the court's judgment dismissing counts X, XI, XII, and XIII. We remand this case for further proceedings.

¶ 55 Affirmed in part and reversed in part; cause remanded.