2017 IL App (1st) 1161738-U

SIXTH DIVISION
JULY 21, 2017

No. 1-16-1738

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOHN KENNETH JACKS GAMBLE, a minor, by his parents and next friends, KEITH JACKS GAMBLE and LAUREN JACKS GAMBLE, KEITH JACKS, individually, and LAUREN JACKS GAMBLE, individually,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	No. 13 L 8236
v.	)	
ALCUIN MONTESSORI SCHOOL,	)	Honorable Daniel T. Gillespie,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Rochford and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's order granting summary judgment in favor of the defendant is affirmed.

¶ 2 Plaintiffs-appellants, John Kenneth Jacks Gamble (John Kenneth), a minor, by his parents and next friends, Keith Jacks Gamble and Lauren Jacks Gamble, Keith Jacks Gamble, individually, and Lauren Jacks Gamble, individually (collectively the plaintiffs), brought this multi-count action against the defendant-appellee, Alcuin Montessori School (the school),

seeking damages sustained as a result of injuries suffered by John Kenneth. The circuit court of Cook County entered partial summary judgment in favor of the school on the ordinary negligence count of the plaintiffs' complaint on the basis that the school was immune from ordinary negligence liability pursuant to section 24-24 of the Illinois School Code (School Code) (105 ILCS 5/24-24 (West 2014)). Following a jury verdict for the school on the remaining counts, the plaintiffs appealed the summary judgment order. For the following reasons, we affirm the circuit court.

¶ 3 BACKGROUND

¶ 4 This appeal arises out of an incident on June 4, 2013, when John Kenneth was a four-year-old student enrolled at the school. John Kenneth was burned on his chin when he bumped into an aluminum baking sheet during a kitchen activity in which the school's Spanish teacher, Rita Cassiano, demonstrated baking plantain chips to the students.

¶ 5 The plaintiffs filed a three-count complaint against the school for John Kenneth's burn. Count I alleged ordinary negligence, count II alleged willful and wanton conduct, and count III sought to recover incurred medical expenses under the Family Expense Act (750 ILCS 65/15 (West 2014)). Count I pled that the school, "by its agents, servants and/or employees, was negligent in one or more of the following ways in that it:

(a) Failed to take reasonable precautions for the safety of the children in its classrooms;

(b) Failed to exercise that degree of care and caution that a reasonable person under similar circumstances would have exercised;

(c) Failed to provide adequate personnel to supervise the children in its classroom;

(d) Failed to properly train its personnel in basic classroom safety and appropriate first aid response;

(e) Placed a scalding hot baking pan within reach of a group of small children;

(f) Failed to properly treat the ensuing burn; and

(g) Failed to promptly notify John Kenneth Jacks Gamble's parents that he had sustained injuries."

¶ 6 The school filed a motion for summary judgment, asserting that it was immune from liability for ordinary negligence claimed in count I pursuant to section 24-24 of the School Code (105 ILCS 5/24-24 (West 2014)) and section 34-84a of the School Code (105 ILCS 5/34-84a (West 2014)).[1] The motion for summary judgment also sought dismissal of count II.

¶ 7 The trial court granted the school's motion for summary judgment on the claim of ordinary negligence in count I, but denied the motion for summary judgment on the claim of willful and wanton conduct in count II. After the trial on counts II and III, the jury returned a verdict in favor of the school on both counts. The plaintiffs filed a notice of appeal, challenging only the entry of summary judgment in favor of the school on count I.

¶ 8 ANALYSIS

¶ 9 We note that we have jurisdiction to review the trial court's order granting partial summary judgment in favor of the school, as the plaintiffs filed a timely notice of appeal

[1] Sections 24-24 and 34-84a of the School Code are identical statutes, with section 24-24 applying to schools in cities with under 500,000 inhabitants and section 34-84a applying to schools in cities of over 500,000 inhabitants. The school cited to both statutes in its motion for summary judgment, and the parties cite to both statutes in their briefs. However, as the school is located in Oak Park, Illinois, a city with a population less than 500,000, we will only cite to section 24-24 in our analysis.

following the court order upon the jury verdict, which was the final order in this case. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); Ill. S. Ct. R. 303 (eff. Jan. 1, 2015).

¶ 10 As a preliminary matter, before we reach the merits, we address the school's argument that this appeal should be dismissed because the plaintiffs failed to comply with section 2-1202(e) of the Code of Civil Procedure (735 ILCS 5/2-1202 (West 2014)), which states that any party who fails to seek a new trial in a post-trial motion waives the right to move for a new trial. The school claims that because the plaintiffs here failed to file a post-trial motion, they have waived their right to seek a new trial on count I and therefore, we should dismiss this appeal. We disagree.

¶ 11 The plaintiffs are appealing the trial court's order granting summary judgment on count I. They were not required to file a post-trial motion on that issue to preserve it for appellate review. As our supreme court has stated, "the jury makes no factual determination concerning the issue or issues disposed of by entry of summary judgment before trial of the case upon the remaining undetermined issues. Thus, we conclude that *** a party need not raise in a post-trial motion any issue concerning the pretrial entry of summary judgment as to part of a cause of action in order to preserve the issue for review." *Mohn v. Posegate*, 184 Ill. 2d 540, 546–47 (1998).

¶ 12 The school next argues that the jury's verdict on the willful and wanton conduct claim established that the plaintiffs did not prove any of the basic elements of a negligence claim. The school states in its brief, "Even if this court were to determine there was an error in the grant of summary judgment on the issue of immunity, there is no relief that the court can provide. The jury already decided that the [plaintiffs] did not prove each element of their aggravated negligence claim ***." We disagree.

¶ 13 While a negligence claim and a willful and wanton conduct claim share some

characteristics, a claim alleging willful and wanton conduct requires proof of an additional element: a failure, after knowledge of impending danger, to exercise ordinary care to prevent the danger. *Ziarko v. Soo Line Railroad Co.*, 161 Ill. 2d 267, 274 (1994). The jury verdict does not indicate which or even how many elements of the willful and wanton claim had not been proven by preponderance of the evidence. We cannot presume that the jury found all elements of the willful and wanton claim to be missing. More importantly, we cannot presume that the jury would have found in favor of the school on the lesser claim of ordinary negligence. Thus, this argument is also rejected.

¶ 14 Turning to the merits of this case, we now review whether the trial court erred in granting summary judgment in favor of the school on count I on the basis of immunity pursuant to section 24-24 of the School Code. Section 24-24 "applies to both private and public schools ***." *Abruzzo v. City of Park Ridge*, 231 Ill. 2d 324, 342 (2008).

¶ 15 The plaintiffs argue that the school is not entitled to immunity under section 24 of the School Code, as the statute only applies to persons, and not to entities.

¶ 16 Summary judgment is appropriate only if 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. *Wells Fargo Bank, N.A. v. McCondichie*, 2017 IL App (1st) 153576, ¶ 10; 735 ILCS 5/2-1005(c) (West 2014). The purpose of summary judgment is not to try an issue of fact but rather to determine whether a triable issue of fact exists. *Id*. We review the circuit court's grant of summary judgment *de novo*. *Id*. Under *de novo* review, we perform the same analysis that a trial court would perform. *Id*.

¶ 17 Section 24–24 of the School Code provides, in pertinent part,:

> "[T]eachers, other certificated educational employees, and any other person, whether or not a certificated employee, providing a

> related service for or with respect to a student shall maintain discipline in the schools ***. In all matters relating to the discipline in and conduct of the schools and the school children, they stand in the relation of parents and guardians to the pupils. This relationship shall extend to all activities connected with the school program *** and may be exercised at any time for the safety and supervision of the pupils in the absence of their parents or guardians." 105 ILCS 5/24-24 (West 2014).

¶ 18 Section 24-24 of the School Code confers on teachers and educational employees *in loco parentis* status in all matters relating to the supervision of students in school activities, which in turn confers immunity from claims of ordinary negligence on teachers and educational employees. *Henrich v. Libertyville High School*, 186 Ill. 2d 381, 388-89 (1998). "Since this statute specifically confers upon educators the status of parent or guardian to the students and since a parent is not liable for injuries to his child absent willful and wanton misconduct, it therefore follows that the same standard applies as between educator and student." *Doe ex rel. Doe v. Lawrence Hall Youth Services*, 2012 IL App (1st) 103758, ¶ 19. The public policy behind the statute is so that educators can perform their obligations to their students without worrying about litigation. *Thomas v. Chicago Board of Education*, 77 Ill. 2d 165, 171-72 (1979).

¶ 19 The plaintiffs direct us to *Sidwell v. Griggsville Community Unit School District No. 4*, 146 Ill. 2d 467 (1992). In *Sidwell*, the plaintiff alleged that the school district's negligence resulted in the school playground conditions causing his injury. *Id*. at 468. Our supreme court held that a school district does not benefit from section 24-24 immunity when a complaint alleges a claim which is based on the negligence of the school district itself, and not based on the

negligence of a teacher. *Id*. at 472. The plaintiffs claim this case is similar because a school, and not its teachers, is responsible for providing an adequate number of personnel to supervise the children and for training its personnel in first aid.

¶ 20 We disagree with the plaintiffs that this case is similar. *Sidwell* was a premises liability case. In holding that immunity did not apply, our supreme court stressed the distinction between alleging that the school district allowed a rut to form on the playground and alleging that the teacher allowed a student to use that part of the playground. *Sidwell*, 146 Ill. 2d 467, 473. We find this case to be more analogous to *Doe ex rel. Doe v. Lawrence Hall Youth Services*, 2012 IL App (1st) 103758. In *Doe*, this court held the school to be immune from the plaintiff's claim that the school negligently supervised him, allowing him to sneak off campus and engage in sexual activity with a teacher. *Id*. at ¶ 22. Thus, our courts distinguish between allegations that an individual negligently conducted an action related to supervision of the student and allegations that the school negligently carried out a separate function as an entity, such as providing equipment to the student.

¶ 21 Most of the allegations in count I of the plaintiffs' complaint clearly relate to personal actions by educational employees, *i.e.*, "(e) Placed a scalding hot baking pan within reach of a group of small children; (f) Failed to properly treat the ensuing burn," that would undoubtedly fall within the immunity under section 24-24 of the School Code.

¶ 22 Application of immunity is less clear with respect to the plaintiffs' allegations that the school: "(c) Failed to provide adequate personnel to supervise the children in its classroom" and "(d) Failed to properly train its personnel in basic classroom safety and appropriate first aid response." The plaintiffs argue that these are actions only the school, as an entity, can execute,

and not teachers.[2] However, the record shows that providing adequate personnel to supervise the children and properly training the personnel in classroom safety and first aid response are the responsibility of the executive director, who is similar to the position of a principal, and the board of trustees. Even though the board of trustees is a volunteer position, section 24-24 of the School Code provides immunity to "teachers, other certificated educational employees, and *any other person, whether or not a certificated employee*, providing a related service for or with respect to a student." These allegations relate to actions by individuals serving and supervising the school's students. They do not relate to the premises of the building, but instead are duties that section 24-24 of the School Code was intended to protect. Count I of the plaintiffs' complaint even begins by alleging that the school was negligent in these actions "by its agents, servants and/or employees." Therefore, we find that the school is immune to the claim of negligence in plaintiffs' complaint under section 24-24 of the School Code. Accordingly, the court did not err in entering summary judgment in favor of the school.

¶ 23 CONCLUSION

¶ 24 For the foregoing reasons, we affirm the judgment of the circuit court entering summary judgment in favor of the school.

¶ 25 Affirmed.

[2] The plaintiffs also argue that that the school did not employ adequate medical personnel, and that this failure does not fall within the school's immunity protections. However, the plaintiffs did not plead that the school did not employ adequate medical personnel in their complaint, and therefore have waived this argument. An argument not raised in the trial court and presented for the first time on appeal is waived, even in an appeal from a summary judgment. *Johnson Press of America, Inc. v. Northern Insurance Company of New York*, 339 Ill. App. 3d 864, 874 (2003).