2018 IL App (1st) 171698-U

FOURTH DIVISION
September 28, 2018

No. 1-17-1698

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

CHEMESE M. HOLLY, as independent administrator of the Estate of Jasinae Poole, deceased, Plaintiff-Appellant, v. JRK PROPERTY HOLDINGS, INC., JRK RESIDENTIAL GROUP, INC., TANGLEWOOD APARTMENTS PROPERTY OWNER, LLC d/b/a RESIDENCES AT ARLINGTON HEIGHTS, NICOLE NORMAN, BG PERSONNEL, LP d/b/a BG STAFFING, and WILLISHA HAMPTON, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County No. 15 L 5431 Honorable Kathy Flanagan, Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Justice Hall and Presiding Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court correctly determined that, under the voluntary-undertaking doctrine and the Swimming Facility Act, the defendant-pool attendant had no duty to assist the decedent. The circuit court, however, incorrectly determined that, under the Arlington Heights Municipal Code, the defendant-pool attendant did not

> have a duty where the Municipal Code required enforcement of regulations of the Department of Health disallowing children under the age of 16 who are unaccompanied by a responsible person over the age of 16 from being at the pool when a lifeguard is not present.

¶ 2 In 2014, decedent, 12-year-old Jasinae Poole (Jasinae), died after drowning in an apartment complex swimming pool. Plaintiff, Chemese Holly, as administrator of Jasinae's estate, brought an action sounding in negligence in the circuit court of Cook County against defendants, JRK Property Holdings, Inc., JRK Residential Group, Inc., Tanglewood Apartments Property Owner, LLC, Nicole Norman (collectively JRK) and BG Personnel, LP doing business as BG Staffing (BG Staffing) and Willisha Hampton (Hampton). Plaintiff alleged Jasinae drowned in an outdoor swimming pool owned and operated by JRK while it was being attended by Hampton. After extensive discovery had been conducted, JRK, BG Staffing, and Hampton moved for summary judgment. The trial court granted summary judgment in defendants' favor finding that they had no duty as a matter of law. On appeal, plaintiff maintains the trial court erred in this determination. For the reasons that follow, we affirm in part, reverse in part, and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 On May 26, 2015, plaintiff, as the independent administrator of Jasinae's estate, filed wrongful death and survival actions against all defendants named in this appeal. The operative fourth amended complaint generally alleged that JRK was negligent in that it failed to exercise reasonable care in the ownership and operation of Tanglewood Apartments (Tanglewood), including the swimming pool. Regarding BG Staffing and Hampton, the complaint alleged they were negligent in failing to exercise reasonable care in the supervision and operation of the swimming pool. Each allegation was accompanied by the further allegation relevant to this appeal that the defendants collectively failed to: (1) provide immediate rescue and immediate

emergency care to Jasinae; (2) comply with the Swimming Facility Act (Act) (210 ILCS 125/1 *et seq.* (West 2014)); and (3) enforce pool rules not allowing a child under 16 to swim unaccompanied by an adult.

¶ 5 The following facts are taken from depositions, photographs, and a surveillance videotape of the incident in the record.

¶ 6 The incident occurred in an outdoor swimming pool at Tanglewood in Arlington Heights, Illinois on August 18, 2014. At that time, Tanglewood was owned and operated by JRK, which had taken over management of the apartment complex in July 2014.

¶ 7 When JRK took over the management of Tanglewood, the same rules applicable to the operation of the pool and to pool attendants continued to apply as under the prior management. Specifically, the signage around the pool, which set forth the pool rules, remained the same. These signs stated: "Persons under 18 must be accompanied by an adult;" "No lifeguard on duty;" "swim at your own risk;" and "no one should swim alone." JRK also used the same pool attendant guidelines and job responsibilities. These guidelines provided that a pool attendant was to keep the pool and surrounding area clean, enforce the pool rules, and provide assistance to service technicians. While the guidelines also required a pool attendant have the ability to swim, JRK did not enforce this requirement, maintaining that the ability to swim was for an attendant's own safety and that a pool attendant is not a lifeguard.

¶ 8 In its management of Tanglewood, JRK employed BG Staffing as a temporary employment agency. Hampton, an employee of BG Staffing, was assigned by BG Staffing to work as the pool attendant at Tanglewood on August 18, 2014. She brought her children with her to work (ages one and four). Hampton had served in this capacity only a few times before the incident in question.

¶ 9 In his deposition, Corey Ross (Ross), a resident of Tanglewood, testified as follows. On August 18, 2014, Jasinae and her friends, E.G. (age 11) and C.B. (age 11), were visiting him for the weekend. At 11:45 a.m. he walked with the girls to the pool area and presented Hampton with documentation that he was a resident of Tanglewood. Hampton asked if the girls knew how to swim, and he replied that they did. Ross explained to Hampton that he was leaving the pool area to do his laundry. Ross then instructed the girls not to swim in the deep end of the swimming pool and went to do his laundry in a facility adjacent to the pool area. Ross left the pool area under the assumption that, as the pool attendant, it was Hampton's "responsibility to keep after the pool or if anything went wrong that she was equipped to handle it." As Ross left, Hampton continued to sit in a pool chair at the side of the pool feeding her two children while talking on a cell phone.

¶ 10 The surveillance video and the deposition testimony of C.B., E.G., and employees of JRK, demonstrated that Jasinae and her friends initially entered the pool at the shallow end, but after a few minutes they decided to play at the deep end of the pool. At 11:49 a.m. Jasinae jumped into the deep end of the swimming pool. Jasinae was bobbing up and down in the water and, according to her friends, appeared to be playing. At 11:50 a.m. Jasinae began to struggle. As the other two girls exited the pool to get Hampton's attention, at 11:52 a.m. Jasinae went under the water. Hampton, while remaining on her cell phone, walked over to the far side of the pool where she obtained a skimming net instead of either the shepherd's hook or life saver that were placed nearby the pool. Hampton approached the edge of the pool, but did not extend the pool skimmer. Instead, Hampton walked back to the far side of the pool and returned the pool skimmer to where it was initially. Hampton then walked back to the pool and entered it, but exited the pool roughly thirty seconds later. Hampton then walked over to the leasing office

carrying her one year old child and informed them that a little girl was drowning. Thereafter, Hampton returned to the pool area.

¶ 11 Shortly thereafter, leasing manager for JRK Janet Zringivl (Zringivl) yelled out that a girl was drowning in the pool and called 911 four seconds after 11:56 a.m. Immediately after being informed, James Rae (Rae), a national training manager for JRK, rushed to the pool area and jumped into the pool. At 11:55 a.m. Rae removed Jasinae from the pool with the assistance of a co-worker, Sharon Williams (Williams). Williams, who was Red Cross certified, then commenced performing CPR on Jasinae. Minutes later the paramedics arrived.

¶ 12 In her deposition, Hampton testified that on the day of the incident she was assigned to be the pool attendant at Tanglewood. Hampton brought her two children with her to work, ages one and four as she had done previously. Hampton was aware of the pool rules, including that children under the age of 18 were not allowed in the pool area without adult supervision. According to Hampton, however, she received no training on how to be a pool attendant from either BG Staffing or JRK except to check that those individuals entering the pool area were either residents or guests of residents of Tanglewood.

¶ 13 When Ross entered the pool area with the three girls, Hampton testified that she asked Ross if the girls knew how to swim. Ross replied, "yes." Hampton could not recall Ross informing her that he was leaving the pool area to do his laundry. She did not observe Ross leave the pool area and thus did not inform the girls they were not allowed in the pool. When the girls moved to the deep end of the pool, Hampton knew Ross was no longer in the pool area, but believed he could have been in the gym or "doing anything." Despite knowing Ross was no longer accompanying the girls, she still did not instruct the girls to exit the pool. Hampton further testified that she was feeding her two children and was on her cell phone speaking with

her grandmother at the time of the incident.

¶ 14 Hampton also testified that shortly after the girls entered the pool, one of them came over to her crying. Hampton could not recall what the girl said to her. Shortly thereafter, she got out of her chair, picked up a pool skimmer, and went to the edge of the pool. Hampton then observed Jasinae at the bottom of the pool and realized that the pool skimmer could not reach her. According to Hampton, she got into the pool but then realized she could also drown because she did not know how to swim, so she exited the pool. Hampton then picked up her one-year-old child and walked to the leasing office where she informed them a little girl was drowning.

¶ 15 When alerted that Jasinae was in trouble, Hampton testified she did not call 911 right away, "[b]ecause I thought that I can maybe try to help." When asked whether there was any reason she waited seven minutes to call 911, Hampton answered, "Yes. I had tried to get – I went and got the little – the little long thing, tried to hand it to her. Once I noticed she was down at the bottom, I tried to get in. If I went down, I was going to drown myself. Then I went and got help." Hampton remained on the phone with her grandmother while assisting Jasinae.

¶ 16 Defendants JRK and BG Staffing (along with Hampton) filed separate motions for summary judgment, but argued similarly that they each owed no duty. JRK asserted it had no duty to furnish a lifeguard and BG Staffing maintained that Hampton did not violate any duty related to her employment and regardless she had no duty to assist Jasinae.

¶ 17 In response, plaintiff asserted that Hampton failed to carry out her duties as a pool attendant under section 19-402 of the Municipal Code, that defendants voluntarily assumed a duty to provide a lifeguard or an attendant trained to assist patrons, that defendants were required to post a lifeguard because they allowed children under 16 years of age to be present without an adult, and that Hampton was such a lifeguard.

¶ 18 After the matter was fully briefed and argued the circuit court granted defendants' motions for summary judgment finding that as a matter of law, defendants had no duty under any of the three theories asserted by plaintiff. This appeal follows.

¶ 19 ANALYSIS

¶ 20 On appeal, plaintiff maintains that the circuit court erred when it determined defendants owed no duty to Jasinae. In response, defendants assert that the circuit court correctly granted summary judgment in their favor because plaintiff failed to meet her burden of demonstrating that they had any duty to protect Jasinae from the open-and-obvious danger of drowning.[1]

¶ 21 Summary judgment is appropriate where the pleadings, affidavits, depositions, and admissions on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. *Duffy v. Togher*, 382 Ill. App. 3d 1, 7 (2008); 735 ILCS 5/2-1005(c) (West 2014). Summary judgment is a drastic means of resolving litigation and should be allowed only when the right of the moving party is clear and free from doubt. *Duffy*, 382 Ill. App. 3d at 7. Therefore, where reasonable persons could draw different inferences from the undisputed material facts or where there is a dispute as to a material fact, summary judgment should be denied. *Id.* Review of a summary judgment ruling is *de novo. Barnett v. Zion Park District*, 171 Ill. 2d 378, 385 (1996).

¶ 22 The governing substantive law is that, "[t]o succeed in a claim for negligence, a plaintiff must establish the existence of a duty, a breach of the duty, and an injury to the plaintiff that was

[1] The JRK defendants and the BG Staffing defendants (including Hampton) filed separate briefs but presented similar arguments. Accordingly, we address their arguments as those of "defendants" where appropriate.

proximately caused by the breach." *Vancura v. Katris*, 238 Ill. 2d 352, 373 (2010)). "A duty is an obligation to conform to a certain standard of conduct for the protection of another against an unreasonable risk of harm. Whether such a duty exists is a question of law, the determination of which must be resolved by the court. If no duty exists, it is axiomatic that no recovery can occur." (Internal citations omitted.) *Mount Zion State Bank & Trust v. Consolidated Communications, Inc.*, 169 Ill. 2d 110, 116 (1995).

¶ 23 On appeal, plaintiff acknowledges that a swimming pool is an open and obvious danger and that the law in Illinois is that persons who own, occupy, or control and maintain land generally do not have a duty to protect children on their premises from such a danger. *Corcoran v. Village of Libertyville*, 73 Ill. 2d 316, 325-27 (1978). Because children are expected to avoid obvious dangers, no reasonably foreseeable risk of harm exists. *Cope v. Doe*, 102 Ill. 2d 278, 286 (1984); see *Englund v. Englund*, 246 Ill. App. 3d 468, 476 (1993) (danger of drowning in a swimming pool obvious to a three-year-old child). Moreover, the responsibility for a child's safety "lies primarily with his or her parents, whose duty it is to see that the child is not placed in danger." *Mount Zion State Bank & Trust*, 169 Ill. 2d at 116. Here, plaintiff, in apparent recognition of these common law principles, maintains that a duty exists (1) because Hampton voluntarily assumed a duty to assist Jasinae, (2) pursuant to the Act, and (3) pursuant to section 19-402 of the Municipal Code (Arlington Heights Municipal Code § 19-402 (eff. Oct. 1, 2011)). We address each argument in turn.

¶ 24 Voluntary Undertaking

¶ 25 Plaintiff asserts that defendants voluntarily assumed a duty to exercise care for Jasinae where Hampton controlled access to the pool and had lifeguard tools nearby and Ross left the pool area in reliance on his belief that Hampton was responsible for safeguarding the children.

Plaintiff specifically argues that this issue should be viewed through what Ross believed Hampton's role as a pool attendant encompassed. Plaintiff asserts that Ross assumed Hampton would keep the pool safe, expected her to render assistance to swimmers if need be, and that she could swim and use the rescue equipment or call 911. Plaintiff further maintains that had Ross known Hampton was incapable of assisting the children if there was any trouble, he would not have left them alone at the pool. According to plaintiff, because defendants held Hampton out as someone who would render assistance to Jasinae, and Ross relied on their actions, a duty was created pursuant to the applicable sections of the Restatement (Second) of Torts (1965).

¶ 26 In response, defendants assert there is no duty created under the voluntary-undertaking doctrine. First, Ross admitted in his deposition that Hampton never represented to him that she was a lifeguard or adept at water safety skills. Second, Ross admitted he did not ask if a lifeguard was on duty, thus his reliance was not reasonable. Third, the signs posted poolside affirmatively disclaimed the presence of a lifeguard and required that children under 18 years of age be accompanied by an adult. Defendants thus conclude that the record clearly indicates that any reliance Ross may have had on Hampton assisting the girls after he left the pool area was unreasonable.

¶ 27 Here, plaintiff relies on the voluntary-undertaking doctrine to establish the existence of a duty where one would not otherwise lie under the common law. "Under the voluntary-undertaking theory, where a person voluntarily agrees to perform a service necessary for the protection of another person or their property, a duty may be imposed on the party undertaking the service; that party must perform the service in such a manner as not to increase the risk of harm to the other person who relies on the undertaking. [Citation.] One who is negligent in the undertaking will be held liable for the foreseeable consequences of the act if another suffers

harm because they relied on the undertaking." *Claimsone v. Professional Property Management, LLC*, 2011 IL App (2d) 101115, ¶ 21; see also *Frye v. Medicare-Glaser Corp.*, 153 Ill. 2d 26, 32 (1992). "The essential element of the voluntary[-]undertaking doctrine is an undertaking and the duty of care imposed on a defendant is limited to the extent of his undertaking." *Iseberg v. Gross*, 366 Ill. App. 3d 857, 865 (2006). Further, the extent of the undertaking is determined by a reasonable assessment of its underlying purpose. *Bourgonje v. Machev*, 362 Ill. App. 3d 984, 1002-03 (2005). The voluntary-undertaking doctrine is to be narrowly construed. *Jablonski v. Ford Motor Co.*, 2011 IL 110096, ¶ 123; *Claimsone*, 2011 IL App (2d) 101115, ¶ 22. Whether a defendant has voluntarily undertaken a duty to a plaintiff is a question of law for the court, but if there is a dispute of material fact affecting the existence of an undertaking of a duty, summary judgment is improper. *Bourgonje*, 362 Ill. App. 3d at 995.

¶ 28 Our supreme court has looked to sections 323 through 324A of the Restatement (Second) of Torts (Restatement (Second) of Torts §§ 323 through 324A (1965)) to define the parameters of the theory. *Bell v. Hutsell*, 2011 IL 110724, ¶ 12; *Wakulich v. Mraz*, 203 Ill. 2d 223, 242-46 (2003).

¶ 29 Here, plaintiff generally asserts defendants voluntarily assumed a duty through the actions of Hampton under all three of the sections of the Restatement referenced by our supreme court. At oral argument, however, plaintiff conceded that her primary argument relied solely on sections 323 and 324A of the Restatement and did not raise any arguments on appeal as to section 324 of the Restatement. Based on plaintiff's representation and argument before this court, we decline to address the application of section 324 of the Restatement. See *Vancura v. Katris*, 238 Ill. 2d 352, 369-70 (2010). Thus, we begin by addressing section 323 and its counterpart 324A.

¶ 30 Section 323 provides:

> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking."

Restatement (Second) of Torts § 323 (1965).

Similar to section 323, section 324A sets forth the same principles but with respect to third parties:

> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking." Restatement (Second) of Torts § 324A (1965)

¶ 31 Plaintiff analogizes the facts of this case to those of *Blankenship v. Peoria Park District*, 269 Ill. App. 3d 416 (1994), wherein a duty pursuant to the voluntary-undertaking doctrine was found. We find that analogy to be misplaced. In *Blankenship*, an adult drowned while swimming in a pool owned by the Board of Education, Peoria School District 150 (school district) and operated by defendant Peoria Park District (park district). *Id.* at 418. At the time

the plaintiff drowned the three lifeguards on duty were on break and had cleared the pool for "adult swim." *Id.* While the park district's rules required that at least one lifeguard remain on duty during breaks, all of the lifeguards left the pool area and were unable to see the pool. *Id.* at 418-19. It was during this time that the decedent struck her head while diving and floated face down in the water for two to three minutes before someone noticed her and altered the lifeguards. *Id.* at 419.

¶ 32 The plaintiff filed a two-count complaint under the Wrongful Death Act alleging that the defendants' failure to supervise the pool caused the decedent's death. *Id.* at 418. The trial court dismissed count one, finding that the park district owed no duty to the decedent and that even if a duty had existed the defendant was granted immunity by section 3-108 of the Local Governmental and Governmental Employees Tort Immunity Act. *Id.* Thereafter, the court granted the school district's motion for summary judgment with respect to count two. *Id.*

¶ 33 Pertinent to this appeal, the plaintiff maintained that the park district voluntarily assumed a duty to protect the decedent by stationing lifeguards at the pool. Looking to section 323 of the Restatement, the reviewing court first observed that for the plaintiff to state a cause of action under a theory of voluntary undertaking, the plaintiff must plead facts establishing the decedent's reliance upon the undertaking. *Id.* at 423. The court noted that plaintiff's second amended complaint alleged that " 'as an inducement to the public in general and the [p]laintiff's decedent specifically to swim in the pool the [d]efendant hired or required lifeguards for the swimming pool.' " *Id.* The reviewing court concluded that this allegation was sufficient "to raise an inference that the presence of lifeguards may have created a deceptive appearance of safety on which the decedent relied." *Id.*

¶ 34 Besides the fact that the procedural posture of *Blankenship* differs from that in this case,

the facts of *Blankenship* are not analogous where (1) the decedent was an adult, and (2) the defendant park district employed lifeguards and its rules required that one lifeguard remain on duty during break. Here, plaintiff asserts that defendants held Hampton out to Ross as one who would render assistance to Jasinae. However, Ross knew there was no lifeguard on duty and was aware of the pool rules that required children under the age of 18 to be supervised. The evidence in the present case thus demonstrates that these are decidedly different circumstances than those present in *Blankenship*.

¶ 35 Examining the pleadings, affidavits, and depositions in this record, we conclude that no duty lies under either section 323 or section 324A of the Restatement. Here, at no time did Ross ever receive an affirmative acknowledgement that Hampton would supervise the girls. In fact, Hampton made no express promise to supervise or protect Jasinae nor did she hold herself out as a lifeguard. Furthermore, the facts do not support a finding that Hampton could have been confused as a lifeguard; at the time Jasinae entered the pool area with Ross, Hampton was seated with her two toddlers eating lunch and talking on a cell phone. In addition, Hampton was not dressed in a bathing suit nor did she have on any clothing signifying she was a lifeguard. This is not a situation where Hampton so resembled a lifeguard or held herself out as a lifeguard so that a deceptive appearance of safety was created upon which we can say Ross relied. See *id.* at 423-24. Consequently, we decline to find a duty was created in contravention of the common-law under the voluntary-undertaking doctrine as argued by plaintiff.

¶ 36 The Swimming Facility Act

¶ 37 Plaintiff next contends that defendants owed a duty to Jasinae where the regulations pursuant to the Act (210 ILCS 125/1 *et seq.* (West 2014)), as read by plaintiff, require a lifeguard to be present when a person under the age of 16 is allowed in a pool enclosure without adult

supervision.

¶ 38 The purpose of the Act is to "protect, promote and preserve the public health, safety and general welfare by providing for the establishment and enforcement of minimum standards for safety, cleanliness and general sanitation for all swimming facilities" as well as to provide for inspection and licensing of all such facilities. 210 ILCS 125/2 (West 2014). Plaintiff relies primarily on section 820.300(b) of the Illinois Administrative Code (Administrative Code) (77 Ill. Adm. Code 820.300(b) (2013)), which was promulgated by the Illinois Department of Public Health (Department) pursuant to the Act. See 210 ILCS 125/13 (West 2014) (authorizing the Department to issue "rules [and regulations] as may be necessary *** to protect the health and safety of the public using *** pools and beaches [and] spas" covered by the Act). Section 820.300(b) states in pertinent part:

> "(b) Lifeguards. Lifeguards shall be provided at all wave pools and water slides. Lifeguards shall be provided at all pools, as defined in Section 820.10, when persons under the age of 16 are allowed in the pool enclosure specified in Section 820.200(a) without supervision by a parent, guardian or other responsible person at least 16 years of age. *At facilities where lifeguards are not provided*, a sign shall be posted that states 'This facility is not protected by lifeguards. Persons under the age of 16 must be accompanied by a parent, guardian or other responsible person at least 16 years of age. Swimming alone is not recommended.' " (Emphases added.) 77 Ill. Adm. Code 820.300(b) (2013).

The parties do not dispute that the pool and pool area here are within the class of "pools" and "pool enclosures" governed by section 820.300(b).

¶ 39 Plaintiff asserts while Jasinae entered the pool enclosure accompanied by an adult, that

scenario ended when Ross stepped away. According to plaintiff, at that point, defendants were in violation of the Act because Hampton allowed Jasinae to remain in the pool without adult supervision. Plaintiff maintains that under the Act and the attendant regulations defendants then had a duty to either (1) provide a lifeguard or (2) require Jasinae and the other children to leave the pool enclosure.

¶ 40 We find the case of *Barnett v. Ludwig and Co.*, 2011 IL App (2d) 101053, highly instructive to our analysis. *Barnett* involved a similar set of facts, except for the age of the child who drowned. The facts of *Barnett* disclose that 17-year-old Darius Smith, while at an apartment complex, drowned in the deep end of an outdoor swimming pool which was provided for residents and their guests. *Id.* ¶ 3. On the day he drowned, Darius was the guest of his sister, a resident of the apartment complex. *Id.* A pool attendant was on duty that day, but no lifeguard was present. *Id.* Signs were prominently posted in the pool area that read: "NOTICE. This facility is NOT protected by lifeguards. Persons under the age of 16 must be accompanied by a parent, guardian, or other responsible person at least 16 years of age. Swimming alone is not recommended." *Id.* ¶ 38. While in the water playing " 'tag-like games' " with other children, Darius struck his head on the concrete pool deck, became disoriented, and was unable to swim. *Id.* ¶ 3. Darius called out for help and was thrashing in the water. *Id.* The pool attendant was asked to assist Darius, but before the attendant took action, Darius was brought out of the pool by others. *Id.* He later died. *Id.*

¶ 41 A lawsuit was commenced on behalf of Darius' estate against the owners and operators of the apartment complex. *Id.* ¶ 4. The complaint alleged numerous grounds of negligence including that (1) the defendants were negligent because their employee, the pool attendant, did not attempt to stop the dangerous activities in which the swimmers were engaged and did not

assist Darius when alerted he was in distress, (2) that defendants failed to comply with the Act, section 820.300(b) of title 77 of the Administrative Code as well as defendant's own policies on pool use in force at the time of Darius' death. *Id.* Relevant to the case at bar, regarding the Act, plaintiff specifically alleged defendants violated section 820.300(b) by not providing a lifeguard and for failing to enforce the minimum required standards for safety at its swimming pool as required under that section. *Id.*

¶ 42 The parties filed cross motions for summary judgment. Plaintiff argued that the defendants were negligent as a matter of law for failing to provide a lifeguard at the pool. *Id.* ¶ 26. The defendants argued four points: (1) the defendants did not fail to comply with section 820.300(b) and, alternatively, Darius did not belong to the class of persons that section 820.300(b) was meant to protect; (2) because the potential danger from the pool was open and obvious, the defendants did not owe a duty to protect or warn Darius about any risks associated with the use of the swimming pool; (3) the defendant's employment of a pool attendant and its provision of rescue equipment did not in itself constitute a voluntary undertaking to protect the health, safety, and welfare of anyone swimming in the pool; and (4) the defendants' own internal policies and procedures did not create a duty of care to Darius. *Id.* ¶ 28. While the trial court found that the evidence established there was a pattern that minors at the swimming pool were routinely not supervised pursuant to section 820.300(b), it ultimately determined the defendants had no duty to provide Darius with a lifeguard and granted the defendant's motion for summary judgment. *Id.* ¶ 29.

¶ 43 On appeal, the plaintiff argued that the trial court erred in its grant of summary judgment because the defendants owed Darius a duty to provide a lifeguard. The reviewing court acknowledged that the plaintiff's argument on appeal relied most heavily on section 820.300(b),

a section that "unquestionably" was designed to prevent the principal harm of drowning. *Id.* ¶ 35. The court noted, however, that it is not enough that the decedent suffered the kind of harm the provision was meant to prevent; he must also fall within the class of persons the provision was meant to protect. *Id.* ¶ 36. In this instance, section 820.300(b) required lifeguards " 'when persons *under the age of 16* are allowed in the pool enclosure *** without supervision by a parent, guardian or other responsible person at least 16 years of age.' " (Emphases in original.) *Id.* ¶ 37. Seventeen-year-old Darius, however, did not fall within the class of individuals (those under age 16) that section 820.300(b) was intended to protect. *Id.* The *Barnett* court, notably, went on to state:

> "Even if section 820.300(b) did create a duty to Darius, the undisputed facts show that defendants did not breach that duty. [Citation.] The record shows that, on July 30, 2008, there was prominently posted in the CLT pool area a notice that read: 'NOTICE. This facility is NOT protected by lifeguards. Persons under the age of 16 must be accompanied by a parent, guardian, or other responsible person at least 16 years of age. Swimming alone is not recommended.' This tracked verbatim the language that section 820.300(b) requires be displayed where lifeguards 'are not provided.' " *Id.* ¶ 38.

The *Barnett* court explained that section 820.300(b) provides for "two classes of pools: (1) wave pools and water slides, where a lifeguard must, without exception, be provided; and (2) all other pools, as defined in section 820.10, where *either* a lifeguard must be provided *or* a sign must be posted that no lifeguard is on duty and that persons under 16 'must be accompanied by a parent, guardian, or other responsible person at least 16 years of age.' " (Emphases in original.) *Id.* ¶ 39. The court ultimately reasoned that where a pool operator posts a notice with the language of section 820.300(b), that the pool operator has, under section 820.300(b), otherwise disallowed

such persons under 16 years of age from the pool enclosure. *Id.* "Hence, except for wave pools and water slides, a lifeguard need not be provided as long as the notice specified in the final sentence of section 820.300(b) is posted." *Id.* The court continued by stating, "This is the case even if the pool operator has no system for monitoring whether persons under 16 years of age are in the pool area without a responsible person at least 16." *Id.* The court concluded by stating, "As there is no dispute that defendants posted the notice specified in section 820.300(b), there could have been no breach of duty to Darius—assuming, of course, that a duty was owed to him in the first place." *Id.*

¶ 44 Here, plaintiff asserts that when Ross left the pool area defendants had the duty to provide a lifeguard or to see that Jasinae and the other children left the pool area pursuant to section 820.300(b). We hold, as in *Barnett*, that even if there was a duty owed Jasinae pursuant to the Act, the undisputed facts establish that defendants did not breach that duty. See *Adams v. Northern Lights Gas Co.*, 211 Ill. 2d 32, 43-44 (2004) ("the issues of breach and proximate cause are factual matters for the jury to decide [citation], provided there is a genuine issue of material fact regarding those issues"). The record demonstrates that there was no breach of that duty because defendants posted signs in the pool area as required by section 820.300(b). We agree with *Barnett*, and follow its conclusion that "where a pool operator posts a notice that a lifeguard is not on duty and that person under the age of 16 must be accompanied by a parent, guardian, or other responsible person at least 16 years of age, the pool operator has, under the section, otherwise disallowed such person under 16 years of age from the pool enclosure." *Barnett*, 2011 IL App (2d) 101053, ¶ 39. Accordingly, "except for wave pools and water slides, a lifeguard need not be provided as long as the notice specified in the final sentence of section 820.300(b) is posted." *Id.*

¶ 45 Arlington Heights Municipal Code

¶ 46 Plaintiff next maintains that based on a violation of section 19-402 of the Arlington Heights Municipal Code (Municipal Code) (Arlington Heights Municipal Code § 19-402 (eff. Oct. 1, 2011)) defendants owed a duty to Jasinae. Plaintiff asserts that section 19-402 requires that a pool attendant must be present any time an outdoor swimming pool is in use and that the pool attendant must enforce all applicable regulations pertaining to the operation of swimming pools. See *id.* Thus, defendants through Hampton had a duty to ensure all applicable regulations were enforced. Consequently, the circuit court erred as a matter of law when it determined no duty was owed pursuant to the Municipal Code.[2]

¶ 47 In response, defendants maintain that the Municipal Code does not impose a duty as plaintiff suggests. Instead, defendants assert that the regulations referenced in section 19-402 "appear to be a reference to the immediately preceding section of the [Municipal] Code, section 19-401, which is entitled 'Adoption of Minimum Sanitary Requirements for the Design and Operation of Swimming Pools and Bathing Beaches.' " Defendants argue that both sections 19-401 and 19-402 are placed within the "Health and Sanitation" chapter of the Municipal Code, therefore section 19-402, like section 19-401, is concerned solely with sanitary-related matters.

¶ 48 We first observe that plaintiff's common-law negligence claim is based on the violation of an ordinance. The essential elements of common-law negligence are (1) the existence of a duty owed by the defendant to the plaintiff, (2) breach of that duty, and (3) an injury caused by that breach. *Vancura*, 238 Ill. 2d at 373. When a plaintiff's negligence claim—as in this case—is based on the violation of an ordinance, different elements must be demonstrated. *Price ex rel.*

[2] Plaintiff also argued that Hampton had a duty to Jasinae as a lifeguard. At oral argument, however, plaintiff declined to provide argument in furtherance of this claim. Accordingly, we decline to consider it in this appeal.

Massey v. Hickory Point Bank & Trust, Trust No. 0192, 362 Ill. App. 3d 1211, 1216 (2006). A violation of an ordinance designed to protect human life is *prima facie* evidence of negligence. *Id.* To prevail on a claim of negligence based on a violation of an ordinance designed to protect human life, the plaintiff must establish that (1) the plaintiff is a member of the class of persons the ordinance was designed to protect, (2) the injury is the type of injury that the ordinance was intended to protect against, and (3) the defendant's violation of the statute or ordinance was the proximate cause of the plaintiff's injury. *Kalata v. Anheuser-Busch Cos.*, 144 Ill. 2d 425, 434-35 (1991). Because evidence of the violation of an ordinance is *prima facie* evidence of negligence, and *not* negligence *per se*, a defendant can prevail despite an ordinance violation by establishing that he acted reasonably under the circumstances. *Id.* at 435. Notably, the circuit court granted summary judgment in defendants' favor solely on the issue of whether there was a duty under the ordinance. Accordingly, whether or not plaintiff will ultimately prevail on her claim of negligence based on a violation of the Municipal Code is not a question that is before this court.

¶ 49 What is at issue before this court is whether the circuit court erred when it found no duty exists under section 19-402 of the Municipal Code. As previously stated, for a violation of an ordinance to be *prima facie* evidence of negligence it must be designed to protect human life. *Price ex rel. Massey*, 362 Ill. App. 3d at 1216. This is because ordinances designed to protect human life establish the standard of conduct required of a reasonable person and thus "fix the measure of legal duty." *Noyola v. Board of Education of the City of Chicago*, 179 Ill. 2d 121, 130 (1997). Thus, we turn to consider whether section 19-402 of the Municipal Code was designed to protect human life. See *Kalata*, 144 Ill. 2d at 435.

¶ 50 In order to reach the required conclusion, we begin by examining the ordinance at issue and the parties' arguments regarding the statutory construction of the ordinance; namely, what

"regulations" the Village of Arlington Heights intended the pool attendant to enforce when it enacted section 19-402. These arguments require us to interpret the Municipal Code. We use the same rules of construction when interpreting municipal ordinances as we do when construing statutes. *Pooh-Bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463, 492 (2009)). It is well settled that the primary objective of this court when construing the meaning of a statute is to ascertain and give effect to the intent of the legislature. *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 279 (2003). In determining legislative intent, our inquiry begins with the plain language of the statute, which is the most reliable indication of the legislature's objectives in enacting a particular law. *In re Madison H.*, 215 Ill. 2d 364, 372 (2005). A fundamental principle of statutory construction is to view all provisions of a statutory enactment as a whole. Accordingly, words and phrases should not be construed in isolation, but must be interpreted in light of other relevant provisions of the statute. *Michigan Avenue National Bank v. County of Cook*, 191 Ill. 2d 493, 504 (2000). "In construing a statute, we presume that the legislature, in its enactment of legislation, did not intend absurdity, inconvenience or injustice." *Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415 (2006). We review questions of statutory construction *de novo*. *Palm v. 2800 Lake Shore Drive Condominium Ass'n*, 2013 IL 110505, ¶ 48.

¶ 51 Article four of the Municipal Code entitled "Swimming Pools" states in its entirety:

> "**Section 19-401 Adoption of Minimum Sanitary Requirements for the Design and Operation of Swimming Pools and Bathing Beaches.** There is hereby adopted by reference the Illinois Department of Health's Minimum Sanitary Requirements for the Design and Operation of Swimming Pools and Bathing Beaches.
>
> **Section 19-402 Safety Precautions.** A pool attendant shall be present any time

> an outdoor swimming pool is in use. The attendant shall enforce all applicable regulations pertaining to minimum sanitary requirements and operation of swimming pools." Arlington Heights Municipal Code §§ 19-401, 19-402 (eff. Oct. 1, 2011).

¶ 52 At issue here is what "regulations" are referenced by section 19-402. Section 19-402 states that the pool attendant shall enforce "all applicable regulations pertaining to minimum sanitary requirements and operation of swimming pools" but does not expressly name the regulations to which it is referring. Plaintiff contends that the regulations include those pertaining to *both* the minimum sanitary requirements *and* the operation of swimming pools. On the other hand, defendants assert the ordinance is only referencing those regulations dealing with sanitation.

¶ 53 Examining both sections 19-401 and 19-402 of the Municipal Code assists us in interpreting section 19-402. See *Faison v. RTFX, Inc.*, 2014 IL App (1st) 121893, ¶ 30. We begin by looking to section 19-401, which expressly adopts Department regulations. The Department's regulations are set forth in title 77 of the Administrative Code. See 77 Ill. Adm. Code 100 *et seq.* (2013). Title 77 does not expressly include regulations entitled "Minimum Sanitary Requirements for the Design and Operation of Swimming Pools and Bathing Beaches" as referenced in section 19-401 of the Municipal Code. See *id.* There are, however, regulations regarding recreational facilities, which include the design and operation of bathing beaches and swimming pools, in part 820 of Title 77 of the Administrative Code (77 Ill. Adm. Code 820 *et seq.* (2013)). While section 19-402 does not expressly state the pool attendant shall enforce the *Department's* regulations, it broadly states that the attendant shall enforce "all applicable regulations." Such broad, extensive language together with the adoption of the Department's regulations in section 19-401, leads us to conclude that the phrase "all applicable regulations

pertaining to minimum sanitary requirements and operation of swimming pools" in section 19-402 includes the Department's regulations regarding sanitary requirements *and* operation of swimming pools and in particular those set forth in part 820 of the Administrative Code (*id.*).

¶ 54 We now return to our inquiry into whether section 19-402 of the Municipal Code is designed to protect human life. See *Kalata*, 144 Ill. 2d at 435. Section 19-402 requires that the mandatory pool attendant "shall enforce all applicable regulations pertaining to minimum sanitary requirements and operation of swimming pools." Arlington Heights Municipal Code § 19-402 (eff. Oct. 1, 2011). As previously discussed, this language in section 19-402 includes the regulations of the Department in part 820 of the Administrative Code. These regulations were promulgated pursuant to the Act (see 210 ILCS 125/13 (West 2016)), therefore, we consider the legislative purpose of the Act.

¶ 55 Section 2 of the Act sets forth in full:

> "Legislative purpose. It is found that there exists, and may in the future exist, within the State of Illinois public swimming facilities, including swimming pools, spas, water slides, public bathing beaches, and other swimming facilities, which are substandard in one or more important features of safety, cleanliness or sanitation. Such conditions adversely affect the public health, safety and general welfare of persons.
>
> Therefore, the purpose of this Act is to protect, promote and preserve the public health, safety and general welfare by providing for the establishment and enforcement of minimum standards for safety, cleanliness and general sanitation for all swimming facilities, including swimming pools, spas, water slides, public bathing beaches, and other aquatic features now in existence or hereafter constructed, developed, or altered, and to provide for inspection and licensing of all such facilities." 210 ILCS 125/2 (West 2016).

The legislative purpose of the Act includes the protection of safety and cleanliness of all swimming facilities. *Id.* As the Department's regulations (77 Ill. Adm. Code 820 *et seq.* (2013)) were adopted pursuant to the Act and section 19-402 of the Municipal Code requires a pool attendant to enforce the Department's regulations, we conclude that section 19-402 is a public safety measure and that it is reasonable to conclude that the ordinance was designed to protect human life. See *Kalata*, 144 Ill. 2d at 435 (concluding an ordinance requiring stairways to have walls, railings, or guards was designed to protect human life). We further observe that section 19-402 of the Municipal Code goes one step further than the Act and requires a pool attendant to be present "any time an outdoor swimming pool is in use" to enforce "*all* applicable regulations pertaining to *** [the] operation of swimming pools." (Emphasis added.) Arlington Heights Municipal Code § 19-402 (eff. Oct. 1, 2011).

¶ 56 Having concluded that section 19-402 of the Municipal Code was designed to protect human life, we will briefly consider whether plaintiff established that the ordinance was violated in this instance. See *Kalata*, 144 Ill. 2d at 434; *Price ex rel. Massey*, 362 Ill. App. 3d at 1216.

¶ 57 Section 820.360 titled "patron regulations" sets forth several rules governing the use of a swimming facility and requires that these rules "be displayed on placards at the entrance to bather preparation facilities and adjacent to the swimming facility entrance and *shall be enforced by the swimming facility manager/operator*." (Emphases added.) 77 Ill. Adm. Code 820.360 (2013). Further, this section authorizes a "swimming facility manager/operator" to implement and enforce rules that are more stringent. *Id.* The pertinent patron regulation listed in section 820.360 is as follows: "*Persons less than 16 years of age must be accompanied by a responsible person 16 years of age or older unless a lifeguard is present.*" (Emphasis added.) *Id.*

¶ 58 Here, the record before this court demonstrates that, while acting as the pool attendant,

Hampton allowed the girls to stay in the pool area after she was became aware that Ross was no longer present. She thus failed to enforce the Department regulation or rule that persons under 16 years of age who are unaccompanied by an adult may not remain in the pool area where a lifeguard was not present and thus violated section 19-402. See 77 Ill. Adm. Code 820.360(f) (2013). Accordingly, where, as here, section 19-402 of the Municipal Code requires a pool attendant to enforce "all of the regulations" pertaining to the operation of swimming pools and such ordinance was designed to protect human life, a duty was created. See *Price ex rel. Massey*, 362 Ill. App. 3d at 1216 ("once a violation of [a] statute is shown, there is no question of duty"). We therefore conclude that the circuit court erred when it found no duty existed under the Municipal Code.

¶ 59 This is not to say that because we conclude that the violation of section 19-402 of the Municipal Code creates a duty in this particular case that it necessarily follows that defendants are liable. Plaintiff still must prove that (1) the Jasinae is a member of the class of persons the ordinance was designed to protect, (2) the injury is the type of injury that the ordinance was intended to protect against, and (3) Hampton's violation of the ordinance was the proximate cause of Jasinae's injury. See *Kalata*, 144 Ill. 2d at 434-35; *Price ex rel. Massey*, 362 Ill. App. 3d at 1216-17. Furthermore, in the case of an ordinance violation such as this, the open and obvious dangerous nature of the swimming pool would go to the issue of proximate cause to be resolved by the jury, but it does not negate a duty being imposed under the ordinance. See *Bier v. Leanna Lakeside Property Ass'n*, 305 Ill. App. 3d 45, 59 (1999). In addition, because evidence of the violation of an ordinance is *prima facie* evidence of negligence, and *not* negligence *per se*, defendants can prevail despite an ordinance violation by demonstrating that they acted reasonably under the circumstances. *Kalata*, 144 Ill. 2d at 435.

¶ 60 CONCLUSION

¶ 61 For the reasons stated above, we affirm the finding of the circuit court of Cook County that no duty exists under the voluntary-undertaking doctrine or the Act. We, however, reverse the circuit court's determination that no duty exists under the Municipal Code and remand for further proceedings.

¶ 62 Affirmed in part, reversed in part.