THIRD DIVISION
December 16, 2015

No. 1-14-2465

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ERICA BROWN, Plaintiff-Appellant, vs. PIVOT POINT BEAUTY SCHOOL, INC., a corporation, d/b/a Pivot Point Academy and Pivot Point International Academy, PIVOT POINT INTERNATIONAL. INC., a corporation, and PFE, LLC, a limited corporation, CHICAGO LAND TRUST COMPANY f/k/a LaSalle Bank NA, as Successor Trustee Under Trust Agreement, Dated, May 26, 1988, and known as Trust Number 24-2623-00 to PFE, LLC. Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 13 L 008926 The Honorable William E. Gomolinski Judge, presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in granting defendant's motion to dismiss under section 2-615(a) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615(a)) (West 2012)), where four counts in plaintiff's complaint failed to properly provide facts to state a cause of action. Affirmed.

¶ 2 This interlocutory appeal arises from the trial court's order granting a section 2-615(a) and 2-619(a)(9) motion to dismiss filed by defendants Pivot Point Beauty School, Inc. d/b/a Pivot Point International Academy (Pivot Point), Pivot Point International Inc. and PFE, LLC against plaintiff Erica Brown (735 ILCS 5/2-615(a) (West 2012); 735 ILCS 5/2-619(a)(9) (West 2012)). On appeal, plaintiff contends that the trial court erred in dismissing certain subparagraphs under plaintiff's negligence claim. In addition, plaintiff contends that the trial court erred in dismissing the remaining counts from her Second Amended Complaint with prejudice for willful and wanton conduct, spoliation of evidence, *res ipsa loquitur*, dangerous instrumentality-high degree of care and inherently dangerous condition strict liability. We affirm.

¶ 3 I. BACKGROUND

¶ 4 We recite only those facts necessary to understand the issues raised on appeal. On May 31, 2012, plaintiff sustained permanent bodily injuries while attending a beautician's cosmetology class at Pivot Point. Plaintiff filed an initial complaint and amended complaint containing three counts for common law negligence, dangerous instrumentality-high degree of care and inherently dangerous instrumentality-strict liability. The Second Amended Complaint, however, included three additional counts for willful and wanton misconduct, spoliation of evidence and *res ipsa loquitur*.

¶ 5 Specifically, the Second Amended Complaint pled that plaintiff signed an enrollment agreement to attend beautician classes at Pivot Point, which agreed to supply the necessary equipment to be used by its students. Plaintiff further pled that at the time of the incident she was attempting to plug in a flatiron to an electrical socket when she suffered a severe electrical shock that proximately caused her to suffer severe personal injuries to the left side of her body, paralysis and/or semi paralysis of her left arm and left leg. In addition, plaintiff alleged that during the incident the electrical current in Pivot Point's classroom did not immediately shut off, but continued to surge for 10 to 15 seconds or longer and the classroom lights flickered, which

proved there was a continuous flow or surge of electrical current that prevented plaintiff from being able to release her left hand from the electrical cord. Furthermore, plaintiff pled that shortly after the incident Pivot Point hired an electrical contractor to remove and replace the electrical system in its building, resulting in spoliation of evidence. Plaintiff also pled that defendants by themselves and through their agents or employees or representatives acting on their behalf, were under a duty to provide a safe electrical system, a safe environment and, a safe place for their students to work. Defendants allegedly breached this duty when they failed to provide a reasonably safe electrical system to their students while they were in defendants' school building.

¶ 6 When confronted with defendants motion to dismiss the Second Amended Complaint the trial court initially dismissed subparagraphs a, b, d, g, h, i, j and k of paragraph 20 in plaintiff's negligence claim. The court then dismissed the remaining counts with prejudice. The court further found that the orders were final pursuant to Supreme Court Rule 304(a), and thus, plaintiff could appeal any part of its ruling. Ill. Sup. Ct. R. 304(a) (eff. Feb. 26, 2010). Plaintiff then filed this timely notice of appeal.

¶ 7 II. ANALYSIS

¶ 8 A motion to dismiss brought under section 2-615(a) of the Code (735 ILCS 5/2-615(a) (West 2012)) challenges the legal sufficiency of the complaint by showing defects on its face. *Young v. Bryco Arms*, 213 Ill. 2d 433, 440 (2004). In turn, a motion to dismiss pursuant to section 2-619 admits the legal sufficiency of plaintiffs' complaint, but asserts an affirmative matter which defeats the claim. *Jane Doe-3 v. McLean County Unit District No. 5 Board. of Directors*, 2012 IL 112479, ¶ 15. Review under either section 2-615 or section 2-619 is *de novo*. *King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1, 12, (2005).

¶ 9 A complaint should be dismissed under section 2-615 for failure to state a cause of action only when it clearly appears that no set of facts could be proved under the pleadings that would entitle the plaintiff to relief. *McLean v. Rockford Country Club*, 352 Ill. App. 3d 229, (2004). Although a section 2-615 motion to dismiss admits all well-pled facts as true, it does not admit conclusions of law or factual conclusions that are unsupported by allegations of specific facts. *Lake County Grading Co. of Libertyville, Inc. v. Advance Mechanical Contractors, Inc.*, 275 Ill. App. 3d 452, 457 (1995). If after disregarding any legal and factual conclusions, the complaint does not allege sufficient facts to state a cause of action, the motion to dismiss should be granted. *Id.*

¶ 10 In order to recover damages in a common law negligence case, plaintiff must set forth a duty, a breach of that duty and injury proximately caused by the breach. *Dunning v. Dynegy Midwest Generation, Inc.*, 2015 IL App (5th) 140168, ¶ 63. Whether a duty exists in a particular case is a question of law for the court to decide. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 430 (2006). On the contrary, whether a defendant breached the duty and whether the breach was the proximate cause of the plaintiff's injuries are factual matters for the jury to decide, provided there is a genuine issue of material fact regarding those issues. *Id.* The question of the existence of a duty is a question of law, and, in order to determine if a duty exists, the trial court considers whether a relationship existed between the parties that imposed a legal obligation upon one party for the benefit of the other party. *Sameer v. Butt*, 343 Ill. App. 3d 78, 85 (2003). Generally, a business operator owes its invitees a duty to exercise reasonable care in maintaining the premises in a reasonably safe condition for use by its invitees. *Bulduk v. Walgreen Co.*, 2015 IL App (1st) 150166, ¶ 12.

¶ 11 We initially note that the trial court specifically included in its 304(a) finding the dismissal of eight subparagraphs in paragraph 20 of plaintiff's negligence count in her Second Amended Complaint[1]. Thus, those subparagraphs are properly before us for review. See Ill. Sup. Ct. R. 304(a) (eff. Feb. 26, 2010); *Lozman v. Putnam*, 328 Ill. App. 3d 761, 767-68 (2002). We find, however, that plaintiff has forfeited this contention on appeal. Other than reciting pages of negligence case law and statute, plaintiff's brief fails to provide a cohesive legal argument as to why we should reverse the trial court's determination regarding the specific negligence claims plaintiff makes in the subparagraphs at issue. See Ill. Sup. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). We do appreciate plaintiff's overall negligence contention that as a business invitee defendants owed her a reasonable duty of care, but that does not explain how her pleadings were sufficient to incorporate the dismissed subparagraphs and should automatically be reversed. This court is entitled to clearly defined issues, cohesive legal arguments and citations to relevant authority. *County Mutual Insurance Co. v. Styck's Body Shop, Inc.*, 396 Ill. App. 3d 241, 254-255 (2009). Accordingly, plaintiff has forfeited this contention on appeal. See *TruServ Corp. v. Ernest & Young, LLP*, 376 Ill. App. 3d 218, 227 (2007).

¶ 12 Plaintiff next contends that the trial court erred in dismissing her count for willful and wanton misconduct because she stated a valid cause of action. We disagree. In order to recover damages based on willful and wanton conduct, a plaintiff must not only plead and prove the basic elements of a negligence claim, but allege either a deliberate intention to harm or a conscious disregard for the plaintiff's welfare. *Doe ex rel. Ortega-Piron v.Chicago Board of Education*, 213 Ill. 2d 19, 28 (2004). The Illinois Supreme Court further explained that willful and wanton conduct means "failure after knowledge of impending danger, to exercise ordinary care to prevent it or a failure to discover the danger through recklessness or carelessness when it

[1] We note that Plaintiff's overall negligence claim is still pending in the court below.

should have been discovered through ordinary care." *Lynch v. Board of Education of Collinsville Community Unit Dist. No. 10*, 82 Ill. 2d 415, 429 (1980). To withstand a motion to dismiss, the mere characterization of acts as willful and wanton misconduct is not sufficient, but rather the willful and wanton misconduct must be manifested by the well-pled facts in the complaint. *Oropeza v. Board of Education of City of Chicago*, 238 Ill. App. 3d 399, 403 (1992).

¶ 13 Here, the allegations set forth in plaintiff's complaint are insufficient to establish a cause of action for willful and wanton conduct. Plaintiff failed to plead any specific facts that demonstrate defendants knew of any impending danger or through their own recklessness failed to discover any danger with Pivot Point's electrical system. Plaintiff's complaint admits only factual conclusions that are unsupported by allegations of specific facts. Further, nowhere in plaintiff's brief does she direct us to any facts alleged that meet the criteria for willful and wanton conduct other than highlighting that electricity is inherently dangerous. Thus, as nothing pled demonstrates a deliberate intention to harm or a conscious disregard for plaintiff's welfare, the trial court properly dismissed plaintiff's count for willful and wanton misconduct. See *Dinelli v. County of Lake*, 294 Ill. App. 3d 876, 885 (1998) (dismissal proper where plaintiffs "vaguely alleged only one prior injury that may or may not have any similarity" to the accident at issue and therefore the complaint did not plead facts showing the defendant had the requisite knowledge of the dangerous condition); *Cf. Carter v. New Trier East High School*, 272 Ill. App. 3d 551, 557-58 (1995) (dismissal of the complaint was not appropriate where plaintiff alleged that defendant knew others had been injured by the defective condition of the tennis courts in the past but failed to respond).

¶ 14 Plaintiff also contends that the trial court erred in dismissing her count for spoliation of evidence. A plaintiff claiming spoliation of evidence must prove that (1) the defendant owed the

plaintiff a duty to preserve the evidence; (2) the defendant breached the duty by losing or destroying the evidence; (3) the loss or destruction of the evidence was the proximate cause of the plaintiff's inability to prove an underlying lawsuit; and (4) as a result, the plaintiff suffered actual damages. *Id.* The general rule in Illinois is that there is no duty to preserve evidence, but in *Boyd* the court set forth a two-prong test which a plaintiff must meet in order to establish an exception to the general no-duty rule. *Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188, 195 (1995). Under the "relationship" prong, a plaintiff must show that an agreement, contract, statute, special circumstance, or voluntary undertaking has given rise to a duty to preserve evidence on the part of the defendant. *Id.* Under the "foreseeability" prong, a plaintiff must show that the duty extends to the specific evidence at issue by demonstrating that "a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action." *Id.* If the plaintiff fails to satisfy both prongs, the defendant has no duty to preserve the evidence at issue. *Dardeen v. Kuehling*, 213 Ill. 2d 329, 336 (2004).

¶ 15 In her complaint, plaintiff fails to allege any facts establishing that defendants had a duty to preserve the electrical system. Plaintiff's complaint fails to plead any "agreement, contract, statute, special circumstance or voluntary undertaking" that created a duty obligating defendants to preserve the evidence. Plaintiff only pleads that defendants were "aware to the fact that Plaintiff suffered severe injury on its premises, and therefore knew or should have known that the electrical system of the building constitutes evidence that was material to a potential action." While this may be pertinent under the foreseeability prong, since plaintiff fails to meet the threshold relationship prong, her claim fails. See *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270, ¶ 45 (more than a defendant's mere possession and control of the evidence is needed to establish a duty).

¶ 16 Plaintiff further contends her complaint stated a valid cause of action under the *res ipsa loquitur* doctrine. Plaintiff's Second Amended Complaint alleged a *res ipsa loquitur* theory of negligence stating that "the occurrence would have not taken place in the ordinary course of things if the Defendants had not failed to use proper care in the direction, control, management and maintenance of the electrical system." The purpose of the *res ipsa loquitur* doctrine is to allow proof of negligence by circumstantial evidence when the direct evidence concerning cause of injury is primarily within the knowledge and control of the defendant. *Collins v. Superior Air-Ground Ambulance Service, Inc.*, 338 Ill. App. 3d 812, 816 (2003). A plaintiff seeking to rely on *res ipsa loquitur* must show: (1) he or she was injured, (2) the injury was received from an instrumentality that was under the defendant's control, and (3) in the normal course of events, the injury would not have occurred if the defendant had used ordinary care while the instrumentality was under his or her control. *Heastie v. Roberts*, 226 Ill. 2d 515, 531-32 (2007). "Before *res ipsa loquitur* can be applied, it must be shown that the injury can be traced to a specific instrumentality or cause for which the defendant is responsible or that the defendant was responsible for all reasonable causes to which the accident could be attributed." *Napoli v. Hinsdale Hospital*, 213 Ill. App. 3d 382, 388 (1991). Where there are differing possible causes of an accident and a plaintiff cannot establish that it was defendant's actions which caused the accident, *res ipsa loquitur* will not be applicable. *Id*. at 388.

¶ 17 In the case *sub judice*, plaintiff fails to demonstrate that it was in fact defendants' actions, which caused the occurrence. Plaintiff has pled nothing to establish defendants had constructive knowledge that Pivot Point's electrical system was dangerous or that defendants failed to use ordinary care in maintaining the electrical system. In addition, it is unclear from the facts of the complaint what expressly caused plaintiff's injury. For instance, the power company or a third-

party providing maintenance may have been at fault, or it may have been a defective flatiron. See *Napoli v. Hinsdale Hospital*, 213 Ill. App. 3d 382, 388 (1991) (holding that where there are differing possible causes of an accident and a plaintiff cannot establish that defendant's actions caused it, *res ipsa loquitur* is not applicable); *Loizzo v. St. Francis Hospital*, 121 Ill. App. 3d 172, 178 (1984), quoting 3 J. Dooley, Modern Tort Law §48.19, at 347 (1977) (a plaintiff must '"eliminate the possibility that the accident was caused by someone other than any defendant"'). Consequently, plaintiff's complaint fails to unequivocally demonstrate that plaintiff's injury occurred as a direct result of defendants' improper care for Pivot Point's electrical system. Therefore, the trial court properly dismissed plaintiff's claim for *res ipsa loquitur*.

¶ 18 Plaintiff next contends that the trial court erred in dismissing her claims for dangerous instrumentality-high degree of care and strict liability. We first observe that plaintiff's brief fails to provide cohesive legal arguments for these contentions on appeal. See Ill. Sup. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (argument must contain the contentions of the appellant, the reasons therefor, and the citation of authorities; points not argued in an opening brief are forfeited and shall not be raised in the reply brief, in oral argument, or in a petition for a rehearing). Specifically, plaintiff only cites cases involving electrical utility companies and fails to cite anything for the proposition that an ordinary landowner like defendants owe anything but an ordinary duty of care. See *Nelson v. Comonwealth Edison Co.*, 124 Ill. App. 3d 655 (1984); *German v. Illinois Power Company*, 115 Ill. App. 3d 977 (1983); *Spence v. Commonwealth Edison Co.*, 34 Ill. App. 3d 1059 (1975). Plaintiff provides no argument other than pronouncing that the "[d]istribution of electrical energy requires power companies to exercise a high degree of care." As none of defendants are a power company this contention fails. Furthermore, plaintiff provides no cohesive legal argument as to why strict liability should be imposed upon defendants

other than referencing unrelated cases involving defective products. See *Dubin v. Michael Reese Hospital*, 74 Ill. App. 3d 932 (1979) judgment reversed by *Dubin v. Michael Reese Hospital and Medical Center*, 83 Ill. 2d 277 (1980); *Crowe v. Public Building Commission of Chicago*, 74 Ill. 2d 10 (1978); *Lowrie v. City of Evanston*, 50 Ill. App. 3d 376 (1977). Again, this contention fails and plaintiff has forfeited these issues on appeal. See *Sekerez v. Rush University Medical Center*, 2011 IL App (1st) 090889, ¶ 82. Moreover, we note that plaintiff's reply brief contains an added argument questioning defendants' allegedly improper hybrid motion to dismiss. As plaintiff cannot bring up an issue for the first time in her reply brief we need not consider this contention further. See Ill. Sup. Ct. R. 341(j) (eff. Feb. 6, 2013) (the reply brief "shall be confined strictly to replying to arguments presented in the brief of the appellee").

¶ 19 Based on the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 20 Affirmed.