IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

John Doe, a minor, by Jane Doe and James Doe, his parents and next friends,	)	
Plaintiffs,	)	
v.	)	No. 21 L 8880
The Cove School, Inc.,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

An employer may be subject to direct liability for an employee's tortious conduct if the employer knew or had reason to know of the conduct before it occurred. In this case, the plaintiffs' complaint alleges school officials knew of their employees' abusive conduct toward a minor-student and failed to report the conduct or contact the parents. At the same time, there exists no private right of action under the Abused and Neglected Child Reporting Act. For those reasons, the defendant's motion to dismiss is denied, in part, and granted, in part.

Facts

In August 2015, John Doe, a minor, began attending first grade at the Cove School, a private school for students with learning disabilities located in Northbrook. Beginning in the first grade, Cove employees and agents subjected John to increasing forms of abuse. The abuse included being called fat, a bad boy, and a bad Catholic who would never go to heaven to see his grandfather. During a school assembly, an employee pointed to John to indicate that he was being watched. Employees forced John to take walks against his will. Employees sometimes ate all but a small portion of John's lunch. They kicked, bit, shoved, slapped, or struck John. Employees taught John how to draw a swastika and then took a photo or video of him naked with a swastika on his body. Employees ripped his clothes. An employee turned up a treadmill so fast that John fell off. An employee filmed John dancing naked and was shown pornography on the employee's cell phone. An employee exposed his genitals to John, masturbated in front of him, made oral contact with John's penis, and inserted something into his anus.

On February 22, 2019, John's parents first discovered the abuse. They immediately removed John from Cove and on September 3, 2021 filed suit against Cove on John's behalf. The complaint alleges John reported his abuse to Cove administrators, teachers, and staff, but they never reported the abuse or notified John's parents. The abuse allegedly continued even after John reported the abuse to Cove administrators, teachers, and staff.

The complaint presents two causes of action against Cove. Count one is pleaded in willful and wanton conduct and alleges Cove owed John a duty to protect him from physical, sexual, verbal, and mental abuse that could have reasonably been foreseen and avoided. Cove is claimed to have breached its duty by willfully and wantonly disregarding John's reports and by failing to inform John's parents. Count two is a cause of action under the Abused and Neglected Child Reporting Act. John's parents allege Cove is a mandated reporter under both the statute and the school's own policies. The complaint claims Cove breached its duty by failing to investigate John's reports, reporting the abuse as the statute requires, and informing John's parents.

On November 15, 2021, Cove filed a motion to dismiss the complaint. The parties fully briefed the matter.

Analysis

Cove brings its motion to dismiss pursuant to the Code of Civil Procedure. 735 ILCS 5/2-619. A section 2-619 motion to dismiss authorizes the involuntary dismissal of a claim based on defects or defenses outside the pleadings. *See Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 485 (1994). A court considering a section 2-619 motion must construe the pleadings and supporting documents in a light most favorable to the nonmoving party. *See Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). All well-pleaded facts contained in the complaint and all inferences reasonably drawn from them are to be considered true. *See Calloway v. Kinkelaar*, 168 Ill. 2d 312, 324 (1995). A court is not to accept as true those conclusions unsupported by facts. *See Patrick Eng., Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. As has been stated: "The purpose of a section 2-619 motion is to dispose of issues of law and easily proved issues of fact early in the litigation." *Czarobski*, 227 Ill. 2d at 369.

One of the enumerated grounds for a section 2-619 motion to dismiss is that "affirmative matter" avoids the legal effect of or defeats the claim. 735 ILCS 5/2-619(a)(9). Affirmative matter is something in the nature of a defense negating the cause of action completely or refuting crucial conclusions of law or conclusions of material fact contained in or inferred

from the complaint. *See Illinois Graphics*, 159 Ill. 2d at 485-86. While the statute requires that affirmative matter be supported by affidavit, some affirmative matter has been considered to be apparent on the face of the pleading. *See id.*

Count One – Willful and Wanton Conduct

Cove's central argument is that Cove can be subject to vicarious liability for its employees' tortious conduct under the *respondeat superior* doctrine only if the employees' conduct fell within the scope of their employment. *Deloney v. Board of Ed. of Thornton Twp.*, 281 Ill. App. 3d 775, 784 (1st Dist. 1996). According to Cove, since the alleged conduct of its employees did not benefit Cove, Cove cannot be held liable for their conduct. Restatement (Second) of Agency §§ 228 & 231. Cove cites to various cases supporting that legal proposition.

Cove's argument is misguided based on a fundamental misreading of the complaint. Quite simply, the complaint is not pleaded in *respondeat superior*. The Does allege John informed administrators, teachers, and staff of the increasing abuse to which he was subjected, but Cove failed to investigate or inform his parents. Those allegations are not directed against Cove based on what its employees did, but on what Cove failed to do after it had been placed on notice of the abuse. In other words, the Does' complaint is making an institutional claim of willful and wanton conduct against Cove, not a *respondeat superior* claim. To that extent, the Does' complaint is similar to those in cases in which the employer knew of an employee's offenses but did nothing about them. *See, e.g., Wisniewski v. Diocese of Belleville*, 406 Ill. App. 3d 1119 (5th Dist. 2011).

Cove's second argument—that it owed John no duty to prevent the criminal acts of Cove's employees—fails for related reasons. Illinois common law recognizes a cause of action for negligent hiring, supervision, or retention of an employee who intentionally harms someone while acting outside the scope of employment. *See, e.g., Kigin v. Woodmen of the World Ins. Co.*, 185 Ill. App. 3d 400, 403 (5th Dist. 1989) (employer knew employee who sexually molested camper was intoxicated); *Malorney v. B&L Motor Freight, Inc.*, 146 Ill. App. 3d 265, 268 (1st Dist. 1986) (whether company negligently hired truck driver with criminal history of violent sex-related crimes who later raped and beat hitchhiker); *Gregor v. Kleiser*, 111 Ill. App. 3d 333, 338-39 (2d Dist.1982) (plaintiff knew of bouncer's propensity for violence before he attacker party attendee). These decisions reflect the Restatement (Second) of Torts that imposes on employers a duty to exercise reasonable care to control an employee acting outside the scope of employment to prevent the employee from intentionally harming others, if (a) the employee is on the employer's

premises or using the employer's chattel; and (b) the employer knows or has reason to know of its ability to control his employee, and knows or should know of the necessity and opportunity for exercising control over the employee. Restatement (Second) of Torts § 317 (1965). In this case, the complaint alleges the employees abused John at Cove and John had reported the events, placing Cove's administration on notice of the employees' tortious conduct.

Cove further argues there is nothing in the record suggesting it acted willfully and wantonly and, therefore, the School Code immunizes Cove from the Does' simple negligence claims. 105 ILCS 5/24-24. Cove's argument is belied by the law and the facts. "Illinois courts define willful and wanton conduct, in part, as the failure to take reasonable precautions after 'knowledge of impending danger.'" *See Lynch v. Board of Ed.*, 82 Ill. 2d 415, 429 (1980); *Burke v. 12 Rothschild's Liquor Mart*, 148 Ill. 2d 429, 449 (1992) (willful and wanton conduct "'requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man'") (quoting, Restatement (Second) of Torts § 500 cmt. *g*, at 590 (1965)); *see also Miller v. General Motors Corp.* 207 Ill. App. 3d 148, 161 (1st Dist. 1990). The real issue is whether pleading actual knowledge is sufficient to support a willful and wanton claim. Illinois courts have found it is. In *Hill v. Galesburg Community Unit School District 205*, for example, the plaintiff pleaded the defendant's teacher, "(1) had actual knowledge [the plaintiff-student] was performing the experiment without wearing eye protection, (2) had actual knowledge of the dangers of performing the experiment, and (3) consciously disregarded [the plaintiff student's] safety by permitting him to participate in the experiment without eye protection." 356 Ill. App. 3d 515, 522 (3rd Dist. 2004). The court concluded "these allegations are sufficient for a jury to infer a 'reckless disregard' for [the plaintiff-student's] safety 'after knowledge of impending danger.'" *Id.* Other courts have held similarly. *See Muellman v. Chicago Park Dist.*, 233 Ill. App. 3d 1066, 1069 (1st Dist. 1992) (willful and wanton conduct sufficiently pleaded based on defendant taking no action despite knowing of dangerous condition); *Straub v. City of Mt. Olive*, 240 Ill. App. 3d 967, 978 (4th Dist. 1993) (defendant knew of dangers based on past incidents but took no action); *Pittsburgh, C., C. & S. L. R. Co. v. Kinnare*, 203 Ill. 388, 390-93 (1903) (allegations that defendant knew of decedent's perilous condition sufficiently alleged willful and wanton injury).

In this case, the Does have alleged willful and wanton conduct based on the Cove's administrators, teachers, and staff knowing of John's abuse by Cove employees and not reporting it or informing his parents. Such alleged omissions are plainly sufficient to support a willful and wanton claim at this stage of the proceedings.

Finally, Cove argues there exists no proximate causation between its conduct and John's injury based on its employees' intervening or superseding acts. Proximate cause is generally a question of fact to be decided by the trier of fact. *Fenton v. City of Chicago*, 2013 IL App (1st) 111596, ¶ 27. The test to be applied in determining proximate cause is whether the first wrongdoer might have reasonably anticipated the intervening cause as a natural and probable result of the first party's own negligence. *Merlo v. Public Serv. Co. of N. Ill.*, 381 Ill. 300, 317 (1942). The Does have sufficiently alleged Cove knew its employees' abusive conduct proximately caused John's injuries. That is sufficient at this stage of the litigation to withstand a motion to dismiss.

Count Two – Abused and Neglected Child Reporting Act

Illinois and federal case law consistently hold that the Abused and Neglected Child Reporting Act does not create a private right of action, either express or implied. *John Doe 1 v. North Cent. Behavioral Health Sys.*, 352 Ill. App. 3d 284, 288 (3d Dist. 2004); *Cuyler v. United States,* 362 F.3d 949, 955 (7th Cir. 2004); *Varela v. St. Elizabeth's Hosp. of Chicago, Inc.*, 372 Ill. App. 3d 714, 727 (1st Dist. 2006). Absent a private right of action under the statute, count two must be dismissed with prejudice.

Conclusion

For the reasons presented above, it is ordered that:

1. The defendant's motion to dismiss is granted, in part, and denied, in part;
2. The motion to dismiss count one is denied;
3. The motion to dismiss count two is granted with prejudice; and
4. The defendant has until April 22, 2022 to answer the complaint.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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