IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

FILED

20 AUG 13 2012

JANE DOE-1,

Plaintiff,

v.

JOHN A. SANDISON,
ST. JOSEPH-OGDEN COMMUNITY HIGH SCHOOL DISTRICT 305 BOARD OF EDUCATION, CHAD UPHOFF, BRIAN BROOKS, and JAMES M. ACKLIN,

Defendants.

Case No. 2012-LM-000575

12L83

PLAINTIFF JANE DOE-1'S MEMORANDUM IN OPPOSITION TO DEFENDANTS ST. JOSEPH-OGDEN COMMUNITY HIGH SCHOOL DISTRICT 305 BOARD OF EDUCATION, CHAD UPHOFF, BRIAN BROOKS, AND JAMES ACKLIN'S MOTION TO DISMISS COUNTS III-XIX

Plaintiff JANE DOE-1, by and through one of her attorneys, M. Denise Mickunas, hereby submits her Memorandum of Law in opposition to a Motion to Dismiss against her by Defendants ST. JOSEPH-OGDEN COMMUNITY HIGH SCHOOL DISTRICT 305 BOARD OF EDUCATION, CHAD UPHOFF, BRIAN BROOKS, AND JAMES ACKLIN.

I. ARGUMENT

A motion to dismiss under either section 2-615 or section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615, 2-619 (West 1996)) admits all well-pled allegations in the complaint and reasonable inferences to be drawn from the facts. *Anderson v. Anchor Organization for Health Maintenance*, 274 Ill. App. 3d 1001, 1012, 211 Ill. Dec. 213, 654 N.E.2d 675 (1995); *Pechan v. DynaForce, Inc.*, 257 Ill. App. 3d 1072, 1083-84, 196 Ill. Dec. 698, 622 N.E.2d 108 (1993); *Debra v. Weinkopf*, 168 Ill. App. 3d 505, 509, 64 Ill. Dec. 131, 439

Second, with respect to causation, Uphoff, Brooks and Acklin each had the power to report Jamison's misconduct to DCFS, and consequently the power to end his abuse of the Plaintiff Instead, their failure to make a mandated report and their concealment of evidence of Jamison's misdeeds allowed Jamison to continue and to escalate his abuse of the Plaintiff

Finally, with respect to whether Defendants' conduct was extreme and outrageous, Plaintiff contends that the "recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim[ ] Outrageous!" *Honaker v Smith*, 256 F 3d 477, 490 (7th Cir 2001) (quoting *Doe v Calumet City*, 161 Ill 2d 374, 204 Ill Dec 274, 641 N E 2d 498, 507 (1994) (reversed on other grounds))

> To determine whether the conduct alleged is extreme and outrageous, we employ an objective standard, taking into consideration the particular facts of the case [Honaker, 256 F 3d 477 at 490] The Supreme Court of Illinois has described a number of nonexclusive factors that may inform this analysis, including the degree of power or authority which a defendant has over a plaintiff, whether the defendant reasonably believed that his objective was legitimate, and whether the plaintiff is particularly susceptible to emotional distress because of some physical or mental condition or peculiarity *Honaker*, 256 F 3d at 490-92

Lewis v School Dist # 70, 523 F 3d 730, 747 (7th Cir , 2008)

Further, Brooks' interrogation of the Plaintiff was an extreme and outrageous exercise of his power as Principal It does not require a psychologist to recognize that such an interrogation of a possible victim of sexual abuse would cause extreme emotional distress Brooks" interrogation can only be described as "reckless conduct which will support a cause of action under the rules stated [i e] conduct from which the actor knows severe emotional distress is certain or substantially certain to result " *Public Finance Corp v Davis*, 360 N E 2d 765, 767, 66 Ill 2d 85, 90, 4 Ill Dec 652 (Ill , 1976) "Liability extends to situations in which there is a high degree of probability that severe emotional distress will follow and the

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actor goes ahead in conscious disregard of it." *Id* (quoting Prosser, Law of Torts 60 (4th ed .1971))

Brooks was not trained in interviewing alleged childhood victims of sexual abuse He was not competent to conduct such an interview Further, he was not authorized to conduct such an interview Contrary to Defendants' protestations, the "investigations" of Uphoff, Brooks and Acklin were ham-handed attempts to sweep allegations of Jamison's wrongdoing under the rug

D. Count V Brought under Respondeat Superior Is Well-Pled

As argued in Paragraph C above, Plaintiff has properly stated her claim for IIED against the Defendants Therefore, Count V for IIED against the District under respondeat superior should stand

E. In Count VI for Negligent Hiring, Plaintiff Sufficiently Alleges that the District Knew or Should have Known Jamison had a Particular Unfitness

Defendants argue that Plaintiff's allegations fail to meet any of the three pleading requirements for Negligent Hiring Defendants do not argue that they did not know of Jamison's alleged misconduct Rather, they argue that the misconduct by Jamison was not such that he could be deemed unfit for employment The Plaintiff disagrees

During 2006-2007 school year, two students reported conduct of sexual grooming (see definition of sexual grooming, Plt 's Compl ¶17) to teacher Terri Rein, who reported the allegations to Uphoff (*Plt 's Compl ¶30) Uphoff spoke to the students and their mothers This known prior sexual grooming by Jamison obviously

renders him unfit to be in contact with minor female students

Yet Jamison was re-hired for the 2007-2008 school year

In February, 2008, there was further conduct of sexual grooming by Jamison reported to Brooks (Plt 's Compl ¶36) Brooks reported this to Acklin This known misconduct led Brooks and Acklin to inform Jamison that "if anything else came up regarding this circumstance or similar to these issues," he would be dismissed (Plt's Compl ¶41) If such misconduct engaged in *a second time* warrants dismissal, then certainly such misconduct engaged in *the first time* warrants dismissal- This known prior sexual misconduct and a warning of dismissal obviously rendered Jamison unfit to be in contact with minor female students

Yet Jamison was re-hired for the 2008-2009 school year, and hired again for the 2009-2010 school year

Defendants make much of Plaintiff's denial that anything inappropriate was going on between her and Jamison Plaintiff contends that the prospect of being summoned to the Principal's office is frightening enough for a student Here, the Plaintiff, a minor female, was summoned to the office of the Principal, an adult male There, without the counsel or support of a parent, she was interrogated about her alleged sexual misdeeds with a teacher! Surely it can be inferred that Plaintiff was frightened and intimidated, and that she would "instinctively den[y] that anything inappropriate was going on " (Plt 's Compl ¶40)

F. In Count VII for Negligent Supervision Plaintiff Sufficiently Alleges that the District Knew or Should have Known Jamison had a Particular Unfitness that Created a Danger to Third Parties

As argued in Paragraph E above, Defendants first learned of Jamison's sexual

grooming during the 2006-2007 school year, and learned of further sexual misconduct in February, 2008 Such misconduct clearly indicates that Jamison was unfit to be in contact with minor female students

G. In Count VIII For Negligent Retention Plaintiff's Allegations are Factual and Non-Conclusory

Defendants argue that Plaintiff relies on conclusions of-fact and law in stating her claim for Negligent Retention However, Plaintiff has offered 14 different specific factual allegations (Plt 's Compl Count VIII, ¶50)

Defendants complain that Plaintiff's wording "had knowledge 'of **at least one** incident **in which one** of Jamison's students, parents, former students, former parents, former co-workers, **or** former supervisors complained about Jamison's behavior "is, "vague and wholly conclusory" Plaintiff contends that the meaning of this allegation is easily understood To insist that the sentence be reworded (as, for example, "had knowledge 'of incidents complained of by Jamison's students, parents, former students, former parents, former co-workers, former supervisors, **including but not limited to** behavior ") would elevate form over substance

Therefore, Plaintiff contends that Count VIII is properly pled

H In Count IX for Premises Liability, Plaintiff Properly Alleges that the Condition of the Premises Was Unsafe

Plaintiff has alleged that much of Jamison's misconduct occurred in the gymnasium and on board school buses (Plt 's Compl Count IX, ¶50) These are precisely the same kind of allegations made in *Deborah K v Sperlik* F Supp 2d, 2005 WL 3299804 (N D Ill)

"[A] defendant can be liable for the criminal acts of third persons where the condition of the premises prompted or facilitated the criminal act or where the defendant has unique knowledge regarding the possibility of future criminal acts Plaintiffs have alleged both conditions here 1) the Plaintiffs allege that the private room given to Sperlik directly contributed to and facilitated the abuse, 2) the Plaintiffs allege that the District had actual knowledge that Sperlik was utilizing the private room to commit the abuse The Plaintiffs do more than simply repackage their negligent supervision claims The gravamen of the Plaintiffs' premises liability claim is not that the District failed to supervise Sperlik Instead, the gravamen of the premises liability claims is that the District knew that Sperlik was using a private room to facilitate his abuse or his students and that it had unique knowledge that allowing Sperlik to have access to a private room increased the danger to its students, yet did nothing (for instance, deny Sperlik access to that room) to ensure that the premises were made safe "

Sperlik F Supp 2d at 4 (Citations omitted)

Therefore, Plaintiff has properly pled that a condition of the premises was unsafe

I. Plaintiff's Counts That Do Not Rely On ANCRA Are Proper, Notwithstanding That There May Be a Private Right of Action under ANCRA.

Defendants cite *Varela v St Elizabeth's Hosp of Chicago*, 867 N E 2d 1, 10 (Ill App , 2006) and *Doe 1 v North Central Behavioral Health Systems, Inc* , 352 Ill App 3d 284 (3d Dist 2004) to support the claim that ANCRA does not provide a private right of action

The Plaintiff contends that both *Varela* and *Doe 1 v North Central* are inapposite In *Doe 1 v North Central*, the defendant was a clinic that treated a sex offender Unlike the present case, the clinic had not duty to the victims of the offender In *Varela*, the defendants were a doctor and a hospital where a child was treated X-rays revealed old fractures in the child, but the doctor did not report it as suspected abuse

The Plaintiff is aware of only one instance in which the Illinois Supreme Court has spoken on the matter This occurred in a footnote in the recent case of *Doe-3 v Mclean Cnty Unit Dist No 5 Bd of Dirs* , 2012 IL 112479

> To the extent that plaintiffs argue that defendants' alleged violation of the Abused and Neglected Child Reporting Act (325 ILCS 5/1 et seq (West 2010)) provides a separate basis for liability by implying a private cause of action, we note that plaintiffs failed to raise this issue in the appellate court and, thus, have waived it *See Hansen v Baxter Healthcare Corp* , 198 Ill 2d 420, 428-29 (2002) (where a case is brought to the supreme court from the appellate court, questions which were not raised and argued in that court will not be considered by the supreme court but will be treated as waived)

Doe-3 v Mclean Cnty Unit Dist No 5 Bd of Dirs , 2012 IL 112479 ¶25, Footnote 7

It is particularly noteworthy that the Illinois Supreme Court did not take the opportunity to endorse either *Varela* or *Doe 1 v North Central* The Plaintiff interprets this accommodating comment as an invitation by the Illinois Supreme Court for plaintiffs to allege that ANCRA provides a private right of action Further evidence that the Illinois Supreme Court might endorse a private right of action under ANCRA is found in their recitation of public policy

> [T]his state has traditionally exhibited an acute interest in the well-being of minors Indeed, the welfare and protection of minors has always been considered one of the State's most fundamental interests [Citation omitted] Long ago, this court acknowledged the paramount importance of ensuring the welfare of children, and others, who are least able to protect themselves It is the unquestioned right and imperative duty of every enlightened government, in its character of parens patriae, to protect and provide for the comfort and well-being of such of its citizens as, by reason of infancy, defective understanding, or other misfortune or infirmity, are unable to take care of themselves The performance of this duty is justly regarded as one of the most important of governmental functions, and all constitutional limitations must be so understood and construed as not to interfere with its proper and legitimate exercise [Citations omitted]

Doe-3 v Mclean Cnty Unit Dist No 5 Bd of Dirs , 2012 IL 112479 ¶ 36

> This public policy has led our courts to recognize that even parents' rights are secondary to the State's strong interest in protecting children when the potential for abuse or neglect exists [Citation omitted] Moreover, there is a specific public policy in this State, as evidenced by various statutes, which favors, in particular, the protection of children from sex offenders [Citation omitted] (Internal quotation marks omitted)

Doe-3 v Mclean Cnty Unit Dist No 5 Bd of Dirs, 2012 IL 112479 ¶ 37

Consequently, Plaintiff does not agree that there is no private right of action under ANCRA Nevertheless, Plaintiff will contest Defendants' arguments on other grounds as well

Defendants argue that Counts IV through VII, X through XIII, and XVI through XVIII are solely based on an alleged failure to report under ANCRA Defendants have misconstrued all of the Counts All of the counts that Defendants complain of are based on either IIED or negligence, and the duty alleged is a duty that exists quite apart from ANCRA Thus, ANCRA is not used to create the duty required, but ANCRA merely dictates the standard of care required The distinction was clearly stated in *Varela v St Elizabeth's Hosp of Chicago*, 867 N E2d 1, 10 (Ill App , 2006) (quoting *Marquay v Eno*, 139 N H 708, 662 A 2d 272 (1995) and *Cuyler v U S* , 362 F 3d 949 (7th Cir , 2004))

> '[W]hether or not the common law recognizes a cause of action, the plaintiff may maintain an action under an applicable statute where the legislature intended violation of that statute to give rise to civil liability The doctrine of negligence per se, on the other hand, provides that where a cause of action does exist at common law, the standard of conduct to which a defendant will be held may be defined as that required by statute, rather than as the usual reasonable person standard '* * * Otherwise every statute that specified a standard of care would be automatically enforceable by tort suits for damages — every statute in effect would create an implied private right of action — which clearly is not the law The only modification required to make the passage that we quoted from the *Marquay* case an accurate statement of Illinois law is that in Illinois the violation of a statutory standard of care is prima facie evidence of negligence rather than negligence per se

Varela, 867 N E 2d 1, 10 (Ill App , 2006)

The Defendants rely on *Varela* for the proposition that ANCRA may not be disguised as a common law claim On this point, *Varela* is distinguishable from the present case In *Varela*, the Plaintiffs cited *Doe v Dimovska*, 336 Ill App 3d 292, 270 Ill Dec 618, 783 N E 2d 193 (2003) and *Cuyler* for the proposition that a doctor had a duty to a patient arising from

ANCRA The Varela court found *Dunnuck* and *Cuyler* to be inapposite, noting that "While these cases concern a failure to report abuse, they do not support the present appeal, because they do not indicate the hospital personnel owed this particular duty of care to their minor patient." Varela, 867 N E 2d 1, 9 (Ill App , 2006)

Consequently, contrary to Defendants' argument, Plaintiffs Counts IV through VII, X through XIII, and XVI through XVIII do not allege a private right of action under ANCRA Rather, each of them is based on either IIED or negligence where the duty alleged does not spring from ANCRA, but exists independently from ANCRA

a. Counts X-XIII Are Not Brought under a Failure to Report Theory, but under Negligence

As argued in Paragraph I above, Counts X and XII sound in negligence, with a duty arising quite apart from ANCRA The duty does not spring from ANCRA ANCRA merely determines the standard of care required Therefore, Counts X and XII are proper Counts XI and XIII for *respondeat superior* liability are likewise proper

b Although Plaintiff's Conspiracy Counts Are Predicated on Violation of ANCRA, They Should Stand.

As argued in Paragraph I above, Plaintiff contends that there is a private right of action under ANCRA Consequently, a conspiracy allegation may be based on such a private right of action

c Count IV- VII Do Not Rely on Non- Reporting under the ANCRA

As argued in Paragraph C above, Count IV (IIED) is based on Uphoff's;

Brooks' and Acklin's intentional concealment from the Plaintiff of known threats These allegations stand apart from ANCRA violations Defendants' violations of ANCRA were merely one of the mechanisms by which Defendants caused distress to the Plaintiff Therefore Count IV is proper, as is the corresponding respondeat superior Count V

As argued in Paragraph I above, Counts VI and VII sound in negligence, with a duty that does not spring from ANCRA ANCRA merely determines the standard of care required Therefore Counts VI and VII are proper

J. Plaintiff's Willful and Wanton Counts Are Allowed in Illinois

Defendants argue that there is no cause of action in Illinois for willful and wanton conduct However, the Illionios Supreme Court has summarized willful and wanton conduct, saying

> "There is no separate, independent tort of willful and wanton conduct *Krywin v Chicago Transit Authority*, 238 Ill 2d 215, 235 (2010) (citing *Ziarko v Soo Line R R Co*, 161 Ill 2d 267, 274 (1994)) Rather, willful and wanton conduct is regarded as an aggravated form of negligence *Krywin*, 238 Ill 2d at 235 (citing *Sparks v Starks*, 367 Ill App 3d 834, 837 (2006)) In order to recover damages based on willful and wanton conduct, a plaintiff must plead and prove the basic elements of a negligence claim--that the defendant owed a duty to the plaintiff, that the defendant breached that duty, and that the breach was a proximate cause of the plaintiff's injury *Krywin*, 238 Ill 2d at 225 In addition, a plaintiff must allege either a deliberate intention to harm or a conscious disregard for the plaintiff's welfare *Doe v Chicago Board of Education*, 213 Ill 2d 19, 28 (2004) "

Doe-3 v Mclean Cnty Unit Dist No 5 Bd of Dirs, 2012 IL 112479 (Ill , 2012), ¶19

Plaintiff has properly pled Counts XII and XIV as negligence along with "gross disregard for and utter indifference to [Plaintiff's] safety and well-being " Counts XIII and XV correspondingly allege respondeat superior liability Consequently Counts XII through XV are proper

K State Created Danger is Permitted as a Cause of Action in Illinois

Defendants argue that there is no cause of action in Illinois for "state-create danger" Plaintiff contends that the 4th Appellate District opinion in *Doe–3 v White*, 409 Ill App 3d 1087, 951 N E 2d 216, 351 Ill Dec 396, 269 Ed Law Rep 778 (Ill App , 2011) opened the door to allowing the tort of state-created danger Indeed, the Court's language as much as invited plaintiffs to pursue such a course

> We feel compelled to note that plaintiffs have alleged that McLean and the individual administrators engaged in conduct which, if true, can be described in no other term than egregious and, if true, conduct that may shock the conscience The use of that phrase is akin to the "state-created danger" doctrine developed, applied, and adopted by several of our federal district and circuit courts We note that the doctrine has not yet been recognized by any Illinois appellate court, our supreme court, or the United States Supreme Court We mention this doctrine because it specifically applies to state conduct which rises to the level of egregious conduct in the most extreme cases See *King v East St Louis School District 189*, 496 F 3d 812, 814–15, 818 (7th Cir 2007) (school personnel's enforcement of alleged school policy prohibiting a student's reentry to the school after hours resulted in a student's abduction and rape was not conduct that could be characterized as sufficient to "shock[ ] the conscience")
>
> Under the "state-created danger" doctrine, the state may be liable because " 'the government has a constitutional duty to protect a person against injuries inflicted by a third-party when it affirmatively places the person in a position of danger the person would not otherwise have faced' " and the state actor's conduct in failing to protect an individual shocks the conscience *Walter v Pike County, Pennsylvania*, 544 F 3d 182, 192 (3d Cir 2008) (quoting *Kamara v Attorney General*, 420 F 3d 202, 206 (3d Cir 2005)) Conduct sufficient to shock the conscience is a "necessarily fact-bound inquiry" *King*, 496 F 3d at 818

Doe–3 v White, 409 Ill App 3d 1087 at 1100

Plaintiff notes further that when *Doe-3 v White* was reviewed by the Illinois Supreme Court in *Doe-3 v Mclean Cnty Unit Dist No 5 Bd of Dirs* , the Supreme Court did not comment on the Appellate Court's dicta regarding state-created danger . Therefore, "State Created Danger" is arguably an allowable cause of action in

Illinois

III. PLAINTIFF'S CLAIMS SHOULD NOT BE DISMISSED PURSUANT TO SECTION 2-619 FOR ANY OF THE REASONS CITED BY DEFENDANTS

A. Section 2-201 of the Tort Immunity Act Does Not Provide Immunity to the Defendants

Defendants correctly cite Section 2-201 of the Tort Immunity Act, which provides that

> Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused Section 2-201

a. Immunity does not attach to Defendants' Ministerial Acts

Ministerial acts are not entitled to immunity *Hill v Galesburg Community Unit School District* 205, 346 Ill App 3d 515, 520, 805 N E 2d 299, 304 (3rd Dist 2004), *Trotter v School District* 218, 315 Ill App 3d 1, 13, 733 N E 2d 363, 373 (1st Dist 2000) Acts governed by a 'legal mandate are ministerial See *Snyder*, 167 Ill 2d at 474, 657 N E 2d at 993 (stating "[w]here tailored statutory and regulatory guidelines place certain constraints on the decisions of officials, a court should be reluctant to label decisions falling wholly outside the established parameters as 'discretionary'"), *Hill*, 346 Ill App 3d at 520, 805 N E 2d at 304 (holding that a teacher had no discretion to act in violation of an act and therefore the acts were ministerial), *Doe v Dimovska*, 336 Ill App 3d at 296, 783 N E 2d at 197 (holding that a statute's mandatory language divests an entity from exercising discretion or determining policy), *Trotter*, 315 Ill App 3d at 17, 733 N E 2d at 376 (concluding that school district "could not exercise discretion and determine to implement policy" that was in violation of a regulation), but see *D M ex rel C H*, 305 Ill App 3d at 739, 713 N E 2d at 200 (holding that

where a statute commands some conduct but provides "virtually no guidance as to how it should" be done, the actions taken are discretionary)

ANCRA legally mandates a specific course of action for handling reports Thus, like *Trotter* the Defendants here could not exercise discretion to violate a regulation, and like *Hill* the Defendants had no discretion to violate an act Further, unlike *D M ex rel C H*, ANCRA very specifically mandates conduct School personnel "shall immediately report" abuse to the Department 325 ILCS 5/4 "Under no circumstances shall any person in charge of such institution exercise any control, restraint, modification or other change in the report or the forwarding of such report to the Department " 325 ILCS 5/4 "All reports under this Act shall be made immediately by telephone " 325 ILCS 5/7

That Defendants' reporting was ministerial is summed up in *Dimovsky*

> We disagree with the notion that school personnel are vested with the discretion to determine what constitutes "reasonable cause to believe" or whether such abuse actually occurred The term "reasonable cause to believe" as used in the Reporting Act is equivalent to the term "suspect" as used in the Code of Federal Regulations (45 C F R § 1340 3-3(d)(2) (1977)) 1977 Ill Att'y Gen Op 173 The Reporting Act requires that a credible report of suspected child abuse must be turned over to DCFS DCFS is assigned the authority, or the discretion, to substantiate the accuracy of all reports of known or suspected child abuse or neglect 325 ILCS 5/7 3 (West 2000) Thus, once school personnel suspect or should suspect that a child may be sexually abused, they are divested of any discretion to determine what constitutes "reasonable cause to believe" or whether such abuse actually occurred If school personnel were allowed to determine whether reasonable cause existed or whether such abuse actually occurred before reporting the matter to DCFS, the goal of protecting children from sexual abuse would be undermined Although the school board may initially investigate the credibility of any rumors of sexual abuse, whether there was reasonable cause to report the allegations is an objective determination For purposes of the Reporting Act, the issue of whether school personnel have reasonable cause to report suspected allegations of abuse is determined by the

objective belief of a reasonable person, not the school personnel's subjective belief

Doe v Dimovski, 336 Ill App 3d at 297, 783 N E 2d at 198

When teacher Terri Rein related to Uphoff the allegations of sexual grooming made by two students (Plt 's Compl ¶30), Uphoff did not dismiss the allegations as "incredible " Instead he undertook to investigate the allegations by interviewing the students and their mothers The Plaintiff contends that if the allegations were serious enough for Uphoff to conduct such an investigation, then they were serious enough to warrant a mandated report

When a mother informed Brooks of allegations by her daughter of further sexual misconduct (Plt 's Compl ¶36), Brooks did not dismiss the allegations as "incredible " Instead he undertook to investigate the allegations by interviewing the daughter, by instructing Alicia Maxey to investigate Jamison'w computer activity, and by interrogating the Plaintiff The Plaintiff contends that if the allegations were serious enough for Brooks to conduct such an extensive investigation, then they were serious enough to warrant a mandated report

b Immunity Does Not Attach When There Is No Policy Decision.

Defendants argue that the decision to hire or not to hire is an inherently discretionary act, for which local public entities are provided immunity under Section 2-201 of the Tort Immunity Act, citing *Johnson v Mers*,-279 Ill App 3d 372, 380 (2d Dist 1996) as authority However, the *Johnson v Mers* analysis of 2-201 is incomplete In that case, Plaintiff Johnson alleged that the hiring of a police officer was a ministerial act, the court determined that is was instead a discretionary act The Plaintiff Johnson also alleged that there was an exception to 2-201 for conduct that was willful and wanton, the court determined otherwise The Plaintiff Johnson *did not claim*, and the court consequently *did not address*, the requirement that

immunity attaches only when the act is a policy decision

In order to secure immunity under 2-201, the act must not only be discretionary, it must also involve the determination of policy *Arteman v Clinton Com Unit School Dist*, 763 N E 2d 756, 198 Ill 2d 475, 261 Ill Dec 507 (Ill , 2002) ("We have held that section 2-201 immunity is concerned with both the position held by the municipal employee and the action performed by that employee *Harinek* [*v 161 N Clark Street Ltd P'ship*], 181 Ill 2d at 341, 230 Ill Dec 11, 692 N E 2d 1177 That is, the employee's position may involve either determining policy or exercising discretion, but the employee's 'act or omission must be both a determination of policy and an exercise of discretion ' *Harinek*, 181 Ill 2d at 341, 230 Ill Dec 11, 692 N E 2d 1177")

The Illinois Supreme Court has repeatedly held that "discretionary acts are those which are unique to a particular public office, while ministerial acts are those which a person performs on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, and without reference to the official's discretion as to the propriety of the act " *Van Meter v Darien Park Dist*, 799 N E 2d 273, 281, 207 Ill 2d 359 (Ill , 2003 (quoting *Snyder v Curran Township*, 167 Ill 2d 466, 474, 657 N E 2d 988, 993 (1995)), *Harrison v Hardin County Community Unit School District No 1*, 197 Ill 2d 466, 472, 758 N E 2d 848, 852 (2001) (also quoting *Snyder*) The court has also defined policy decisions as "those that require the governmental entity or employee to balance competing interests and to make a judgment call as to what solutions will best serve each of those interests " *Harrison*, 197 Ill 2d at 472, 758 N E 2d at 852

Here, although the decision to hire Jamison was discretionary, it did not involve

determination of policy Therefore, 2-201 immunity does not attach

B. Immunity under 3-102(a) Does Not Attach to Plaintiff's Premises Liability Claim

Defendants correctly cite Section 3-102(a) of the Tort Immunity Act Defendants argue that Plaintiff has not alleged a condition related to the maintenance of the premises As Plaintiff argued in Paragraph II H above, Plaintiffs have properly alleged failure to maintain the premises in a reasonably safe condition Therefore, 3-102(a) does not apply

C. Section 3-108 of the Tort Immunity Act Does Not Provide Immunity For Willful And Wanton Conduct

Defendants argue that Plaintiff has not adequately pled willful and wanton conduct ANCRA explicitly defines willful and wanton conduct

> Willful and wanton conduct" as used in this Act means a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property This definition shall apply in any case where a "willful and wanton" exception is incorporated into immunity under this Act 745 ILCS 10/1-210

A complaint for willful and wanton misconduct must allege duty, breach, proximate cause, and deliberate intention to harm or utter indifference to or conscious disregard of the plaintiff's welfare *Floyd ex rel 'Floyd v 'Rockford Park Dist*, 355 Ill App 3d 695, 700, 823 N E 2d 1004, 1009 (2nd Dist 2005)

What constitutes willful and wanton conduct is not precisely defined, it "can be slightly more than negligence, slightly less than intentional conduct, or anywhere in between, depending on the circumstances'" *Hill*, 346 Ill App 3d at 522, 805 N E 2d at 305

The definition adopted by the legislature was an exact copy of the pattern jury instruction of the time *Murray v Chicago Youth Center*, 224 Ill 2d 213, 241, 864 N E 2d 176, 192 (2007) The term had a settled judicial meaning, *Id*, which compassed acts "committed under circumstances exhibiting a reckless disregard for the safety of others, such as failure, after knowledge of impending danger, to exercise ordinary care to prevent it or failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care" *Murray*, 224 Ill 2d at 236, 864 N E 2d at 189 (quoting *Schneiderman v Interstate Transit Lines*, 394 Ill 569, 69 N E 2d 293 (1946)) Whether an injury was inflicted by willful and wanton conduct is a question of fact for the jury

Murray, 224 Ill 2d at 236, 864 N E 2d at 189-90

Plaintiff contends that when Uphoff, Brooks and Acklin concealed from her the prior complaints of Jamison's sexual grooming, and when they allowed him to continue to have access to her, they showed utter disregard for and total indifference to her well-being Whether this conduct rises to the level of "willful and wanton" is a question for the jury

Defendants also claim that Section 24-24 of the Illinois School Code, 105 ILCS 5/24-24, immunizes them from suits for negligence that arises from "matters relating to the discipline in and conduct of the schools and school children" However, Plaintiff does not allege that Defendants were negligent in failing to discipline Jamison Rather, they were negligent in allowing him to continue to have contact with the Plaintiff Therefore Section 24-24 of the School Code does not apply

D Plaintiff's Conspiracy Counts Are Consistent with Times of Employment

Defendants seem to argue that Plaintiff's Conspiracy Count XVI against Uphoff and Acklin alleges conduct during times that one or the other of them was not an employee of the District Even if true, this observation is of no consequence

Nowhere does Plaintiff allege that the "agreement" between Uphoff and Acklin was made face-to-face or while both were employed by the District By the end of Uphoff's term, he had received notice of Jamison's sexual grooming (Plt 's Compl ¶30), had conducted his "investigation" (Plt 's Compl ¶31), and had made written notes concerning the "investigation " Those written notes were supplied to Plaintiff by Acklin pursuant to Freedom of Information Act Request Obviously, Uphoff had "communicated" those notes to Acklin Further, according to Defendants' affidavits attached as "Exhibit A" to their Motion to Dismiss, Defendants Uphoff's and Acklin's employment overlapped by one month during the 2006-2007 school year

Defendants argue that Count XIV includes allegations against Defendants for time periods during which they were not employed by the District Again, this is of no consequence

Once Uphoff had acquired knowledge of Jamison's sexual grooming, he was under an obligation to make a mandated report, this obligation continued even after the termination of his employment Nowhere in Count XIV does Plaintiff allege that Uphoff acquired all knowledge of Jamison's sexual proclivities

Once Brooks became Principal, he acquired the files of the prior Principal, Uphoff Those files arguably include Uphoff's notes on Jamison Likewise, once Acklin became Superintendent, he acquired actual or constructive knowledge of all institutional knowledge of the District, including Uphoff's notes on Jamison

Consequently, Plaintiff alleges that Count XIV is proper

Defendants argue that because Defendants Brooks and Acklin were not employed as administrators during the 2006-2007 school year, they could not possibly have acquired actual

knowledge of the 2007-2007 report of Jamison's misconduct . Nowhere does Plaintiff allege that they acquired this knowledge at the time of its acquisition by Uphoff. Rather, as argued above, both Brooks and Acklin surely acquired the actual knowledge once they took their administrative positions and inherited Uphoff's notes on Jamison

Defendant Uphoff argues that Plaintiff's allegation that he failed to investigate and failed to make a mandated report (Plt 's Compl ¶42) are flawed Plaintiff's allegation that Uphoff failed to investigate clearly refers only to that misconduct of which he had actual knowledge Furthermore, as argued above, Uphoff's duty to make a mandated report continued even after his employment with the District ended Consequently, Plaintiff's allegation of Plt 's Compl ¶ 42 against Uphoff is not flawed, and does not vitiate the counts that incorporate it

The allegations of Plaintiff's Plt 's Compl ¶ 42 against Brooks and Acklin are perfectly logical and consistent with the facts that, upon their employment, they each acquired knowledge of Uphoff's notes Consequently, Plaintiff's allegation of Plt 's Compl ¶ 42 against Brooks and Acklin is not flawed, and does not vitiate the counts that incorporate it

WHEREFORE, for each of the foregoing reasons, Plaintiff JANE DOE-1 respectfully requests that this Court deny Defendants' ST JOSEPH-OGDEN COMMUNITY HIGH SCHOOL DISTRICT 305 BOARD OF EDUCATION, CHAD UPHOFF, BRIAN BROOKS, AND JAMES ACKLIN's Motion to Dismiss

Dated August 13, 2012

Respectfully submitted,

JANE DOE-1

By MD Mickunas

One of her Attorneys

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PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon all parties to the above cause by enclosing the same in an envelope addressed to their address as disclosed by the pleading of record herein, with postage fully prepaid and by depositing said envelope in a U S Post Office mailbox in Urbana, Illinois on the 13th day of August, 2012

MD Mickunas