Docket No. 123521

IN THE ILLINOIS SUPREME COURT

JANE DOE, a minor, by her mother and next friend, JANE A. DOE, and by her father and next friend, JOHN DOE; JANE A. DOE, Individually; JOHN DOE, Individually, Plaintiffs-Appellees, v. CHAD COE, an Individual; FOX VALLEY ASSOCIATION ILLINOIS CONFERENCE OF THE UNITED CHURCH OF CHRIST, an Illinois Not-for-Profit Corporation; ILLINOIS CONFERENCE OF THE UNITED CHURCH OF CHRIST, an Illinois Not-for-Profit Corporation; THE UNITED CHURCH OF CHRIST; THE GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST; THE UNITED CHURCH OF CHRIST BOARD, an Ohio Not-for-Profit Corporation, Defendants, and FIRST CONGREGATIONAL CHURCH OF DUNDEE, ILLINOIS, an Illinois Not-for-Profit Corporation, and PASTOR AARON JAMES, an Individual, Defendants-Appellants.	On Appeal From The Illinois Appellate Court, Second Judicial District Docket No. 2-17-0435 There Heard On Appeal From The Circuit Court of Kane County, Illinois No. 2015-L-216 The Honorable James R. Murphy, Judge Presiding

ADDITIONAL BRIEF OF DEFENDANTS-APPELLANTS

Michael Resis and Mari Ann Novy
SMITHAMUNDSEN LLC
150 North Michigan Avenue, Suite 3300
Chicago, Illinois 60601
(312) 894-3200
(312) 894-3210 Fax
mresis@salawus.com / mnovy@salawus.com
Attorneys for Defendants-Appellants

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E-FILED
10/31/2018 10:01 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

TABLE OF POINTS AND AUTHORITIES

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NATURE OF THE CASE

Plaintiffs, Jane Doe ("Jane"), a minor, by her mother and next friend, Jane A. Doe, and by her father and next friend, John Doe, Jane A. Doe, individually, and John Doe, individually, brought this action seeking to recover damages for negligence and willful and wanton negligence against several individuals and entities that were part of the United Church of Christ ("UCC"). The negligence and willful and wanton negligence

claims were based on the alleged sexual misconduct of one of the defendants, Chad Coe, during his tenure as youth pastor at the First Congregational Church of Dundee, Illinois ("FCCD"), a congregation within the UCC. Plaintiffs alleged that Coe groomed Jane, a minor and member of the FCCD's youth group, and eventually had sex with her on the FCCD's premises. The trial court granted the section 2-615 motion to dismiss brought by two of the defendants, FCCD and Pastor Aaron James, and dismissed with prejudice counts VIII-XVI of the second amended complaint. The appellate court (2018 IL App (2d) 170435, 103 N.E.3d 436) reversed the dismissal of plaintiffs' negligent hiring and supervision counts, affirmed the dismissal of the negligent retention count, reversed the dismissal of the willful and wanton negligence counts to the extent they were predicated on the negligent hiring and supervision allegations in the second amended complaint, and remanded for further proceedings.

The question raised is on the pleadings.

ISSUES PRESENTED FOR REVIEW

Whether the appellate court erred in reversing the dismissal of the negligent supervision counts absent well-pled facts showing that FCCD and Pastor James knew or should have known that Coe, who was the Director of Youth Ministries, was a pedophile or that he had some other particular unfitness for employment that made the assault/rape reasonably foreseeable.

Whether the appellate court erred in reversing the dismissal of the negligent hiring count against FCCD absent well-pled facts showing that a background check or a Google search of his online history would have disclosed that Coe visited pornographic sites or

that he had some other particular unfitness for employment that made the assault/rape reasonably foreseeable.

Whether the appellate court erred in reversing the dismissal of the willful and wanton negligence counts that were predicated on the negligent hiring and supervision allegations in the second amended complaint.

STATEMENT OF JURISDICTION

Plaintiffs appealed, pursuant to Supreme Court Rule 304(a) (Ill. S. Ct. R.304(a) (eff. March 8, 2016)), from the trial court's dismissal order entered on May 11, 2017 in favor of two of the defendants, Aaron James and FCCD. On May 11, 2017, the trial court granted these defendants' section 2-615 motion and dismissed counts VIII-XVI of the second amended complaint with prejudice (R.C1900). By the same order, the trial court further found no just reason to delay enforcement or appeal of the dismissal order pursuant to Rule 304(a) (R.C1900). Within 30 days, plaintiffs appealed the dismissal on June 9, 2017 (R.C1901-02). On May 2, 2018, defendants timely filed their Rule 315 petition for leave to appeal from the opinion and judgment of the Illinois Appellate Court, Second Judicial District, which was handed down on March 30, 2018.

STATEMENT OF FACTS

Plaintiffs, Jane Doe (Jane), Jane A. Doe, and John Doe, filed a complaint against FCCD and its senior pastor, Aaron James (R.C10-69), alleging that Chad Coe, who was employed as FCCD's Director of Youth Ministries, sexually groomed and sexually assaulted Jane, who was a member of FCCD's Youth Group (R.C1626-1695). Coe was

hired by FCCD a few months after James in May 2009, and oversaw FCCD's Youth Group activities (R.C1636).

The trial court granted sections 2-615 and 2-619.1 motions to dismiss the original (R.C10-69) and amended complaints (R.C756-839), finding each time that plaintiffs failed to state causes of action against the FCCD and James absent well-pleaded facts showing that they knew or should have known that Coe was a pedophile or that he had some other particular unfitness which created a risk of harm to others (R.C741; R.C1393). The trial court also ordered stricken certain allegations of the amended complaint on grounds that they were conclusory as to what Pastor James and FCCD "knew or should have known" about Coe's "grooming" and "inappropriate" behavior and certain events that took place after Doe's sexual assault/rape and Coe's arrest (R.C1393). When the trial court denied plaintiffs' motion to reconsider the dismissal of the first amended complaint, it gave plaintiffs leave to file a second amended complaint (R.C1611-13).

The following allegations are drawn from the second amended complaint without defendants admitting any conclusions of law or fact.

The Second Amended Complaint

Counts VIII-XI were brought against Pastor James for negligent supervision, negligent retention, willful and wanton failure to protect, and willful and wanton retention and failure to supervise (R.C1665-84). Counts XII-XVI were brought against FCCD for negligent hiring, negligent supervision, negligent retention, willful and wanton failure to protect, and willful and wanton retention, and failure to supervise (R.C1684-95). Counts XVII-XXII were brought against other defendants (RC1695).

FCCD is a member of the United Church of Christ (UCC), which is a religious organization composed of local churches (R.C1628). According to the allegations of the second amended complaint, Coe was hired by FCCD based on the recommendation of his father (who held a senior positon within the UCC) without further investigation into his background by James or FCCD (R.C1636-37). Coe maintained an office in the FCCD building near James's office, and it was common for both to be present, along with other adult employees and volunteers, during normal working hours between 8:00 a.m. and 5:00 p.m. (R.C1638).

Plaintiffs further alleged that Coe used public online profiles under the user name "BluesGod88," and that this pseudonym could be found by performing a cursory Google search of Coe's name (R.C1639). Coe also maintained such profiles as "BluesGod88" on adult and child pornography sites where he allegedly posted obscene photos of himself (R.C1640).

Church Policies

The UCC promulgated policies to create a safe church environment and prevent abuse within its organization, including local churches, and provided recommendations, guidelines and training to recognize, prevent and report abuse (R.C1630). The UCC established a nonprofit entity, the Insurance Board, which published a sample policy providing examples of "Inappropriate Displays of Affection" (R.C1631-32).[1] On November 18, 2006, the Illinois Conference of the United Church of Christ ("ICUCC")

[1] The "Inappropriate Displays of Affection" policy included a variety of examples ranging from piggyback rides, hugs and wrestling to behaviors far more problematic (R.C1632, R.C1634-35). Plaintiffs characterized Coe's actions as "Inappropriate" throughout the second amended complaint without identifying which of the "Inappropriate" behaviors were at issue.

approved a Safe Church Policy which, according to the second amended complaint, FCCD employees were required to read and follow (R.C1633). That policy required at least two adults to be present to supervise minors or child activities ("the two-adult policy") and report incidents of child abuse (R.C1633).

Coe's Conduct with Jane

Coe attended middle and high school events of minor female Youth Group members and his interest in their social lives and relationships was alleged to be "Inappropriate" (R.C1638). Coe allegedly engaged in "Inappropriate" (R.C1632) sexual innuendo and other forms of physical and sexual contact with members of the Youth Group, including Jane, while he was the only adult present (R.C1642-43).

Plaintiffs alleged on June 14, 2013, Coe, then age 31, sexually assaulted Jane, who had just turned age 15, on a couch in the basement classroom of FCCD during normal working hours (R.C6148). Leading up to the assault, Coe used his positon of trust and authority as Director of Youth Ministries to "groom" Jane beginning in late 2011 or early 2012 while she participated in the FCCD's Youth Group and as a member of the Confirmation class (R.C1643). Coe used his office and other areas of the church and its computers, internet and electronics to send Jane "inappropriate" sexual pictures and videos of himself (R.C1645-46). Coe stressed to Jane the need for secrecy against telling anyone about their relationship (R.C1646).

Coe began to have "inappropriate" contact with Jane, including kissing and touching her in a sexual manner, in late 2012 or 2013 (R.C1646). Jane eventually told her mother about Coe's assault and his behavior between June 28, 2013 and July 1, 2013, which led the Elgin police to arrest him (R.C1650). He was ultimately indicted on six

counts of possession of child pornography in December 2013 (R.C1650). Police discovered over 255 images and videos on a desktop computer that Coe used (R.C1560). Plaintiffs alleged that the computer had been used at FCCD between September 2011 and June 2013 (R.C1650).

Allegations Against James and FCCD

Plaintiffs alleged that James and FCCD employees, members and volunteers were present at FCCD during normal working hours and at Youth Group and FCCD functions to witness Coe's "inappropriate" interactions with youth, including Jane, and should have known that Coe's behavior and interactions were dangerous (R.C1652-55). Specifically, plaintiffs alleged, in paragraphs 243 and 265, that James and FCCD employees, members and volunteers knew or should have known, *inter alia*, that Coe had inappropriate interactions with Jane, including spending time alone with her in his office and elsewhere where he kissed and stroked her during normal business hours; that he used technology to engage in inappropriate contact; that James allowed Coe to be the only adult present while supervising youth in violation of the Safe Church Policy; that Coe used his own name and user name "BluesGod88" from FCCD facilities to send and receive inappropriate content to and from Youth Group members; and that Coe assaulted Jane in a classroom at FCCD during normal working hours (R.C1652-57).

On three occasions, James allegedly walked into Coe's office when Jane was on the sofa or sitting on Coe's desk and James knew that it was a violation of the Safe Church Policy for Coe to be alone with Jane (R.C1659-60). On another occasion, an early childhood education professional, who was an adult volunteer and mandatory reporter under the Abused and Neglected Child Reporting Act (325 ILCS 5/1 *et seq*. (West

2012)), witnessed Coe's inappropriate behavior with Jane at a FCCD vacation bible school ("VBS") program in June 2013, called him before the rape, and met with James subsequently, but James did not make a report to DCFS, investigate, terminate or restrict Coe's access to minors (R.C1660-62).

Trial Court Proceedings

Plaintiffs filed this action within two years on May 21, 2015 (R.C10-69) and the second amended complaint, which is operative complaint and the subject of the appellate court's decision, was filed on December 12, 2016 (R.C1626-95). Previously, the trial court granted sections 2-615 and 2-619.1 motions to dismiss plaintiffs' original (R.C10-69) and amended complaints (R.C756-839), finding each time that plaintiffs failed to state causes of action against the FCCD and James, in the absence of well-pleaded facts showing that James and FCCD knew or should have known that Coe was a pedophile or that he had some other particular unfitness which created a risk of harm to others (R.C741, R.C1393). The trial court also ordered stricken certain allegations of the amended complaint on grounds that they were conclusory as to what James and FCCD "knew or should have known" about Coe's "grooming" and "inappropriate" behavior and certain events that took place after Jane's assault and Coe's arrest (R.C1393). When the trial court denied plaintiffs' motion to reconsider the dismissal of the first amended complaint, it gave plaintiffs leave to file a second amended complaint (R.C1611-13).

Plaintiffs filed their 70–page second amended complaint, in which they renewed their various claims against FCCD and James for negligence and willful and wanton conduct (R.C1626-95). In response to plaintiffs' second amended complaint, James and FCCD filed a section 2-615 motion to dismiss based on failure to state a cause of action

(R.C1703-1874). Plaintiffs filed an opposing response (R.C1878-92) and defendants filed a supporting reply (R.C1895-99).

On May 11, 2017, the trial court granted the section 2-615 motion and dismissed with prejudice counts VIII (negligent supervision-James); IX (negligent retention-James); X (willful and wanton failure to protect-James); XI (willful and wanton retention and failure to supervise-James); XII (negligent hiring FCCD); XIII (negligent supervision-FCCD); XIV (negligent retention-FCCD); XV (willful and wanton failure to protect-FCCD); and XVI (willful-and-wanton retention and failure to supervise-FCCD) (R.C1900). By the same order, the trial court found no just reason to delay enforcement or appeal of the dismissal order pursuant to Rule 304(a) (R.C1900). Within 30 days, plaintiffs appealed on June 9, 2017 (R.C1901-02).

The Appellate Court Affirms in Part, Reverses in Part, and Remands

On March 30, 2018, the appellate court handed down an opinion in which it (1) affirmed the trial court's decision to strike portions of the first amended complaint; (2) affirmed the trial court's dismissal of the negligent retention counts against James and FCCD; (3) reversed the dismissal of the negligent hiring count against FCCD; (4) reversed the dismissal of the "omnibus" negligent supervision counts against James and FCCD and (5) affirmed the dismissed willful and wanton counts to the extent they overlapped with the negligent retention counts; but (6) reversed dismissal of the willful and wanton counts to the extent they overlapped with the negligent supervision counts. ¶¶ 106, 108.

The appellate court first held that plaintiff's allegations of FCCD's and James' post-sexual assault conduct were immaterial to the pending action, and affirmed the trial court's order striking those allegations from plaintiffs' first amended complaint. *Id.* at ¶ 58

As to the negligent hiring count, the appellate court held that there was no dispute that FCCD should have conducted a reasonable background check on Coe before hiring him. The appellate court further found that there was an issue of fact as to whether the FCCD could have conducted a "basic, cursory Google search," which, at the relevant time, would have linked Coe's pseudonym "Bluesgod88" to his real name, Chad Coe, and would have further led FCCD to the pornography websites that "Bluesgod88" had been exploring. *Id.* at ¶ 69-72. Accordingly, because there was an issue of fact, the appellate court reversed the trial court's dismissal of the negligent-hiring claim (count XII) against FCCD. *Id.* at ¶ 73.

As to the negligent retention counts, the appellate court found that plaintiffs had failed to plead facts establishing that FCCD learned or should have learned during Coe's employment that he had a particular unfitness for the position of Director of Youth Ministries at FCCD. *Id.* at ¶ 77. Accordingly, the court upheld the dismissal of the negligent retention claims (counts IX and XIV) against FCCD and James, and upheld the dismissal of the willful and wanton counts (X, XI, XV and XVI) to the extent they overlapped with the negligent retention counts. *Id.* at ¶ 106.

With regard to the negligent supervision counts against James and FCCD (counts VIII and XIII), the appellate court held that to state a cause of action for negligent supervision, plaintiff must plead facts establishing that: (1) defendant had a duty to supervise Coe, (2) defendant negligently supervised him, and (3) such negligence proximately caused Jane's injuries. *Id.* at ¶ 90. The appellate court referred to counts VIII and XIII as "omnibus counts" because, according to the court, those counts alleged

sources of a duty of care other than the employment relationship between FCCD and Coe or the supervisory relationship between James and Coe.

In reaching its decision, the appellate court found that the trial court overlooked the fact that the claims in counts VIII and XIII were not premised on notice to FCCD and James of Coe's misconduct or the potential for it. Rather, the court determined that liability was based on a duty to supervise that plaintiffs alleged existed independently of what was known or should have been known about Coe himself. *Id.* at ¶ 93. Significantly, the court held that "under Illinois law, neither negligent supervision nor the other causes of action alleged in counts VIII and XIII have as an essential element that the defendant have notice of the unfitness of the party that caused the harm." *Id.*

Further, although the appellate court agreed that allegations that Coe was alone with Jane in his office appeared to be innocuous, the IUCC "obviously fashioned the two-adult policy in the belief that even the most apparently virtuous adult should not be left alone with children, because it is generally foreseeable that abuse will occur in such a setting." *Id.* at ¶ 101. The appellate court concluded that the common law of this state, whose public policy strongly favors the protection of children, required FCCD and James to enforce the two-adult policy as the IUCC intended. *Id.* at ¶ 101.

Finally, the appellate court agreed that the willful and wanton counts were simply an aggravated form of negligence, and that those counts overlapped in part with the other negligence counts against FCCD and James. *Id.* ¶ 104. Consequently, the appellate court upheld the dismissal of the willful and wanton counts (X, XI, XV, and XVI) to the extent that they overlapped with the negligent retention counts, reversed the dismissal of the

willful and wanton counts to the extent that they overlapped with the "omnibus" negligent supervision counts. *Id.* ¶ 104.

Defendants did not file a petition for rehearing. This Rule 315 petition for leave to appeal is filed within 35 days of the appellate court's opinion and judgment.

ARGUMENT

Introduction: Standard of Review is *De Novo*

A motion to dismiss, pursuant to section 2–615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2013)), challenges the legal sufficiency of a complaint based on defects apparent on its face. *Bell v. Hutsell*, 2011 IL 110724, ¶ 9, 955 N.E.2d 1099. Because Illinois is a fact-pleading jurisdiction, a pleading must not only set forth a legally recognized cause of action, but also the essential facts that bring the claim within it or be dismissed. *Adkins v. Sarah Bush Lincoln Health Center*, 129 Ill. 2d 497, 518, 544 N.E.2d 733 (1989); *Knox College v. Celotex Corp*., 88 Ill. 2d 407, 424, 430 N.E.2d 976 (1981).

Dismissal under section 2-615 is proper where the allegations of the complaint, when viewed in the light most favorable to the plaintiff, are insufficient to state a cause of action upon which relief can be granted. *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 382, 808 N.E.2d 957 (2004). In ruling on a section 2-615 motion, the court is to construe the pleadings strictly against the pleader and disregard conclusions of law or fact unsupported by specific factual allegations, and a pleading that merely paraphrases the law as though to say that the case will meet the legal requirements is insufficient. *Doe v. Calumet City*, 161 Ill. 2d 374, 385, 641 N.E.2d 498 (1994); *Knox College*, 88 Ill. 2d at 424. Even though a pleading may generally inform the defendant as to the nature of a legally cognizable claim, conclusions cannot sustain a complaint that is factually

deficient once legal conclusions are disregarded. *Knox College*, 88 Ill. 2d at 426. Not even a liberal construction will cure factual deficiencies. *Id*. at 427. Review of a decision on a motion challenging the sufficiency of the pleadings is *de novo*. *Oldendorf v. General Motors Corp.*, 322 Ill. App. 3d 825, 828, 751 N.E.2d 214 (2d Dist. 2001).

In this case, the trial court ordered plaintiffs' pleadings stricken and dismissed three times because plaintiffs were unable to set forth well-pleaded facts showing that Pastor James and FCCD knew or should have known that Coe was a pedophile or that he had some other particular unfitness for his position that made the assault reasonably foreseeable. Under ordinary negligence standards, " ' "[f]oreseeability means that which is objectively reasonable to expect, not merely what might conceivably occur." ' " (emphasis omitted). *Hills v. Bridgeview Little League Ass'n*, 195 Ill. 2d 210, 238, 745 N.E.2d 1166 (2000) (quoting *American Nat'l Bk. & Tr. Co. v. National Advertising Co.*, 149 Ill. 2d 14, 29, 594 N.E.2d 313 (1992) (quoting *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456, 466, 343 N.E.2d 465 (1976) (*Winnett v. Winnett*, 57 Ill. 2d 7, 12-13, 310 N.E.2d 1 (1974)). In addition, "[s]erious crimes are generally unforeseeable because they are different in nature from what employees in a lawful occupation are expected to do." *Wright v. City of Danville*, 174 Ill. 2d 391, 405, 675 N.E.2d 110 (1996).

Plaintiffs did not have to plead specific facts in a vacuum to show that the assault/rape was reasonably foreseeable to Pastor James and FCCD. The record shows that plaintiffs had access to a DCFS report concerning Jane and statements made by Pastor James (R.P14-15),[2] as well as materials obtained through discovery from the Kane County State's Attorney Office's criminal file for Coe pursuant to protective orders

[2] Citation to the reports of proceedings will be "R.P" to avoid any confusion with citation to the common law record ("R.C").

(R.C282-83, R.C329-31, R.C333-35). Plaintiffs pled in graphic detail what Coe allegedly did but never alleged what James or other FCCD agents, employees and volunteers witnessed or heard about his "grooming" or other misconduct at any time leading up to the assault/rape.

As plaintiffs elected to stand on their pleadings and not to seek leave to amend, their claims must stand or fall based on what was alleged in the second amended complaint alone. *Sutherland v. Illinois Bell*, 254 Ill. App. 3d 983, 988-89, 627 N.E.2d 145 (1st Dist. 1993). Absent a request for leave to amend, a reviewing court can presume that further attempts to state a cause of action would be no more successful than the previous ones. *Koscur v. Indiana Ins. Co*., 192 Ill. App. 3d 859, 866, 549 N.E.2d 685 (1st Dist. 1989).

As further demonstrated below, the appellate court erred when it reversed the dismissal of the negligent hiring and supervision counts without requiring plaintiffs to set forth well-pleaded facts showing that FCCD and Pastor James had actual or constructive notice that Coe was a pedophile or that he had some other particular unfitness for the position that made the assault/rape reasonably foreseeable. The appellate court further erred in reinstating the willful and wanton negligence counts that were predicated on the hiring and supervision allegations without additionally requiring plaintiffs to allege well-pleaded facts showing that Pastor James and FCCD had actual or constructive notice of the unfitness. The trial court should be affirmed.

I. THE APPELLATE COURT ERRED IN REINSTATING THE NEGLIGENT SUPERVISION COUNTS WITHOUT REQUIRING PLAINTIFFS TO PLEAD SPECIFIC FACTS ESTABLISHING NOTICE OF COE'S UNFITNESS FOR EMPLOYMENT

The rule in Illinois is that one person has no duty to prevent the criminal acts of

another. *Simmons v. Homatas*, 236 Ill. 2d 459, 475, 925 N.E.2d 1089 (2010); *Hills*, 195 Ill. 2d at 228. One exception to this rule, at issue in this case, is that employers have a duty to act reasonably in hiring, supervising, and retaining their employees. *Van Horne v. Muller*, 185 Ill. 2d 299, 310 705 N.E.2d 898, 904 (1998) ("Illinois law recognizes a cause of action against an employer for negligently hiring, or retaining in its employment, an employee it knew, or should have known, was unfit for the job so as to create a danger of harm to third persons"); *Platson v. NSM, America, Inc.*, 322 Ill. App. 3d 138, 144, 748 N.E.2d 1278 (2d Dist. 2001) ("[P]laintiff has alleged sufficient facts to establish a possibility of recovery for negligent supervision"). This requires plaintiff to show that the employer had both the necessity and the opportunity for controlling the employee and that it negligently failed to act on that information. *Hills*, 195 Ill. 2d at 229 (quoting Restatement (Second) of Torts, § 317 (1965)).

To recover for a breach of that duty, courts have held that a plaintiff must prove that: (1) the employer knew or should have known that an employee had a particular unfitness for the position so as to create a danger of harm to third persons; (2) that such particular unfitness was known or should have been known at the time of the hiring, retention, or failure to supervise; and (3) that this particular unfitness proximately caused the plaintiff's injury. *Van Horne*, 185 Ill. 2d at 310-11; *McNerney v. Allamuradov*, 2017 IL App (1st) 153515, ¶ 57, 84 N.E.3d 437; *Dennis v. Pace Suburban Bus Serv*., 2014 IL App (1st) 132397, ¶ 24, 19 N.E.3d 85; *Doe v. Boy Scouts of America*, 2014 IL App (2d) 130121, ¶ 39, 4 N.E3d 550; *Doe v. Brouillete*, 389 Ill. App. 3d 595, 606, 906 N.E.2d 105 (1st Dist. 2009); *Platson*, 322 Ill. App. 3d at 144.

There are many kinds of unfitness for employment, as reviewing courts have recognized, but the employee's particular unfitness that gives rise to liability must have rendered the injury foreseeable to a person of ordinary prudence in the employer's position. *Van Horne*, 185 Ill. 2d at 311; *Platson*, 322 Ill. App. 3d at 144; *Giraldi v. Community Consolidated Sch. Dist. 62*, 279 Ill. App. 3d 679, 692, 665 N.E.2d 332 (1st Dist. 1996); *Fallon v. Indian Trail Sch., Addison Township Sch. Dist. No. 4*, 148 Ill. App. 3d 931, 935, 500 N.E.2d 101 (2d Dist. 1986). The appellate court erred here in eliminating notice altogether as an element of a negligent supervision claim.

A. The Appellate Court Erred In Holding That An Employer's Knowledge Of The Employee's Unfitness Is Not An Element of A Claim For Negligent Supervision

According to the appellate court, a claim for negligent supervision does not "have as an essential element that the defendant have notice of the unfitness of the party that caused the harm." ¶ 93. The court cited only the appellate decision in *Van Horne v. Muller*, 294 Ill. App. 3d 649, 657, 691 N.E.2d 74 (1st Dist. 1998), in discussing the tort generally (¶ 90), and the court did not support its statement with citation to any case law.

In *Van Horne*, the appellate court observed that "negligent and/or reckless hiring, supervision, and retention are distinct causes of action" and held that negligent supervision requires only that plaintiff prove: (1) an employer had a duty to supervise the harming party, (2) the employer negligently supervised the harming party, and (3) such negligence proximately caused plaintiff's injuries. 294 Ill. App. 3d at 656-57. In noting that they were distinct causes of action, the appellate court was not suggesting that notice of the particular unfitness was an element for negligent hiring and retention but not for negligent supervision. It would have had no reason to do so. On further appeal, aside

from noting the negligent and reckless supervision claims (185 Ill. 2d at 303-05, 308-09), the supreme court discussed only the claims for hiring and retention interchangeably.

This court subsequently recognized that its decision in *Van Horne* discussed only negligent hiring and retention. *Vancura v. Katris*, 238 Ill. 2d 352, 372, 939 N.E.2d 328 (2010) (observing in reference to *Van Horne* that "this court focused solely on negligent hiring and retention; the plaintiff's claim of negligent supervision was not separately discussed"). This court likewise had no occasion to consider whether notice of a particular unfitness was necessary to state a claim for negligent supervision in *Vancura* as that case dealt with an employer's liability under the Illinois Notary Public Act (5 ILCS 312/7–102 (West 1996)). In *Vancura*, this court held that to impose liability under the Act, a general negligent failure to discover the misconduct by itself would be insufficient and that plaintiff would have to present proof that the employer had some knowledge of the notary's misconduct. 238 Ill. 2d at 378-80. *Vancura* does not support plaintiffs.

Until the appellate court did so here, appellate panels have not distinguished between negligent supervision and negligent retention with respect to the elements of the common law cause of action. *Helfers-Beitz v. Degelman*, 406 Ill. App. 3d 264, 268, 939 N.E.2d 1087 (3d Dist. 2010) (citing *Zahl v. Krupa*, 399 Ill. App. 3d 993, 1018, 927 N.E.2d 262 (2d Dist. 2010) (noting that supreme court had not distinguished between two causes of action in employment context).

Unlike negligent hiring and retention, the tort of negligent supervision is applicable outside the context of an employment relationship. *Norskog v. Pfiel*, 197 Ill. 2d 60, 84, 755 N.E.2d 1 (2001); *Doe v. Doe*, 2016 IL App (1st) 153272, ¶ 11, 67 N.E.2d 520. When employment is not involved, as these cases recognize, knowledge of the

perpetrator's dangerous propensities has been required. For example, in cases where parents have been held liable for negligent supervision of a child, the law requires that the parents be on notice of specific instances of prior misconduct by the child, and that they have the opportunity to control the child. *Norskog*, 197 Ill. 2d at 84 (citing *Lott v. Strang*, 312 Ill. App. 3d 521, 524, 727 N.E.2d 407 (4th Dist. 2000); Restatement (Second) of Torts § 316 (1965) (requiring that parents know or should know of the necessity of controlling the child)); *Doe*, 2016 IL App (1st) 153272, ¶ 11.

This court should resolve the conflict that the appellate court created in this case by holding that, like the torts of negligent hiring and negligent retention, the tort of negligent supervision requires knowledge of the employee's unfitness for the particular positon. There is no rational basis to require an employer's knowledge of an individual's particular unfitness as an element of both negligent hiring and negligent retention, but not also require the same element to state a claim for negligent supervision. All three torts are predicated on a failure to exercise ordinary care at different times. Put another way, there is no rational basis for the law to require that the employer must know of the unfitness or dangerous propensities before the employment relationship begins (hiring) and when deciding whether to terminate the employee (retention), but not also while the employment relationship is ongoing (supervision).

To remove the notice requirement from the common law tort of negligent supervision in the circumstances of this case would not only be incongruous with the notice that is required for the tort outside the employment context, it would also expose employers to liability whenever an employee fails to follow an internal policy, as in this case, regardless of how innocuous the violation of the policy may have appeared to the

employer at the time. The result would be that any school, church, youth group, athletics team or organization in which adults interact with children could be held liable based on a failure to enforce an anti-abuse policy, even if the employer did not know and had no reason to know from violation of the policy alone that the employee or adult volunteer had any dangerous propensities.

B. The Internal Two-Adult Policy Did Not Create A Legal Duty To Protect Against A Particular Sexual Assault That Was Not Reasonably Foreseeable

As to plaintiffs' claims of negligent retention, the appellate court held that plaintiffs had failed to plead facts establishing that FCCD learned or should have learned during Coe's tenure that he had a particular unfitness for the position of youth director. ¶ 77. Specifically, the court stated that "in all 70 pages of their complaint, plaintiffs failed to allege (1) specific misconduct that (2) was observed by FCCD's agents and (3) was of a nature that placed FCCD on notice of Coe's particular unfitness for the position of youth director." *Id*. at ¶ 87. Accordingly, the court affirmed the dismissal of the negligent retention claims. *Id*. at ¶¶ 87-88. If the torts of negligent retention and negligent supervision both require notice of particular unfitness, then plaintiffs' failure to state a claim for negligent retention means that they also failed to state a claim for negligent supervision.

Nevertheless, as to negligent supervision, the appellate court held that:

> [T]he trial court overlooked the fact that the [negligent supervision] claims are not premised on notice to FCCD and James of Coe's misconduct or the potential for it. Liability is based on a duty to supervise that the plaintiffs' allege existed independently of what was known or should have been known about Coe himself.

Id. at ¶ 93. The appellate court relied on allegations that there was a special relationship between Jane and FCCD based on a voluntary-custodial relationship which created a legal duty (*id*. at ¶¶ 88, 95), and that the two-adult policy imposed a standard of care requiring defendants to enforce that policy that was co-extensive with Illinois law. *Id.* at ¶¶ 98-101.

The appellate court held that the existence of FCCD's internal policies provided a basis for a finding that Coe's actions were foreseeable to FCCD and James. Even where a special relationship or a voluntary undertaking exists, plaintiff must still allege well-pled facts to show that the criminal attack by the third party was foreseeable. *Doe*, 389 Ill. App. 3d at 615; *Doe v. Goff*, 306 Ill. App. 3d 1131, 1134, 716 N.E.2d 323 (3d Dist. 1999) (referring to reasonable foreseeability as an "additional requirement"); *Hernandez v. Rapid Bus Co.*, 267 Ill. App. 3d 519, 524-25, 641 N.E.2d 886 (1st Dist. 1994) (observing that even under a voluntary undertaking, "the occurrence for which tort recovery is sought must have been reasonably foreseeable").

The appellate court in this case held that that "FCCD and James had a duty of care requiring them to enforce the two-adult policy, regardless of their actual or constructive knowledge of Coe's predatory potential." ¶ 99. Further, the court held that it is "generally foreseeable that abuse will occur in programs providing adults with unsupervised access to children." For case support, the appellate court relied only on *Bruntjen v. Bethalto Pizza, LLC*, 2014 IL App (5th) 120245, ¶ 50, 18 N.E.2d 215, a case that has nothing to do with an adult's sexual misconduct in a youth program. *Id.* The court's reliance on *Bruntjen* was misplaced. There, where a pizza delivery driver caused an auto accident, the employer had policies that incentivized pizza delivery drivers to deliver as many

pizzas as possible in the shortest time possible and not to employ drivers who had three moving violations in the three preceding years. *Bruntjen* at ¶¶ 49-50. *Bruntjen* involved an auto accident—not a sexual assault or any other crime—which the court recognized was not as foreseeable as ordinary negligence. *Id*. at ¶ 43 (citing *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 442, 856 N.E.2d 1048 (2006) (observing that a person has greater reason to anticipate negligence than criminal conduct). Indeed, as the Restatement recognizes, it is generally reasonable for one to assume that a person will not violate the criminal law. See Restatement (Second) of Torts § 302B, Comment *d*, at 89 (1965). In reaching a desired result, the appellate court here departed from this well-established distinction between criminal and negligent conduct.

The two-adult policy by itself is not evidence that a particular employee or volunteer is dangerous around children. The appellate court here recognized that it was "apparently innocuous" when, for instance, Coe was left alone with Jane in his office. ¶ 101. According to the court, the two-adult policy was fashioned in the belief that "even the most apparently virtuous adult" should not be left alone with children, because "it is generally foreseeable that abuse will occur in such a setting." *Id*. Although the two-adult policy might view predators and non-predators as equally suspect, Illinois case law does not: what is "generally foreseeable" does not satisfy the fact pleading requirement for showing that a particular assault was reasonably foreseeable. See *Mieher v. Brown*, 54 Ill. 2d 539, 544, 301 N.E.2d 307 (1973) ("In a sense, in retrospect almost nothing is entirely unforeseeable"); *Doe v. Goff*, 306 Ill. App. 3d at 1135 (statistics of sex abuse by adult volunteers were not enough to show that particular defendant's sexual assault was reasonably foreseeable).

"Generally, pursuant to the voluntary undertaking theory of liability, 'one who undertakes, gratuitously or for consideration, to render services to another is subject to liability for bodily harm caused to the other by one's failure to exercise due care in the performance of the undertaking.' " *Wakulich v. Mraz,* 203 Ill. 2d 223, 241, 785 N.E.2d 843 (2003) (quoting *Rhodes v. Illinois Central Gulf R.R.,* 172 Ill. 2d 213, 239, 665 N.E.2d 1260 (1996)). "The theory is narrowly construed." *Bell,* 2011 IL 110724, ¶ 12. Moreover, " 'the duty of care to be imposed upon a defendant is limited to the extent of the undertaking.' " *Id.*

It is well settled that violations of self-imposed rules or internal guidelines do not give rise to a legal duty or constitute evidence of negligence. *Rhodes*, 172 Ill. 2d at 238; *Doe v. Bridgeforth*, 2018 IL App (1st) 170182, ¶ 57, 102 N.E.3d 710. Illinois courts have not applied the law in a way that discourages the adoption of safety programs. *See e.g. Calderon v. Residential Homes of Am., Inc.*, 381 Ill. App. 3d 333, 343-44, 885 N.E.2d 1138 (1st Dist. 2008) (finding that penalizing a general contractor's efforts to promote safety and coordinate a general safety program does not serve to advance the goal of work site safety); *O'Brien v. City of Chicago*, 285 Ill. App. 3d 864, 874, 674 N.E.2d 927 (1st Dist. 1996) (holding that if maintaining roads and studying safety patterns can form the basis of a voluntary undertaking, municipalities might refrain from conducting even minor repairs in order to avoid this liability). "Where the law does not impose a duty, one will not generally be created by a defendant's rules or internal guidelines. Rather, it is the law which, in the end, must say what is legally required." *Rhodes*, 172 Ill. 2d at 238.

Even under a voluntary undertaking theory, the particular assault had to be reasonably foreseeable to Pastor James and the FCCD. *Hernandez,* 267 Ill. App. 3d at

525. As Pastor James and FCCD did not assume a voluntary undertaking to protect Jane from assaults generally, especially unforeseeable ones, the two-adult policy did not by itself impose a legal duty absent notice of specific facts that made Coe's assault/rape reasonably foreseeable in time to prevent it. Plaintiffs could not avoid having to plead specific facts showing that the assault/rape was reasonably foreseeable merely by alleging that the FCCD adopted a two-adult policy that was violated before the assault took place.

C. Plaintiffs Further Failed To Plead Facts Establishing That James And FCCD Knew Or Should Have Known That Coe Had A Particular Unfitness For Employment

Although plaintiffs alleged explicit sexual and other misconduct against Coe, they never alleged the particulars of what Pastor James and FCCD witnessed or what others reported to them in time to prevent Jane's assault/rape. Plaintiffs couched their allegations to state that Coe's sexual and physical contact with members of the Youth Group took place when no other adult was present (including Pastor James) and when Coe was "habitually alone" with Youth Group members in his office, the sanctuary, the audio-visual booth, and classrooms (R.C1642-43). Likewise, according to plaintiffs, Coe stressed to Jane the need for secrecy in not telling anyone about their relationship (R.C1646). Most importantly, plaintiffs' allegations never identified what Pastor James and FCC Dundee knew about Coe's "Inappropriate" behavior and when they knew it—and without those specific allegations of fact, the assault was not reasonably foreseeable to them, regardless of the negligence or willful and wanton theory alleged.

Despite the vague allegations, plaintiffs claim that the assault was reasonably foreseeable to Pastor James and FCCD based on (i) the "2011 Confirmation Incident" in

which Coe allowed underage girls to sit on his lap and engaged in "Inappropriate bodily contact"; (ii) three occasions when Pastor James walked into Coe's office and saw Doe lying on the couch or sitting on Coe's desk with no adult present other than Coe; and (iii) an unidentified FCCD volunteer's communication to Pastor James after the volunteer witnessed "Inappropriate" interaction between Coe and Jane at a FCCD vacation bible school ("VBS") program in June 2013 (R.C1677-78, R.C1688). Taken at face value, without more, these vague and conclusory allegations did not make the assault reasonably foreseeable.

As to the 2011 Confirmation Incident, plaintiffs did not support their allegations with specific facts describing the nature of Coe's "Inappropriate bodily contact" (R.C1643). Violations of the two-adult policy can be apparently innocuous, as the appellate court noted (¶ 101), and not every violation, assuming for the moment there was a violation, makes an assault/rape reasonably foreseeable. *Doe*, 2018 IL App (1st) 170182, ¶ 54 (merely because several school employees knew that student was receiving rides from teacher in violation of transportation policy did not mean student was in "impending danger of [teacher-on-student] sexual assault"). Based on the vagueness of the allegation, it remains anyone's guess what Coe's "Inappropriate bodily contact" actually was—was it that underage girls were allowed to sit on Coe's lap or something else? Either way, assuming the 2011 Confirmation Incident violated the two-adult policy, the vague allegation of "Inappropriate bodily contact" did not make the assault/rape by Coe reasonably foreseeable two years later in June 2013. In fact, plaintiffs did not allege that Pastor James and FCCD knew about the 2011 Confirmation Incident *before* the assault/rape, and when plaintiffs alleged that adults complained about the 2011

Confirmation Incident, it was during the meeting held on July 3, 2013—after Coe's arrest (R.C1662).

Plaintiffs' argument would make virtually every assault reasonably foreseeable regardless of how harmless the alleged violation of an abuse-prevention policy may have been at the time. Case in point: assuming there was a violation of the two-adult policy when Pastor James saw Jane lying on the couch or sitting on Coe's desk with no other adult present in Coe's office, as alleged, the policy violation did not make the rape reasonably foreseeable. Plaintiffs did not allege that James saw any contact between Coe and Jane—"Inappropriate" or otherwise, in Coe's office or elsewhere on the premises.

Finally, the FCCD volunteer's report of Coe's "Inappropriate" interaction during the VBS program was similarly vague and conclusory, both as to what the volunteer allegedly reported to Pastor James and when it was reported to him. Notably, plaintiffs did not allege the particulars of the interaction, leaving one again to speculate about what happened. Nor did plaintiffs allege when in relation to the assault the volunteer told Pastor James about the interaction, other than to allege that the volunteer contacted James within two days after seeing it (R.C1660). Speculation cannot be the basis of liability. Vague conclusions aside, plaintiffs did not allege well-pled facts to show that the volunteer reported the interaction—whatever it was—in time for James and FCCD to prevent the assault/rape.[3]

Plaintiffs never identified in their 70-page second amended complaint what

[3] The reporting obligations of the Abused and Neglected Child Reporting Act (325 ILCS 5/4 (West 2012)) did not give rise to a private right of action. *Varela ex rel. Nelson v. St. Elizabeth's Hosp. of Chicago, Inc*., 372 Ill. App. 3d 714, 719-20, 867 N.E.2d 1 (1st Dist. 2006) (citing *Doe 1 v. North Central Behavioral Health Systems, Inc*., 352 Ill. App. 3d 284, 286, 816 N.E.2d 4 (3d Dist. 2004)).

specifically Pastor James and FCCD saw, were told, knew or should have known before the assault/rape took place. Nothing that plaintiffs alleged put Pastor James and FCCD on notice of Coe's particular unfitness when plaintiffs never identified the "Inappropriate" conduct that Pastor James and FCCD knew or should have known about in time to prevent the assault/rape. No matter how many times the allegations of Coe's "Inappropriate" contact or behavior are repeated, they do not meet the fact pleading requirements for stating a cause of action. The trial court's dismissal of counts VIII, IX, XII, XIII and XIV predicated on negligent hiring, supervision and retention should be affirmed.

II. THE APPELLATE COURT ERRED IN REINSTATING THE NEGLIGENT HIRING COUNT AGAINST FCCD WHEN PLAINTIFFS DID NOT PLEAD FACTS SHOWING THAT FCCD KNEW OR SHOULD HAVE KNOWN THAT COE HAD A PARTICULAR UNFITNESS FOR EMPLOYMENT AS DIRECTOR OF YOUTH MINISTRIES

"Illinois law recognizes a cause of action against an employer for negligently hiring, or retaining in its employment, an employee it knew, or should have known, was unfit for the job so as to create a danger of harm to third persons." *Doe*, 2014 IL App (2d) 130121, ¶ 39 (citing *Van Horne*, 185 Ill. 2d at 310); see also *Doe*, 389 Ill. App. 3d at 605-06.

Here, plaintiffs may have alleged in count XII that FCCD conducted no background check before Coe was hired (R.C1636-37), but what they failed to allege was that a background check would have made a difference by disclosing the particular unfitness that made Coe's assault/rape reasonably foreseeable. Plaintiffs did not allege that Coe had any criminal history or prior relationships with children or that he had engaged in other conduct that made him a danger to children, let alone that FCCD knew

or should have known about a criminal history, his relationships or other similarly dangerous conduct before he was hired.

At most, plaintiffs claimed that a "cursory" Google search into Coe's public online presence would have revealed his activities on pornographic websites (R.C1639-40, R.C1685), but plaintiffs did not allege how FCCD or Pastor James would have discovered Coe's username was "BluesGod88" online in May 2009. A "cursory" online search of "Chad Coe" would not have revealed his activities on pornographic websites. Plaintiffs did not even explicitly allege that Coe was even visiting those websites before FCCD hired him. While a court may draw reasonable inferences from the facts alleged, a court is not required to reach unwarranted conclusions or to draw unwarranted inferences as the appellate court did here to sustain the sufficiency of a complaint. *Leekha v. Wentcher*, 224 Ill. App. 3d 342, 352, 586 N.E.2d 557 (1st Dist. 1991). The inference that a Google search of someone's name, without more, can reveal that person's history of visiting pornographic websites is implausible on its face.

Plaintiffs set forth specific facts that clearly established that Coe was unfit for his position. What plaintiffs did not allege, despite three attempts, were specific facts showing that FCCD knew or should have known that Coe had a particular unfitness and that FCCD had the opportunity to prevent the harm to Jane. Not a single paragraph of the second amended complaint contained sufficient facts from which FCCD knew or should have known of Coe's online behavior before he was hired. The second amended complaint was devoid of any specific facts showing that FCCD had notice of online behavior that should have raised suspicions that Coe was a pedophile or that he had some other particular unfitness for his position. The trial court's dismissal of count XII should

be affirmed.

III. THE APPELLATE COURT ERRED IN REINSTATING THE WILLFUL AND WANTON COUNTS WHICH WERE PREDICATED ON HIRING AND SUPERVISION ABSENT WELL-PLEADED FACTS SHOWING THAT DEFENDANTS KNEW OR SHOULD HAVE KNOWN OF COE'S UNFITNESS FOR EMPLOYMENT

There is no separate, independent tort of willful and wanton conduct. *Krywin v. Chicago Transit Auth.*, 238 Ill. 2d 215, 235, 938 N.E.2d 440 (2010) (citing *Ziarko v. Soo Line R.R. Co.*, 161 Ill. 2d 267, 274, 641 N.E.2d 402 (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, 856 N.E.2d 575 (1st Dist. 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 defendant owed a duty to plaintiff, that defendant breached that duty, and that the breach proximately caused plaintiff's injury. *Doe-3 v. McLean County Unit School Dist. No.5*, 2012 IL 112479, ¶ 19, 973 N.E.2d 880. In addition, plaintiff must allege facts showing either a deliberate intention to harm or a conscious disregard for plaintiff's welfare. *Id.*; *Doe v. Chicago Bd. of Educ.*, 213 Ill. 2d 19, 28, 820 N.E.2d 418 (2004); *Doe*, 2018 IL App (1st) 170182, ¶ 45.

As set forth above, if plaintiffs failed to allege the facts necessary to support claims for negligent supervision and hiring, then the willful and wanton counts (X, XI, XV and XVI) of the second amended complaint based on the allegations for negligent supervision and hiring must also fail. As was true of the negligence counts, plaintiffs alleged that FCCD employees saw and were told of Coe's "Inappropriate" behavior without ever identifying what that "Inappropriate" behavior was that made the

assault/rape reasonably foreseeable. If plaintiffs did not state a cause of action for negligence, they also could not state a claim for willful and wanton negligence based on equally vague allegations of Coe's "Inappropriate" behavior. The trial court's dismissal of counts X, XI, XV and XVI should be affirmed.

CONCLUSION

For all of the foregoing reasons, defendants-appellants, First Congregational Church of Dundee, Illinois, and Pastor Aaron James, respectfully request that this Court reverse in part and affirm in part the opinion and judgment of the Illinois Appellate Court, Second Judicial District, filed on March 30, 2018, and reinstate in its entirety the dismissal order of the Circuit Court of Kane County entered on May 11, 2017.

Respectfully submitted,

/s/ Michael Resis
Michael Resis and Mari Ann Novy
SMITHAMUNDSEN LLC
150 North Michigan Avenue, Suite 3300
Chicago, Illinois 60601
(312) 894-3200
(312) 894-3210 Fax
mresis@salawus.com
mnovy@salawus.com

Attorneys for Defendants-Appellants

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b) of the Supreme Court Rules. The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and those matters to be appended to the brief under Rule 342(a) of the Supreme Court Rules, is 8,195 words.

/s/ Michael Resis
Michael Resis

Attorney for Defendants-Appellants
SMITHAMUNDSEN LLC
150 North Michigan Avenue
Suite 3300
Chicago, Illinois 60601
(312) 894-3200

APPENDIX

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IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

Case No. 15 L 216

DOE Plaintiff(s)	COE Defendant(s)	Clerk of the Circuit Court Kane County, IL MAY 11 2017 FILED 046 4/6 ENTERED
Kevin Lyons Plaintiff(s) Atty.	Thomas Scherschel Defendant(s) Atty.	
Judge Murphy / Court Reporter / Deputy Clerk Mike		
A copy of this order ☐ should be sent ☐ has been sent ☐ Plaintiff Atty. ☐ Defense Atty. ☐ Other		File Stamp

ORDER

THIS CAUSE coming on to be heard for hearing on defendants' Motion to Dismiss Plaintiff's Second Amended Complaint;

IT IS HEREBY ORDERED:

1. Motion of Defendants, Pastor Aaron James and First Congregational Church of Dundee Illinois to dismiss Counts VIII, IX, X, XI, XII, XIII XIV, XV and XVI of Plaintiffs' Second Amended Complaint, pursuant to 735 ILCS 5/2-615, is granted with prejudice;

2. Pursuant to Supreme Court Rule 304(a), the Court finds no just reason to delay enforcement or appeal of this order of dismissal.

Date: 5/11/2017 ☐ Yes - Disposal ☐ No - Disposal Judge: Jean P. Murphy

P7-MISC-001 (11/09) White - Clerk Yellow and Pink Copies - Parties

APPEAL TO THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FROM THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICIAL CIRCUIT, KANE COUNTY, ILLINOIS

JANE DOE, a minor, by her mother and next friend, JANE A. DOE, and by her father and next friend, JOHN DOE; JANE A. DOE, Individually; JOHN DOE, Individually, Plaintiffs-Appellants,	)	
v.	)	Case No. 2015 L 216
CHAD COE, as an individual, FIRST CONGREGATIONAL CHURCH of DUNDEE ILLINOIS, an Illinois Not-For-Profit Corporation, PASTOR AARON JAMES, as an individual, FOX VALLEY ASSOCIATION ILLINOIS CONFERENCE OF THE UNITED CHURCH OF CHRIST, an Illinois Not-for-Profit Corporation, ILLINOIS CONFERENCE OF THE UNITED CHURCH OF CHRIST, an Illinois Not-for-Profit Corporation, THE UNITED CHURCH OF CHRIST, THE GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST, THE UNITED CHURCH OF CHRIST BOARD, an Ohio Not-for-Profit Corporation, Defendants-Appellees.	)	

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Plaintiffs, Jane Doe, Jane A. Doe, and John Doe, by their attorneys, Lyons Law Group, LLC, hereby appeal to the Appellate Court of Illinois, Second Judicial District, from the judgment entered on May 11, 2017 in favor of Defendants Aaron James and First Congregational Church of Dundee Illinois and against Plaintiffs.

Plaintiffs-Appellants pray that the Appellate Court reverse the judgment against them and remand this cause with directions to reinstate all Counts of the Second Amended Complaint alleged against Defendants Aaron James and First Congregational Church of Dundee Illinois for trial on the merits as to all claims, and any other relief to which Plaintiffs-Appellants may be

deemed entitled.

Respectfully Submitted,

By: _____
Kevin M. Lyons, Esq.
One of the attorneys
for the Plaintiffs-Appellants

Kevin M. Lyons, Esq.
Lyons Law Group, LLC
5333 Main St.
Downers Grove, IL 60515
ARDC #: 6243395

Francis C. Lipuma, Esq.
The Law Office of Francis C. Lipuma
105 W. Adams Street, 35th Floor
Chicago, IL 60603
ARDC #: 6192070

2018 IL App (2d) 170435
No. 2-17-0435
Opinion filed March 30, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JANE DOE, a Minor, by her Mother and Next Friend, Jane A. Doe, and by her Father and Next Friend, John Doe; JANE A. DOE; and JOHN DOE, Plaintiffs-Appellants, v. CHAD COE; THE FIRST CONGREGATIONAL CHURCH OF DUNDEE, ILLINOIS; and PASTOR AARON JAMES, Defendants (The First Congregational Church of Dundee, Illinois, and Pastor Aaron James, Defendants-Appellees).	)	Appeal from the Circuit Court of Kane County. No. 15-L-216 Honorable James R. Murphy, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court, with opinion.
Justices Hutchinson and Jorgensen concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiffs, Jane Doe (Jane), Jane A. Doe, and John Doe, appeal the dismissal with prejudice of their second amended complaint against defendants, the First Congregational Church of Dundee, Illinois (FCCD), and its pastor, Aaron James. The complaint alleged that

Chad Coe sexually groomed and ultimately raped[1] Jane while Coe was employed as FCCD's director of youth ministries and Jane was a member of FCCD's youth group, which was overseen by Coe. For the following reasons, we affirm in part, reverse in part, and remand for further proceedings.

¶ 2 I. BACKGROUND

¶ 3 A. Plaintiffs' Original and First Amended Complaints

¶ 4 Plaintiffs filed their initial complaint in August 2015. They named several defendants, including Coe, James, and FCCD. FCCD is a local congregation of the United Church of Christ (UCC) that employed James and Coe during the relevant period. Plaintiffs also named the UCC itself and various entities within its loosely hierarchical organization (collectively, the UCC defendants).

¶ 5 In January 2016, on the motion of FCCD and James, the trial court dismissed without prejudice the counts against them. Plaintiffs filed their first amended complaint in February 2016. They alleged four causes of action against both FCCD and James: negligent supervision, negligent retention, "willful and wanton failure to protect," and "willful and wanton retention and failure to supervise." Against FCCD, plaintiff additionally alleged negligent hiring. The core allegations of the complaint described a two-year period, from 2011 through 2013, in which

[1] The common-law crime of rape has been replaced with statutes defining the offenses of criminal sexual assault and aggravated criminal sexual assault. See *People v. Brown*, 2013 IL App (2d) 110303, ¶ 61. Nonetheless, in keeping with plaintiffs' terminology in their complaint, we will refer to Jane as (allegedly) having been "raped" by Coe.

Coe abused his position as FCCD's youth director through various forms of sexual misconduct toward female minors who were members of FCCD's youth and confirmation groups. A particular focus of the allegations was Jane, whom Coe subjected to persistent sexual advances before raping her in June 2013.

¶ 6 In the negligent-hiring count, plaintiffs alleged that, if FCCD had searched Coe's online activity prior to hiring him, it would have discovered that Coe maintained profiles on several websites that featured adult or child pornography. In the remaining counts, plaintiffs alleged that FCCD and James failed to properly supervise Coe. They also alleged that FCCD and James knew or should have known of Coe's misconduct prior to the rape of Jane.

¶ 7 James, FCCD, and the UCC defendants filed motions to dismiss plaintiff's first amended complaint, pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2014)). James and FCCD also moved the trial court to strike, as irrelevant or cumulative, certain paragraphs of the first amended complaint, in case the court denied the motions to dismiss or granted them with leave to refile. FCCD and James sought to have stricken, *inter alia*, paragraphs alleging how FCCD and James responded after Jane disclosed the rape and Coe was arrested for it.

¶ 8 The trial court agreed with FCCD and James that the counts against them failed to state a cause of action. As to the negligent-hiring count against FCCD, the court reasoned that an online search of Coe's name would not necessarily have disclosed his activity on pornographic websites, because, according to the complaint, he conducted that activity under a pseudonym. As to the remaining counts, the court found nothing in the complaint to indicate that either FCCD or James was or should have been aware of Coe's malfeasance prior to his sexual assault of Jane.

¶ 9 The court denied plaintiffs leave to replead any of the counts against James or the willful-and-wanton counts against FCCD. First, the court reasoned that, if plaintiffs could not adequately plead simple negligence after two attempts, there was scant chance of their success on a subsequent attempt to plead willful and wanton conduct (which is an aggravated form of negligence (see *Doe-3 v. McLean County Unit District No. 5 Board of Directors*, 2012 IL 112479, ¶ 19)). Second, the court held that, while James's acts or omissions as an agent of FCCD might form the basis for FCCD's liability, James could not be held personally liable.

¶ 10 The court dismissed the negligence counts against FCCD without prejudice. The court also granted in its entirety FCCD and James's motion to strike portions of the first amended complaint.

¶ 11 The court dismissed with prejudice the counts in the first amended complaint that were particular to the UCC defendants. Subsequently, we reversed that dismissal and remanded for further proceedings. See *Doe v. Coe*, 2017 IL App (2d) 160875.

¶ 12 Plaintiffs filed a motion to reconsider the dismissals of the counts against FCCD and James. The court granted the motion only to the extent of permitting plaintiffs to replead the negligence counts against James.

¶ 13 B. Plaintiffs' Second Amended Complaint

¶ 14 1. Overview of Counts Against FCCD and James

¶ 15 In December 2016, plaintiffs filed their 70-page second amended complaint, which is the subject of this appeal. Plaintiffs renewed their various claims against Coe and their claims against FCCD and James for negligence and willful and wanton conduct. They pled 16 counts in total. Counts I through VII named only Coe. James alone was named in counts VIII (negligent supervision), IX (negligent retention), X (willful-and-wanton failure to protect), and XI (willful-

and-wanton retention and failure to supervise). FCCD alone was named in counts XII (negligent hiring), XIII (negligent supervision), XIV (negligent retention), XV (willful-and-wanton failure to protect), and XVI (willful-and-wanton retention and failure to supervise).

¶ 16 We organize the general and specific allegations under the following headings:

¶ 17 2. The UCC, the IUCC, and the Safe Church Policy

¶ 18 Plaintiffs alleged that the UCC is "a religious organization composed of Local Churches, Associations, Conferences, and a General Synod organized in a hierarchical structure." The UCC has an entity called the Insurance Board, one purpose of which is to "assist in creating and maintaining safe church environments within the UCC organization, including, but not limited to, Local Churches." On August 21, 2006, the Insurance Board "sent a letter to the UCC and its sub-entities to provide expectations and recommendations regarding the adoption of written safe church abuse prevention policies at UCC Local Churches." The August 21 letter contained recommended " 'Internet Safety Guidelines' " (ISG). The ISG restricted adult-minor online interaction and barred "improper" or "offensive" online content. The letter also contained a sample policy on " 'Appropriate and Inappropriate Affection Between Staff and Children,' " which provided specific examples of such inappropriate contact.

¶ 19 Following the August 21 letter from the Insurance Board, the general counsel for the UCC (General Counsel) sent a letter to local churches within the UCC "regarding compliance with the Insurance Board's recommendations." The General Counsel included in the letter "a sample safe church policy that the General Counsel drafted pursuant to the Insurance Board's recommendation for a more comprehensive safe church policy for Local Churches." On November 18, 2006, the Illinois Conference of the United Church of Christ (IUCC) "approved

the 'Safe Church Policy-Abuse Prevention' policy" (SCP), which was based on the safe church policy provided by the General Counsel.

¶ 20 As FCCD is a local church within the IUCC, "[FCCD] employees and volunteers were required to read and follow the [SCP]" and "to sign a disclosure statement attesting to and acknowledging the [SCP]." The SCP required that (1) all employees and volunteers undergo a background check prior to working with minors, (2) "at least two adults be present to supervise any minor youth or child activities," and (3) "incidents of child abuse observed by employees or volunteers *** be reported to the Illinois Department of Children and Family Services[.]" The SCP also defined "sexual exploitation" and "sexual harassment."

¶ 21 3. FCCD's Hiring of Coe

¶ 22 Plaintiffs alleged that, when Coe was hired as youth director by FCCD, his father, Douglas Coe (Douglas), "held a senior position within the UCC as an Association Council Member of [the Fox Valley Association]" (FVA), which is an "Association" within the IUCC. In hiring Coe, FCCD relied on the recommendation of Douglas or the FVA and performed no further investigation into Coe's background or fitness for the position.

¶ 23 In their specific allegations within the negligent-hiring count (count XII) against FCCD, plaintiffs alleged that FCCD "failed to conduct even a basic, cursory Google search, or any investigation into the background and fitness of Coe for the position of Director of Youth Ministries in violation of church policy." They further alleged:

> "A basic, cursory Google search into the online public presence of Coe would have revealed Coe's activity, which included posting public photos of his own genitalia, on numerous websites, such as, 'newbienudes,' 'motherless,' 'wouldyouhitthis,' 'ratemybody,' 'ratemymelons,' and 'datehookup,' among many others."

¶ 24 In their general allegations—incorporated into the negligent-hiring count—plaintiffs elaborated on the nature of Coe's online presence:

> "127. At all times relevant, Coe maintained public online profiles under his name and under the username 'BluesGod88' that could be found using a basic, cursory Google search.
>
> 128. At all times relevant, Coe commonly 'friended' employees, volunteers, and members of [FCCD], including members of the Youth Group[,] on social media sites.
>
> 129. At all times relevant, Coe commonly 'friended' employees, volunteers, and members of [FCCD], including members of the Youth Group, of [*sic*] social media sites on which he maintained profiles as 'BluesGod88.'
>
> 130. At all times relevant, Coe maintained profiles as 'BluesGod88' on numerous pornographic Adult Obscenity or Child Pornography Internet Sites.
>
> ***
>
> 132. At all times relevant, Coe posted Obscene, pornographic images of himself, including his genitals and erect penis, on the internet using 'BluesGod88' profiles."

¶ 25 The complaint did not identify when FCCD hired Coe, but it alleged that his misconduct occurred from 2011 through 2013 and that FCCD fired him on November 12, 2013. FCCD hired James in May 2009 as its senior pastor. In that capacity, James was "the master and direct supervisor of Coe[.]"

¶ 26 Coe's responsibilities as FCCD's youth director "included, among other things, counseling of youth members and the planning and execution of all programming for the confirmation class, as well as the middle and high school youth ministries at [FCCD]."

¶ 27 Coe worked from an office inside FCCD's building. His office was near other church administrative offices, such as James's office. Coe and James typically were present together in the building on weekdays from 8 a.m. to 5 p.m. (normal working hours) and for church services and special events.

¶ 28 4. Coe's Misconduct at FCCD

¶ 29 a. General Misconduct Involving Female Minors

¶ 30 Plaintiffs devoted 28 pages of their complaint to an inventory of Coe's alleged misconduct at FCCD. Some of the conduct is described in detail, but other descriptions are vague and make frequent use of the capitalized catchall term, "Inappropriate," which plaintiffs defined early in the complaint to encompass:

> "Inappropriate Content, Inappropriate Displays of Affection, Sexual Harassment and Sexual Exploitation, as defined by UCC policies and materials, as well as conduct or materials defined by Illinois law to be Grooming, Sex Offenses, Harmful to Minors, Obscene, Adult Obscenity or Child Pornography Internet Site."

¶ 31 Our recapitulation of the misconduct allegations is not exhaustive, and need not be. In this appeal, Coe's conduct is relevant only as it impacts the potential liability of FCCD and James. We are concerned particularly with alleged violations of the SCP by FCCD and James and with allegations suggesting that they were or should have been aware of Coe's unfitness for his position.

¶ 32 Some of Coe's misconduct at FCCD is not alleged to have directly impacted others in the church. For instance, Coe is alleged to have used FCCD's computers to visit and maintain profiles on websites with adult and child pornography and to store pornographic pictures.

¶ 33 The remaining misconduct involves members of FCCD's youth and confirmation groups, which Coe oversaw as FCCD's youth director. There are separate paragraphs in the complaint for misconduct involving Jane in particular and for misconduct that Coe directed toward multiple unnamed female minors who were members of the youth or confirmation groups at FCCD. As for the latter, general misconduct, Coe is alleged to have used his cellular phone and FCCD's computers to (1) store pornographic images of underage female members of the youth group, (2) store pornographic images of himself and send them to underage female members, and (3) " 'friend' " underage female members on social media sites and "discuss [their] romantic relationship or sexual relationships," in violation of the ISG.

¶ 34 This general misconduct toward underage female members of the youth and confirmation groups also allegedly included in-person misconduct. Plaintiffs alleged the following misconduct by Coe, "commonly" or "habitually" with underage female members: (1) making inappropriate physical contact, (2) making sexually suggestive remarks and engaging the members in sexually-charged banter and games, and (3) showing the groups videos with "Inappropriate sexual content," including pornographic content. Plaintiffs specifically described the types of touches, remarks, games, and movies that constituted Coe's misconduct.

¶ 35 Plaintiffs alleged no dates for the foregoing misconduct, except for an instance that occurred at a "Confirmation event" in 2011. *Infra* ¶ 43.

¶ 36 b. Misconduct Involving Jane

¶ 37 Plaintiffs alleged that Jane was the victim of a campaign of grooming by Coe that occurred from 2011 through 2013. According to plaintiffs, the grooming "escalated" during the summer of 2012, when Jane was 14 years old and Coe was 30 years old. Coe psychologically manipulated Jane to increase her trust and emotional dependence on him. He "encouraged [Jane]

to spend large amounts of time telling Coe about intimate details of her life[.]" He "stressed to [her] the importance of and necessity for secrecy and cautioned her repeatedly against telling anyone about the 'relationship' between [them]."

¶ 38 Plaintiffs alleged that Coe used FCCD's computer equipment to communicate with Jane. Coe sent her sexually explicit pictures and videos, including some of himself. He also "gradually encourage[d] and convince[d] [Jane] to remove her clothing during 'games' of 'truth or dare.' " Coe accessed and viewed sexually explicit images of Jane.

¶ 39 In late 2012 and in 2013, Coe "began to make Inappropriate physical contact with Jane Doe, including kissing [her] and touching [her] in a sexual manner." Coe encouraged Jane to use the pretext of church activities to visit him at his office at FCCD during normal working hours. Coe "isolated [Jane] in areas of the church building, such as the downstairs classroom, the sacristy, and the audio-visual booth, where Coe kissed [Jane] and touched her in a sexual manner." During at least one occasion when Coe played a movie for the youth group, he sat with Jane in the back of the room and fondled her. Coe would also make sexual comments to Jane. For instance, he developed a pet name for her genitalia and used it "openly in front of other youths."

¶ 40 In June 2013, Coe convinced Jane to volunteer at FCCD's vacation bible school (VBS), a daytime summer program for elementary-age children. Coe presented it as a way for the two to be alone together. On June 14, 2013, Doe and Jane were alone together in a basement classroom of the church when he raped her on a couch. The assault occurred during normal working hours.

¶ 41 c. Visibility of Coe's Misconduct

¶ 42 Plaintiffs alleged that Coe was the only adult present "[d]uring many of the times that [he] engaged in acts of sexual innuendo and suggestion and other forms of Inappropriate physical

and sexual conduct with Youth Group participants[.]" Coe was also the only adult present with the youth group when he showed them videos with sexual content. Coe was "habitually alone" on FCCD's premises with underage female members of the youth group. He would "habitually isolate[ ] minor female members of the Youth Group for 'private lessons' *** and would send away other Youth Group members who would attempt to watch or otherwise be present for the 'private lessons.' "

¶ 43 In what follows, we recite verbatim the allegations on which plaintiffs rely in this appeal for their position that FCCD and James knew or should have known of Coe's unfitness for his position as youth director, prior to the rape of Jane. Plaintiffs alleged:

> "159. During the Confirmation event for the 2011 confirmation class at [FCCD], Coe allowed underage girls to sit on his lap and engaged in Inappropriate bodily contact (the '2011 Confirmation Incident').
>
> * * *
>
> 177. On one occasion, Coe represented to Jane Doe that he was waiting for a colleague to come to Coe's office and retrieve Coe for an employee meeting. While he waited for the colleague to arrive and with the door to his office fully open to the adjacent offices, Coe sent Jane Doe a picture of his erect penis with the caption 'How's that?'
>
> * * *
>
> 183. When Jane Doe visited Coe in his office during Normal Working Hours, Coe routinely kept his office door open.
>
> * * *

187. When Jane Doe visited Coe in his office during Normal Working Hours and with his office door open, Coe routinely stroked her legs, breasts, buttocks, crotch, and kissed Jane Doe.

* * *

196. During an FCC overnight retreat in late 2012, Coe maintained a sleeping area in the same area as underage female Youth Group members and allowed the females in or on his sleeping bag. Coe stayed up late with Jane Doe, who was in or on his sleeping bag, while the rest of the participants slept. Later in the weekend, Coe isolated Jane Doe in one of the dormitory buildings and told her he wanted to put her on one of the dorm beds and 'have sex' with her, i.e., rape her.

* * *

239. Rev. James was present at [FCCD] during Normal Working Hours and at Youth Group and [FCCD] functions to witness Coe's interactions with youth.

240. Rev. James was present at [FCCD] during Normal Working Hours and at Youth Group and [FCCD] functions to witness Coe's Inappropriate interactions with Jane Doe.

241. Rev. James knew or had reason to know that Coe's behavior and interactions with youth, including Jane Doe, were Inappropriate.

242. Rev. James knew or had reason to know that Coe's behavior and interactions with youth, including Jane Doe, were dangerous.

243. Specifically, Rev. James knew or should have known the following:

[repeating the allegations of Coe's misconduct toward youth group members and the allegation concerning Coe's behavior at the 2011 confirmation event].

* * *

261. [FCCD] employees, members, or volunteers were present at [FCCD] during Normal Working Hours and at Youth Group and [FCCD] functions to witness Coe's interactions with youth.

262. [FCCD] employees, members, or volunteers were present at [FCCD] during Normal Working Hours and at Youth Group and [FCCD] functions to witness Coe's Inappropriate interactions with Jane Doe.

263. [FCCD] knew or had reason to know that Coe's behavior and interactions with youth, including Jane Doe, were Inappropriate.

264. [FCCD] knew or had reason to know that Coe's behavior and interactions with youth, including Jane Doe, were dangerous.

265. [FCCD] knew or should have known the following:

[repeating the allegations of Coe's misconduct toward youth group members and the allegation concerning Coe's behavior at the 2011 confirmation event].

* * *

272. [FCCD] employees, volunteers, or members were present at [FCCD] during Normal Working Hours and during church events to witness Coe's Inappropriate attentiveness, behavior, or physical contact with minor members of the Youth Group, including Jane Doe.

273. Multiple adult employees, volunteers, or members witnessed behavior on the part of Coe toward minor females in the youth group that those adults found unsettling and Inappropriate.

274. Multiple adult employees, volunteers, or members received information from the children of [FCCD] regarding Coe's Inappropriate behavior toward minor females in the Youth Group that the [*sic*] made the children feel uncomfortable, weird, isolated, or frustrated.

275. Multiple adult [FCCD] employees, volunteers, or members witnessed Coe alone in the sanctuary of the church with minor female members of the Youth Group.

276. Multiple adult [FCCD] employees, volunteers, or members witnessed Coe alone in his office with minor female members of the Youth Group.

277. [FCCD] employees, volunteers, or members reported or discussed among themselves the Inappropriate attentiveness, behavior, or physical contact by Coe with female members of the Youth Group witnessed by those employees or volunteers.

***

279. [FCCD] employees, volunteers, or members were present at [FCCD] during Normal Working Hours and during church events to witness Coe's Inappropriate attentiveness, behavior, or physical contact with Jane Doe during late 2012 and 2013.

280. In March 2013, at least [one] employee of [FCCD] observed Coe alone in the audio-visual booth with Jane Doe with the lights out.

281. Multiple [FCCD] employees, volunteers, or members witnessed Coe's Inappropriate attentiveness, behavior, or physical contact with Jane Doe during late 2012 and 2013.

282. At least one [FCCD] employees, volunteers, or members [*sic*] confronted Coe regarding his Inappropriate behavior.

283. [FCCD] employees, volunteers, or members reported or discussed among themselves the Inappropriate attentiveness, behavior, or physical contact by Coe with Jane Doe witnessed during late 2012 and 2013.

* * *

286. Coe's Inappropriate attentiveness, behavior, or physical contact with Jane Doe was reported to Rev. James during late 2012 and 2013.

287. Coe's attentiveness, behavior, or physical contact with Jane Doe was witnessed by Rev. James during Normal Working Hours, and at Youth Group and/or [FCCD] events during late 2012 and 2013.

288. On at least three (3) separate occasions, Rev. James walked into Coe's office when Coe was alone with Jane Doe.

289. During each of the three (3) separate occasions in which Rev. James witnessed Coe alone with Jane Doe, Jane Doe was either lying on a sofa or sitting on Coe's desk.

* * *

297. In June 2013, an [FCCD] volunteer was present during normal business hours at [FCCD] for the purpose of assisting with the VBS program.

298. The [FCCD] volunteer assisting with the VBS program was an early childhood education professional and, therefore, a mandatory reporter separate and apart from her role at [FCCD] (the 'Volunteer').

299. Within less than two days of witnessing the interaction between Coe and Jane Doe at VBS, the Volunteer recognized the interaction as Inappropriate or dangerous.

300. The Volunteer placed a phone call to Rev. James before the rape occurred to report the Inappropriate conduct and reported the Inappropriate conduct to Rev. James in a subsequent meeting.

***

302. At no point after the Volunteer reported the Inappropriate conduct to Rev. James did James remove Coe as Director of Youth Ministries or otherwise restrict his access to minors, including Jane Doe."

¶ 44 5. Violations of the SCP

¶ 45 As noted, plaintiffs alleged that Coe was the only adult present when he showed the youth group movies with sexual content. Plaintiffs further alleged that Coe was the only adult present "[d]uring many" of the times in which he "engaged in acts of sexual innuendo and suggestion and other forms of Inappropriate physical and sexual conduct" with youth group members. (Plaintiffs did not identify which other adults were present on the other occasions.) Plaintiffs also alleged that Coe was "habitually alone" in various parts of the church with underage female members of the youth group. Regarding Jane specifically, plaintiffs alleged that Coe would isolate her in various parts of the church and that on one of these occasions he raped her.

¶ 46 Plaintiffs alleged that FCCD and James "knew or should have known that Coe was routinely the only adult supervising minor youths at [FCCD]." On three separate occasions, James witnessed Coe alone with Jane in his office but did not enforce the two-adult policy. According to plaintiffs, other FCCD employees, volunteers, or members also witnessed Coe in

his office or in the church sanctuary alone with Jane or other underage female members of the youth group.

¶ 47 6. Events Subsequent to the Rape of Jane

¶ 48 Plaintiffs alleged that, in mid-June 2013, Jane shared with " 'Sally,' " a fellow member of the youth group, text messages that Coe had sent Jane. After Sally revealed the texts to her parents, her father went to Coe's office at FCCD and loudly confronted him. Afterward, Sally's parents removed her from an upcoming youth trip to Costa Rica that Coe was planning to lead. James allowed Coe to take the group to Costa Rica despite what James had been told by the VBS volunteer and despite his knowing or having reason to know of the confrontation between Sally's father and Coe. Between June 28 and July 1, 2013, Jane told Jane A. that Coe had raped her. Coe was arrested on July 3, 2013, and subsequently charged with sex crimes against Jane. Several months later, after a search of his work computer, he was charged with possession of child pornography.

¶ 49 Plaintiffs alleged that, on July 3, 2013, following Coe's arrest, James conducted an open meeting with FCCD's employees, members, and volunteers. At the meeting, FCCD members "questioned Rev. James regarding the lack of or ongoing failure of any safety plan, specifically citing the 2011 Confirmation Incident." James responded that FCCD currently had a safety plan, which could be viewed on the church's website. Plaintiffs alleged that, contrary to James's assertion at the meeting, there was no safety plan in place at FCCD as of July 3, 2013, and that, if there were such a plan in place, it had not been followed. At the July 3 meeting, James did not address any of Coe's misconduct but expressed gratitude that Coe and his family had strong support at FCCD.

¶ 50 On August 25, 2013, James held a meeting for the parents of youth group members. James "represented that a 'new' safety policy was in place that would require at least two adult supervisors in the presence of any child or minor youth." James encouraged members to be supportive of Coe but failed to inform them that the Illinois Department of Children and Family Services had made an indicated finding of child abuse at FCCD or that the court in Coe's criminal case had prohibited him from having unsupervised contact with children. FCCD terminated Coe's employment on November 12, 2013.

¶ 51 C. FCCD and James's Motion to Dismiss

¶ 52 FCCD and James filed a joint motion, pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2014)), to dismiss plaintiffs' second amended complaint. The trial court agreed with them that the complaint did not cure the deficiencies that led to the dismissal of the first amended complaint. The court found that plaintiffs' allegations still lacked factual detail as to the misconduct of Coe that was observed, who observed it, and when it was observed. The court held that, because plaintiffs failed to establish that Coe's rape of Jane was reasonably foreseeable to FCCD and James, plaintiffs failed to establish that FCCD and James had a duty to prevent it. The court dismissed plaintiffs' complaint with prejudice. The court found, pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016), that there was no just cause for delaying enforcement or appeal.

¶ 53 Plaintiffs filed this timely appeal. FCCD and James filed a joint appearance and a joint appellees' brief.

¶ 54 II. ANALYSIS

¶ 55 A. Stricken Portions of the First Amended Complaint

¶ 56 Plaintiffs challenge the trial court's grant of FCCD and James's motion to strike portions of plaintiffs' first amended complaint as irrelevant or cumulative. FCCD and James brought the motion pursuant to section 2-615(a) of the Code (735 ILCS 5/2-615(a) (West 2014)), which permits the trial court to strike "immaterial matter" from a complaint. While the motion covered diverse portions of the complaint, and the court granted it in its entirety, plaintiffs' challenge on appeal is limited to the striking of allegations concerning events that occurred after Jane disclosed the alleged rape and Coe was arrested (curiously, the parties seem to have forgotten the breadth of the motion and rely on some allegations as if they were not stricken). We review *de novo* the grant of a motion to strike pursuant to section 2-615(a). *Department of Healthcare & Family Services ex rel. Daniels v. Beamon*, 2012 IL App (1st) 110541, ¶ 15.

¶ 57 Before addressing plaintiffs' challenge, we briefly note plaintiffs' remark that the motion to strike "did not specify which allegations are immaterial or superfluous" and that the trial court "did not specify which allegations were to be stricken." Technically, if this assertion were true, plaintiffs would not even have known that the allegations stricken were those concerning post-rape events. In any case, the motion to strike did in fact identify precisely which paragraphs it covered, and the trial court was clear that it was granting the motion in its entirety.

¶ 58 On the merits, plaintiffs claim that the reactions of FCCD and James to Jane's disclosure of the alleged rape and Coe's arrest for it are relevant to show that they acted willfully and wantonly *prior* to the rape. According to plaintiffs, those allegations "not only support a pattern of behavior by [FCCD] and James to willfully ignore Inappropriate conduct but also help demonstrate an ongoing disregard for Jane Doe's welfare[.]" We disagree. The allegations in question portray FCCD and James as mistaken that FCCD had a safety policy in force, as hesitant to accept Jane's accusations against Coe, and as unwilling to immediately remove Coe

from contact with youth. Plaintiffs see this conduct as a "pattern" of indifference that predated the alleged rape, but in fact the conduct is perfectly consistent with FCCD and James having not acted wrongly prior to the alleged rape. "[A] fact is 'relevant' if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *People v. Pawlaczyk*, 189 Ill. 2d 177, 193 (2000). The alleged actions of FCCD and James following Jane's accusations and Coe's arrest are simply neutral on the question of whether those parties acted culpably prior to the alleged rape. Consequently, the allegations are immaterial and were properly stricken. Notably, even if the court had denied the motion to strike, we would still have considered the allegations irrelevant to whether the complaint stated a cause of action for willful and wanton conduct.

¶ 59 B. Dismissal of the Second Amended Complaint

¶ 60 1. Review of a Dismissal under Section 2-615 of the Code

¶ 61 The following principles guide our review of a dismissal under section 2-615 of the Code:

> "A motion to dismiss brought pursuant to section 2-615 of the Code attacks the legal sufficiency of the complaint. [Citation.] When ruling on such a motion, the court must accept as true all well-pleaded facts in the complaint, as well as any reasonable inferences that may arise from them. [Citation.] However, a court cannot accept as true mere conclusions unsupported by specific facts. [Citation.] A complaint should be dismissed under section 2-615 only if it is clearly apparent from the pleadings that no set of facts can be proven that would entitle the plaintiff to recover. [Citation.] The critical inquiry is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action on which relief may be granted.

[Citation.] Our review of an order granting a section 2-615 motion to dismiss is *de novo*." *In re Estate of Powell*, 2014 IL 115997, ¶ 12.

¶ 62 2. General Principles Governing a Negligence Claim

¶ 63 Plaintiffs' claims against FCCD and James are all common-law negligence claims, even the claims of willful and wanton conduct, which is a species of common-law negligence (*Doe-3*, 2012 IL 112479, ¶ 19). To state a cause of action for common-law negligence, the plaintiff must plead facts establishing (1) a duty of care owed to the plaintiff by the defendant, (2) the defendant's breach of that duty, and (3) injury to the plaintiff proximately caused by that breach. *Tyrka v. Glenview Ridge Condominium Ass'n*, 2014 IL App (1st) 132762, ¶ 44.

¶ 64 The specific issue on appeal is whether plaintiffs sufficiently alleged that FCCD and James owed Jane a duty to protect her from being raped by Coe. Unless a duty of care is owed, there can be no negligence. *Doe v. Boy Scouts of America*, 2014 IL App (2d) 130121, ¶ 36. Generally, one has no duty to protect another from the harmful acts of a third party. *O'Rourke v. McIlvaine*, 2014 IL App (2d) 131191, ¶ 19. Exceptions to this rule depend on the existence of a recognized "special relationship." *Id.* First, the special relationship can exist between the injured party and the party alleged to owe the duty. *Id.* These relationships include common carrier-passenger, innkeeper-guest, business invitor-invitee, and voluntary custodian-protectee. *Iseberg v. Gross*, 227 Ill. 2d 78, 88 (2007). Second, the special relationship can exist between the party who is the source of the harm and the party alleged to owe the duty. *O'Rourke*, 2014 IL App (2d) 131191, ¶ 19. Such relationships include parent-child and master-servant or employer-employee. *Id.*

¶ 65 Finally, a duty of care can exist even in the absence of a special relationship, where the defendant has voluntarily undertaken a duty. *Lewis v. Heartland Food Corp.*, 2014 IL App (1st) 123303, ¶ 14.

¶ 66 Here, plaintiffs claim the existence of both types of a special relationship and a voluntary undertaking. FCCD and James present their arguments monolithically except with respect to negligent hiring, the only cause of action that was not against them both.

¶ 67 3. Negligent Hiring—FCCD only

¶ 68 Count XII of plaintiffs' second amended complaint alleged negligent hiring against FCCD. To state a cause of action for negligent hiring, the plaintiff must plead facts establishing that (1) the employer knew or should have known that the employee had a particular unfitness for the position so as to create a danger of harm to third persons, (2) this particular unfitness was known or should have been known at the time of the hiring, and (3) this particular unfitness proximately caused the plaintiff's injury. *Van Horne v. Muller*, 294 Ill. App. 3d 649, 656-57 (1998), *aff'd in part & rev'd in part on other grounds*, 185 Ill. 2d 299 (1998).

¶ 69 There is no dispute on appeal that FCCD should have conducted a reasonable background check on Coe before hiring him. There is also no dispute that a reasonable background check would have included a reasonable search for Coe's online activity as it bore upon his fitness for the position of youth director. The dispute on appeal concerns what was feasible for FCCD to learn about Coe from an online search of the kind that plaintiffs alleged FCCD should have done prior to hiring him.

¶ 70 In their specific allegations within their negligent-hiring count, plaintiffs alleged that "[a] basic, cursory Google search into the online presence of Coe would have revealed Coe's activity, which included posting public photos of his own genitalia, on numerous pornographic websites,

such as, 'newbienudes,' 'motherless,' 'wouldyouhitthis,' 'ratemybody,' 'ratemymelons,' and 'datehookup,' among many others." In their general allegations, plaintiffs asserted that Coe's profiles on pornographic websites were maintained not under his given name but under the pseudonym " 'BluesGod88.' "

¶ 71 FCCD claims that there are two major deficiencies in plaintiffs' allegations pertaining to negligent hiring. First, FCCD asserts that plaintiffs "do not *** explicitly allege that Coe was visiting the [pornographic] websites before he was hired *** in May 2009." In reviewing the sufficiency of a complaint, we accept all reasonable inferences from the allegations. *Powell*, 2014 IL 115997, ¶ 12. In their specific allegations within the negligent-hiring count, plaintiffs alleged that Coe maintained profiles on pornographic websites "[a]t all times relevant," which we construe to include before Coe's hire. Moreover, the negligent-hiring claim implies, indeed depends on, the (alleged) fact that Coe maintained such objectionable online profiles before his hire.

¶ 72 Second, FCCD contends that, even if plaintiffs have alleged that Coe maintained the profiles prior to his hire, they have failed to establish how FCCD could have become aware of those profiles before hiring Coe. FCCD notes that Coe is alleged to have maintained the profiles under the pseudonym " 'BluesGod88,' " and FCCD questions how it could have become aware of those profiles prior to Coe's hire when it did not know his pseudonym. Plaintiffs alleged, however, that "[a] basic, cursory Google search" would have revealed Coe's profiles on pornographic websites. From this allegation we draw the reasonable inference that a search under Coe's given name would have revealed his pseudonym (which in turn would have led FCCD to the profiles on pornographic websites). Whether the search would indeed have revealed that information is a question of fact. At this stage of the proceeding, we merely accept

this well-pled allegation as true. See *Olson v. Hunter's Point Homes, LLC*, 2012 IL App (5th) 100506, ¶ 10 (on motion to dismiss complaint for fraud and misrepresentation in the sale of homes, it was a question of fact whether purchasers could have discovered the alleged misrepresentations in the exercise of ordinary prudence).

¶ 73 For these reasons, we reverse the dismissal of the negligent-hiring claim (count XII) against FCCD.

¶ 74 4. Negligent Retention

¶ 75 Plaintiffs alleged negligent retention against both FCCD (count XIV) and James (count IX). To state a cause of action for negligent retention, the plaintiff must plead facts establishing that: (1) the employer knew or should have known that the employee had a particular unfitness for the position so as to create a danger of harm to third persons, (2) the employer retained the employee in his or her employment even after the employer knew or should have known about the unfitness, and (3) the unfitness proximately caused the claimed injury. *Van Horne*, 294 Ill. App. 3d at 656-67. "[T]he particular unfitness of the employee must have rendered the plaintiff's injury foreseeable to a person of ordinary prudence in the employer's position." *Platson v. NSM, America, Inc.*, 322 Ill. App. 3d 138, 144 (2001).

¶ 76 Obviously, as the tort of negligent retention assumes the capacity of the defendant to have terminated the employment of the harming party, the tort does not apply outside the employment relationship. See *Doe*, 2014 IL App (2d) 130121, ¶ 40 (no cause of action for negligent retention where no employment relationship existed). Accordingly, since James was not Coe's employer, but rather both were employed by FCCD, we affirm the dismissal of count IX, the negligent-retention count against James.

¶ 77 As for the claim against FCCD, plaintiffs have failed to plead facts establishing that FCCD learned or should have learned during Coe's tenure that he had a particular unfitness for the position of youth director at FCCD. For purposes of our analysis, knowledge held by an agent of FCCD is imputable to FCCD itself. See *Bryant v. Livigni*, 250 Ill. App. 3d 303, 308-09 (1993).

¶ 78 To facilitate our analysis, we group as follows the allegations on which plaintiffs rely in claiming that FCCD had notice of misconduct by Coe. The first group of allegations describes specific instances of misconduct, or patterns of misconduct, that Coe would "habitually" engage in, apparently during youth group meetings. Plaintiffs alleged that Coe was "habitually alone" with, or he "habitually isolated," underage female members of the youth group. Interestingly, plaintiffs appeared to imply at one point that another adult was present on some occasions when Coe engaged in misconduct: "During *many* of the times that Coe engaged in acts of sexual innuendo and suggestion and other forms of inappropriate physical and sexual conduct with Youth Group participants, Coe was the only adult present." (Emphasis added.) However, plaintiffs did not indicate which other adult was present on these occasions.

¶ 79 Also, plaintiffs repeatedly alleged that James or other persons affiliated with FCCD were present on FCCD's premises, including during youth group functions, "*to witness* Coe's Inappropriate interactions with Jane Doe" (emphasis added). Even if, however, we interpreted this to mean that such persons actually witnessed "Inappropriate" conduct by Coe toward Jane (and were not just present on the premises when the misconduct occurred), we would hold that the allegations failed for lack of specificity as to what conduct was actually witnessed. Conclusions of fact, such as of "Inappropriate" conduct, fail where, as here, they are not supported by specific allegations. *Powell*, 2014 IL 115997, ¶ 12. Thus, while this set of

allegations describes many outrageous acts by Coe, it simply does not establish that FCCD knew or should have known of Coe's malfeasance.

¶ 80 The second group of allegations, which describes Coe's conduct in settings other than youth group functions, likewise fails to establish notice to FCCD. Plaintiffs alleged:

> (a) On one occasion, Coe was in his office during normal business hours when he took and sent Jane a picture of his erect penis. At the time, Coe's office door was fully open and he was waiting for a colleague to retrieve him for an employee meeting.
>
> (b) Jane spent lengthy amounts of time alone with Coe during normal business hours, and during these visits Coe would routinely fondle and kiss Jane while the office door was fully open.
>
> (c) "During the Confirmation event for the 2011 class at [FCCD], Coe allowed underage girls to sit on his lap and engaged in Inappropriate bodily contact[.]"

¶ 81 Regarding allegations (a) and (b), plaintiffs invite us to infer that someone must have witnessed Coe's behavior, given his brazenness in leaving the door fully open during normal business hours. We decline the invitation. Our standard of review directs us to make only *reasonable* inferences in judging the sufficiency of a complaint. *Id.* Given no concept of how Coe's office was configured or who was present at FCCD when these incidents occurred, it would be an overreach to make the inference that plaintiffs invite.

¶ 82 As for allegation (c), it does not indicate who was present for the "Confirmation event" and might have witnessed Coe's behavior. Plaintiffs assert in their brief that "parents, staff and other members [of FCCD] [were] present" for the event, but this fact is not alleged in the complaint. Plaintiffs also point to their allegation that, at the July 2013 church meeting following Coe's arrest, FCCD members complained to James about the "2011 Confirmation

Incident." Obviously, such notice to FCCD after the abuse and ultimate rape of Jane does not support a claim that FCCD should have terminated Coe prior to the abuse of Jane.

¶ 83 The third group of allegations describes specific conduct of Coe that was observed by James or others affiliated with FCCD. Plaintiffs alleged:

> (d) On three separate occasions, James saw Coe alone in his office with Jane, who was "either lying on a sofa or sitting on Coe's desk," and James left Coe alone with Jane. Plaintiffs provided no dates for these instances.
>
> (e) In March 2013, at least one FCCD employee witnessed Coe alone with Jane in FCCD's audio-visual booth with the lights turned off.
>
> (f) "Multiple adult [FCCD] employees, volunteers, or members" observed Coe alone in the sanctuary or in his office with underage female members of the youth group. Plaintiffs provided no dates here.

¶ 84 As no dates were provided for allegations (d) and (f), they cannot establish notice to FCCD of a problem with Coe in time for FCCD to take action. Moreover, none of the incidents is sinister on its face. For instance, Coe and Jane were not alone together in just any darkened room, but in an audio-visual booth where low light or darkness would not have been unusual during, say, a production. Also, Jane's posture inside Coe's office suggests at most a sense of ease or familiarity. While the alleged instances might arguably have been violations of the SCP's two-adult policy, and indicate that Coe was not properly mindful of it, they do not in themselves suggest that Coe took an improper interest in Jane or other underage female members of the youth group.

¶ 85 The fourth and final set of allegations we consider are those in which plaintiffs' oft-repeated term "Inappropriate" bears much of the weight. We quoted above the core allegations featuring the term (*supra* ¶ 43). The following are representative paragraphs:

> "273. Multiple adult employees, volunteers, or members witnessed behavior on the part of Coe toward minor females in the youth group that those adults found *unsettling and Inappropriate*.
>
> 274. Multiple adult employees, volunteers, or members received information from the children of [FCCD] regarding Coe's *Inappropriate* behavior toward minor females in the Youth Group that the [*sic*] made the children feel uncomfortable, weird, isolated, or frustrated.
>
> * * *
>
> 277. [FCCD] employees, volunteers, or members reported or discussed among themselves the *Inappropriate* attentiveness, behavior, or physical contact by Coe with female members of the Youth Group witnessed by those employees or volunteers.
>
> * * *
>
> 297. In June 2013, an [FCCD] volunteer was present during normal business hours at [FCCD] for the purpose of assisting with the VBS program.
>
> ***
>
> 299. Within less than two days of witnessing the interaction between Coe and Jane Doe at VBS, the Volunteer recognized the interaction as *Inappropriate or dangerous*.

> 300. The Volunteer placed a phone call to Rev. James before the rape occurred to report the *Inappropriate* conduct and reported the *Inappropriate* conduct to Rev. James in a subsequent meeting." (Emphases added.)

Early in the complaint, plaintiffs defined "Inappropriate" to include:

> "Inappropriate Content, Inappropriate Displays of Affection, Sexual Harassment and Sexual Exploitation, as defined by UCC policies and materials, as well as conduct or materials defined by Illinois law to be Grooming, Sex Offenses, Harmful to Minors, Obscene, Adult Obscenity or Child Pornography Internet Site."

"Illinois is a fact-pleading jurisdiction; although the plaintiff is not required to set forth evidence in the complaint, the plaintiff must allege facts sufficient to bring a claim within a legally recognized cause of action, not simply conclusions." *Rubin & Norris, LLC v. Panzarella*, 2016 IL App (1st) 141315, ¶ 26. Plaintiffs were required to specify the allegedly objectionable conduct. Adjectives such as "Inappropriate," "unsettling," and "dangerous" are not stand-ins for specific facts.

¶ 86 Plaintiffs rely on *Platson*, where we reversed the dismissal of the plaintiff's complaint for negligent supervision. The plaintiff was an intern at NSM, America, Inc. (NSM), when she was physically assaulted by NSM's employee Mark Eigenbauer, while he and the plaintiff were working alone together. Specifically, Eigenbauer grabbed the plaintiff's waist and pulled her to him. This caused her to fall to her knees, at which point Eigenbauer " 'forced himself on top of her and pressed himself against her.' " *Platson*, 322 Ill. App. 3d at 141-42. We held that the plaintiff sufficiently pleaded that NSM had been on notice that Eigenbauer posed a danger to the plaintiff. She alleged that Eigenbauer had on previous occasions rubbed and massaged her shoulders and brushed up against her body. She alleged that this behavior had been witnessed by

other employees, as well as supervisors, and that it was well known throughout the office that Eigenbauer would single her out for such touching. *Id.* at 141. We held that the plaintiff "adequately alleged a cause of action for negligent supervision based on NSM's failure to take reasonable measures to protect plaintiff from Eigenbauer once NSM was aware of Eigenbauer's inappropriate touching of plaintiff." *Id.* at 145.

¶ 87 The plaintiff in *Platson* did what plaintiffs here failed to do: allege specific behavior witnessed by the defendant's agents that was of a kind that put the defendant on notice of the assailant's dangerous tendencies. In all 70 pages of their complaint, plaintiffs failed to allege (1) specific misconduct that (2) was observed by FCCD's agents and (3) was of a nature that placed FCCD on notice of Coe's particular unfitness for the position of youth director.

¶ 88 For these reasons, we uphold the dismissal of the negligent-retention claims (counts IX and XIV) against FCCD and James.

¶ 89 5. Negligent Supervision/Custodial Relationship/Voluntary Undertaking

¶ 90 Counts VIII and XIII alleged, *inter alia*, negligent supervision against FCCD and James. To state a cause of action for negligent supervision, the plaintiff must plead facts establishing that: (1) the defendant had a duty to supervise the harming party, (2) the defendant negligently supervised the harming party, and (3) such negligence proximately caused the plaintiff's injuries. *Van Horn*e, 294 Ill. App. 3d at 657. Negligent supervision applies not just in the employment context but wherever it is appropriate to find a duty to supervise. See, *e.g.*, *State Farm Fire & Casualty Co. v. Mann*, 172 Ill. App. 3d 86, 92 (1988) (alleged parental negligence in supervision of child). FCCD and James do not appear to contest that James, as senior pastor, had a duty to supervise Coe during their time together at FCCD.

¶ 91 Counts VIII and XIII are omnibus counts because they alleged sources for a duty of care other than the employment relationship between FCCD and Coe and the supervisory relationship between James and Coe. First, plaintiffs alleged the existence of a voluntary custodial relationship between FCCD and Jane. Such a relationship exists when one voluntarily takes custody of another so as to deprive the other of her normal opportunities for protection. *Platson*, 322 Ill. App. 3d at 146. Second, plaintiffs alleged that FCCD and James voluntarily undertook a duty to protect Jane. "Pursuant to the voluntary undertaking theory of liability, one who undertakes, gratuitously or for consideration, to render services to another is subject to liability for bodily harm caused to the other by one's failure to exercise due care in the performance of the undertaking." *Rhodes v. Illinois Central Gulf R.R.*, 172 Ill. 2d 213, 239 (1996).

¶ 92 The counts alleged failures by FCCD and James to monitor both Coe's Internet activity at FCCD and his interaction with the members of FCCD's youth and confirmation groups. Prominent in these counts is the SCP. Plaintiffs alleged that, when Coe exploited youth group members in the absence of another adult, all churches within the IUCC were required to follow the SCP, which mandated that "at least two adults be present to supervise any minor youth or child activities." Plaintiffs alleged that FCCD and James violated the two-adult policy by allowing Coe to conduct youth activities with no other adult present and that Coe used that unsupervised access to abuse Jane and other youths.

¶ 93 Critically, the trial court overlooked the fact that the claims in counts VIII and XIII are not premised on notice to FCCD and James of Coe's misconduct or the potential for it. Liability is based on a duty to supervise that plaintiffs alleged existed independently of what was known or should have been known about Coe himself. Moreover, under Illinois law, neither negligent

supervision nor the other causes of action alleged in counts VIII and XIII have as an essential element that the defendant have notice of the unfitness of the party that caused the harm.

¶ 94 FCCD and James devote most of their brief to defending the trial court's specific and only rationale for dismissing plaintiffs' claims: that plaintiffs failed to allege that FCCD and James had notice that Coe had any particular unfitness. As noted, these arguments miss the point of the omnibus negligent-supervision counts. FCCD and James do reserve a small portion of their brief for an argument that at least in part pertains to those counts. The argument is narrow, however. Before reaching its merits, we briefly address a forfeiture claim that FCCD and James raise. They contend that plaintiffs have forfeited any argument that FCCD and James voluntarily undertook a duty to protect Jane during the VBS program. FCCD and James claim forfeiture on the basis that, in its section on voluntary undertaking, plaintiffs' response to the motion to dismiss their second amended complaint did not refer to the VBS program. We reject the claim since FCCD and James cite no authority for it. See Ill. S. Ct. R. 341(h)(7), (i) (eff. July 1, 2017) (arguments of the appellee containing no citation to authority are forfeited).

¶ 95 Moving to the substance, we note that FCCD and James do not appear to contest the existence of the special relationships alleged by plaintiffs. What they argue, first, is that plaintiffs' allegations did not establish that FCCD and James voluntarily undertook to protect Jane or other youths through the SCP. Second, they argue alternatively, and broadly with respect to any claim of negligence based on the SCP, that plaintiffs failed to establish that the rape of Jane was a reasonably foreseeable result of the alleged failures of FCCD and James to enforce the SCP.

¶ 96 For their first argument, FCCD and James cite case law for the principle that "[w]here the law does not impose a duty, one will not generally be created by a defendant's rules or internal

guidelines" (*Rhodes*, 172 Ill. 2d at 238). In *Rhodes*, the supreme court held that, assuming an individual found lying on the defendant railroad's property was a trespasser, the common law did not impose on the railroad a duty to check on his welfare. *Id.* at 228-37. The railroad had internal policies requiring that railroad and municipal police be summoned to check on reports of injured persons, but the court held that these policies did not of themselves create a duty of care. "Rather, it is the law which, in the end, must say what is legally required." *Id.* at 238.

¶ 97 In *Blankenship v. Peoria Park District*, 269 Ill. App. 3d 416, 422 (1994), cited in *Rhodes*, the appellate court held that the internal rules of the Peoria Park District requiring the presence of at least one lifeguard during an adult swim did not create a duty of care toward adult swimmers where "the Park District's common law duty to supervise the patrons of its swimming pool [did] not extend to adult swimmers."

¶ 98 Under *Rhodes* and *Blankenship*, a defendant's internal policies do not create a duty of care that the law would not otherwise impose. In those cases, there was no special relationship upon which to base a duty of care, and the courts held that the defendants' internal policies did not of themselves give rise to a duty. In the present case, FCCD and James do not appear to dispute the existence of the special relationships alleged by plaintiffs. Moreover, we hold that, under the facts alleged, the law imposed on FCCD and James a standard of care co-extensive with the two-adult policy of the SCP.

¶ 99 The nature and scope of the two-adult policy plainly reveals the concerns that motivated the IUCC in imposing the SCP on all churches within the conference. The two-adult policy requires that "at least two adults be present to supervise *any* minor youth or child activities" (emphasis added). Evidently, the IUCC did not believe that it was enough to provide adult co-leaders just for those adults who the church had specific reason to know were capable of abuse

(assuming such adults would even be permitted to serve). Rather, the IUCC must have believed that the general risk of the sexual abuse of children within settings like church youth activities warranted a precautionary measure for *all* such activities. See *Bruntjen v. Bethalto Pizza, LLC*, 2014 IL App (5th) 120245, ¶ 50 (in suit based on death caused by restaurant franchisee's pizza delivery driver, franchisor's standards for delivery drivers formed the standard of care, where, *inter alia*, the standards evinced the franchisor's own belief in the general foreseeability of accidents caused by drivers with poor driving records). Indeed, it is, in our view, generally foreseeable that abuse will occur in programs providing adults with unsupervised access to children, for it is well known that pedophiles are drawn to such opportunities, in churches and elsewhere. See Federal Judicial Center, *Handbook for Working with Defendants and Offenders with Mental Disorders*, 80 (3rd ed., 2003) ("Pedophiles will seek employment and volunteer work that gives them access to children. Examples are teacher, clergyman, police officer, coach, scout leader, Big Brother, or foster parent. The pedophile will also find ways to get the child into a situation where other adults are absent."). The existence of a duty "turns largely on public policy considerations." *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 391 (2004). Public policy in Illinois favors the protection of children. *Doe-3*, 2012 IL 112479, ¶ 36. The statutes of this state also manifest "a specific policy *** which favors, in particular, the protection of children from sex offenders." *Id.* ¶ 37. In deference to this policy, we hold that FCCD and James had a duty of care requiring them to enforce the SCP's two-adult policy, regardless of their actual or constructive knowledge of Coe's predatory potential.

¶ 100 Having so held, we can reject in short order FCCD and James's second argument, on foreseeability. Here they revert to their approach on the negligent-retention counts: since plaintiffs failed to allege that FCCD was or should have been aware of any specific misconduct

by Coe leading up to the rape of Jane, they failed to establish that Jane's rape was reasonably foreseeable. As explained, this argument is inapposite to the claims in the omnibus negligent-supervision counts.

¶ 101 At oral argument, counsel for FCCD and James argued that not every violation of the two-adult policy alleged in the complaint made it reasonably foreseeable that Coe would rape Jane. For instance, counsel pointed to the alleged occasions when James witnessed Coe alone with Jane in his office. We agree that these instances were apparently innocuous, at least as described in the complaint. This is beside the point, however. The IUCC obviously fashioned the two-adult policy in the belief that even the most apparently virtuous adult should not be left alone with children, because it is generally foreseeable that abuse will occur in such a setting. The IUCC did not intend for the two-adult policy to be enforced on a rolling, case-by-case basis. We hold that the common law of this state, whose public policy strongly favors the protection of children, required FCCD and James to enforce the two-adult policy as the IUCC intended.

¶ 102 For these reasons, we reverse the dismissal of counts VIII (James) and XIII (FCCD), the omnibus negligent-supervision counts.

¶ 103 6. Willful-and-Wanton Counts

¶ 104 Counts X, XI, XV, and XVI alleged willful and wanton conduct against FCCD and James, specifically, "willful and wanton failure to protect" and "willful and wanton retention and failure to supervise." These counts overlap in part with the negligence counts against FCCD and James. Willful and wanton conduct is an aggravated form of negligence. *Id.* ¶ 19. Consequently, we uphold the dismissal of the willful-and-wanton counts to the extent that they overlap with the negligent-retention counts. However, we reverse the dismissal of the willful-

and-wanton counts to the extent that they overlap with the omnibus negligent-supervision counts. Whether a defendant has acted willfully and wantonly is a question of fact. *Id.* ¶ 45.

¶ 105 7. Summary

¶ 106 For the foregoing reasons, we (1) affirm the trial court's decision to strike portions of plaintiffs' first amended complaint, (2) reverse the dismissal of the negligent-hiring count (XII) in plaintiffs' second amended complaint, (3) affirm the dismissal of the negligent-retention counts (IX and XIV) and of the willful-and wanton-counts (X, XI, XV, and XVI) insofar as they overlap with the negligent-retention counts, and (4) reverse the dismissal of the omnibus negligent-supervision counts (VIII and XIII) and of the willful-and-wanton counts to the extent that they overlap with the negligent-supervision counts.

¶ 107 III. CONCLUSION

¶ 108 The judgment of the circuit court of Kane County is affirmed in part and reversed in part, and the cause is remanded for further proceedings consistent with this opinion.

¶ 109 Affirmed in part and reversed in part.

¶ 110 Cause remanded.

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Docket No. 123521

IN THE ILLINOIS SUPREME COURT

JANE DOE, a minor, by her mother and next friend, JANE A. DOE, and by her father and next friend, JOHN DOE; JANE A. DOE, Individually; JOHN DOE, Individually, Plaintiffs-Appellees, v. CHAD COE, an Individual; FOX VALLEY ASSOCIATION ILLINOIS CONFERENCE OF THE UNITED CHURCH OF CHRIST, an Illinois Not-for-Profit Corporation; ILLINOIS CONFERENCE OF THE UNITED CHURCH OF CHRIST, an Illinois Not-for-Profit Corporation; THE UNITED CHURCH OF CHRIST; THE GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST; THE UNITED CHURCH OF CHRIST BOARD, an Ohio Not-for-Profit Corporation, Defendants, and FIRST CONGREGATIONAL CHURCH OF DUNDEE, ILLINOIS, an Illinois Not-for-Profit Corporation, and PASTOR AARON JAMES, an Individual, Defendants-Appellants.	On Appeal From The Illinois Appellate Court, Second Judicial District Docket No. 2-17-0435 There Heard On Appeal From The Circuit Court of Kane County, Illinois No. 2015-L-216 The Honorable James R. Murphy, Judge Presiding

NOTICE OF FILING

TO: See attached service list

PLEASE BE ADVISED that on this 31st day of October 2018, we caused to be electronically filed with the Clerk of the Illinois Supreme Court, the attached additional brief of defendants-appellants, a copy of which, along with this notice of filing with affidavit of service, is herewith served upon all attorneys of record.

Respectfully submitted,

By: /s/ Michael Resis
Attorneys for Defendants-Appellants

Michael Resis
SmithAmundsen LLC
150 North Michigan Avenue, Suite 3300
Chicago, Illinois 60601
(312) 894-3200
mresis@salawus.com

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT OF SERVICE

I, Jacqueline Y. Smith, a non-attorney, on oath state that I served this notice via electronic mail to the attorneys listed on the attached Service List at their email address prior to 5:00 p.m. on October 31, 2018.

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Jacqueline Y. Smith
SMITHAMUNDSEN LLC

SERVICE LIST

Attorneys for Plaintiffs-Appellants

Kevin M. Lyons
Lyons Law Group, LLC
5333 Main Street
Downers Grove, IL 60515
kevinl@kllawfirm.com

Francis C. Lipuma
The Law Office of Francis C. Lipuma
105 West Adams Street, 35th Floor
Chicago, IL 60603
franklipuma@gmail.com

Attorneys for Defendants

James E. Abott
Lichfield Cavo LLP
303 West Madison Street, Suite 300
Chicago, IL 60606
abbott@litchfieldcavo.com

Daniel E. Compton
Compton Law Group
85 Market Street
Elgin, IL 60123
dancom@comptonlawgroup.net