No. 131420

IN THE SUPREME COURT OF ILLINOIS

KEVIN HAASE and RILEY HAASE, Plaintiffs-Appellees, v. KANKAKEE SCHOOL DISTRICT 111 and DARREN DAYHOFF, Defendants-Appellants.	) On Petition for Leave to Appeal) From the Appellate Court of) Illinois, Third Judicial District) Appeal No. 3-23-369)) There heard on Appeal from the) Circuit Court of the 21st Judicial) Circuit, Kankakee County, Illinois) Case No. 2018-L-00012) Hon. Lindsay Parkhurst, Judge) Presiding

BRIEF AND ARGUMENT OF THE PLAINTIFFS-APPELLEES, KEVIN HAASE AND RILEY HAASE

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INTRODUCTION AND SUMMARY OF ARGUMENT

The appellate court's decision reversing summary judgment was correct. Questions of material fact preclude summary judgment. Defendants acknowledge that §3-108 of the Tort Immunity Act (745 ILCS 10/3-108) does not afford immunity for willful and wanton conduct but urge this Court to find their conduct was not willful and wanton as a matter of law. Defendants contend, "this case addresses the question of what constitutes willful and wanton conduct…" (Def. brief p. 1). However, as the appellate court aptly observed, "[g]enerally, whether a defendant's conduct is willful and wanton is a question for the jury." *Haase v. Kankakee Sch. Dist. 111*, 2024 IL App (3d) 230269-U, ¶30, *see also, Murray v. Chicago Youth Ctr.*, 224 Ill.2d 213, 245 (2007).

In this case, viewing the evidence in the light most favorable to Plaintiff, a jury could reasonably conclude that the school's gym teacher, Darren Dayhoff, exhibited utter indifference to and conscious disregard for the safety of his students, including Riley Haase, when he willfully ignored his responsibility to monitor the class and sat with his feet up on a desk in the corner of the gym looking at his computer and cell phone while an increasingly aggressive student with a history of fighting repeatedly disrupted an otherwise structured soccer game by pushing, shoving, and running into other classmates.

Defendants argue that Dayhoff's conduct can amount to no more than ordinary negligence because he had no actual knowledge of the imminent danger posed by Student A. (Def. brief p. 14). However, for well over 100 years, the definition of willful and wanton conduct in Illinois has included the failure to discover an unreasonable risk of danger through recklessness or carelessness when the danger could have been discovered by the exercise of ordinary care. *See, e.g., Hering v. Hilton*, 12 Ill.2d 559, 564 (1958). A

triable issue of material fact with respect to willful and wanton conduct exists where Defendants should be aware of a specific, identifiable danger arising from their lack of supervision. *Murray*, 224 Ill.2d at 217. Here, Student A's ongoing physically aggressive behavior during the class period alone would have given any reasonable person in Dayhoff's position notice that lack of proper supervision conduct posed a danger to other students in the class. Student A's extensive history of physical aggression and fighting gave Dayhoff even further notice of the unreasonable risk of harm.

The question of whether a defendant knew or should have known of an impending danger is, itself, a question of fact that cannot be decided as a matter of law. *See Schellenberg v. Winnetka Park Dist.*, 231 Ill.App.3d 46, 52 (1st Dist. 1992). Here, the evidence shows that Student A posed a danger to fellow students in the class, a danger that Dayhoff could and should have been aware of had he simply looked up from his screens. *See* R. SUP CS320, CS328, CS346-47, CS349, CS360, CS371-72. The appellate court correctly identified disputed questions of fact regarding Dayhoff's conduct, Student A's aggressiveness, and Dayhoff's actual or constructive knowledge of Student A's aggressiveness, any one of which renders summary judgment inappropriate. It is not this Court's role to resolve factual disputes or to determine which of two competing inferences is the correct one, but only to identify that different inferences can be drawn. *Monson v. City of Danville*, 2018 IL 122486 at ¶12. Under the circumstances shown by the evidence in this case, the question of whether Dayhoff's failure to intervene rises to the level of willful and wanton conduct should be left for the jury to decide.

Defendants also contend they are immune from liability under §2-201 of the Act, which confers absolute immunity for a public official's misconduct in making discretionary

policy decisions. 745 ILCS 10/2-201. However, §2-201 does not apply because §2-201 provides discretionary immunity only in the absence of a more specific provision, and §3-108 is a more specific provision that applies to supervision, which is the governmental function at issue in this case. *See Murray*, 224 Ill.2d at 232, 745 ILCS 10/2-201.

Moreover, to be entitled to immunity under §2-201, a municipal defendant must present evidence of a conscious decision by its employee pertaining to the conduct alleged to have caused the plaintiff's injuries. *Andrews v. Metro Water Reclamation Dist. of Greater Chicago*, 2019 IL 124283, ¶34. "The failure to do so is fatal to the claim." *Monson*, 2018 IL 122486 at ¶33. Here, the appellate court correctly found, "[t]he disputed facts call into question whether Dayhoff made a decision, let alone a discretionary decision." *Id.* at ¶27. There is no evidence that Dayhoff's failure to intervene to stop Student A's repeated, ongoing, and increasingly aggressive behavior during class was the result of a considered choice. Rather, the evidence shows that Dayhoff sat in the corner of the gym with his feet up on a desk, using his computer and phone, while letting the students "do whatever," and was willingly oblivious to the ongoing threat posed by Student A's readily apparent conduct throughout class. *See* R. SUP CS294-97, CS299, CS318, CS321-25, CS372. Dayhoff testified that he did not see Student A repeatedly pushing, shoving, and running into classmates throughout class, despite the fact that at least two students in the class, including Riley, saw Student A acting that way. R. SUP CS294-96, CS297. Because Dayhoff did not even see the dangerous conduct Plaintiff alleges he should have been aware of, Dayhoff could not possibly have made a decision not to intervene, let alone a discretionary one involving policy. Therefore, §2-201 does not apply.

This Court should affirm the decision of the appellate court.

ADDITIONAL STATEMENT OF FACTS

On March 13, 2017, Dayhoff was assigned to teach a seventh-grade P.E. class at Kankakee Junior High School. R. C65, C67. His role was to "supervise and make sure everybody is doing what they are supposed to be doing, correcting behaviors that may come up." R. SUP CS292. If Dayhoff saw a student being physically aggressive or fighting with another student, he was required to stop it. R. SUP CS295.

Dayhoff follows his custom and practice of sitting in the corner of the gym with his feet up on a desk using his computer, tablet, and cell phone during class

Shortly after class began that day, Dayhoff took attendance, dropped soccer balls and basketballs in the middle of the gym floor, then receded to a corner of the gym, where he sat on a chair with his feet up on a little portable desk using his laptop and phone while the students would "do whatever basically." R. SUP CS318-19. This was Dayhoff's custom and practice – to sit at his desk and use his computer, tablet, or phone during class. R. SUP CS318, CS321, CS372. He would do this every day for the entire class period other than the first 10 minutes and last 10 minutes of class. R. SUP CS318. For nearly the entire class, Dayhoff sat at his desk, with his feet either up or down, on his tablet, laptop, or phone in the corner, "mind[ing] his own business." R. SUP CS318.

According to Riley and his classmate, Jacob Gilreath, Dayhoff followed his regular practice of sitting in the corner with his phone and computer throughout class on the day of this incident. R. SUP CS321-22, CS372. Riley testified that, "like every other day," Dayhoff was "where he always was," in his chair in the corner with his feet up on the desk with his computer open, and his phone out. R. SUP CS321-22, CS372. Riley looked over in Dayhoff's direction multiple times during the soccer game because there was a clock on the wall in that area, and each time he looked, Dayhoff was still sitting at the desk in the

corner, either using his computer or his phone. R. SUP CS320-25. Jacob also observed Dayhoff sitting in the corner of the gym at his desk using his phone and computer on the day of the incident, as was his regular custom and practice. R. SUP CS372. Jacob testified that is what Dayhoff was doing at the time Riley was injured. R. SUP CS372.

Student A begins repeatedly pushing, shoving, and running into classmates

The students separated into two groups, one playing basketball and the other, including Riley, playing soccer. R. SUP CS320. One student in the class, Student A, did not dress for gym class that day, so he did not participate in either game and was not on either team. R. SUP CS297, CS320. Students who did not dress would instead sit along a wall of the gym. R. SUP CS320. According to Dayhoff, Student A began the day "with a strike against him" because he did not dress that day. R. SUP CS297.

Shortly after the game began, Student A began running into the game from his position against the wall, repeatedly interrupting the game by pushing and shoving people at random and running into anyone that was around the soccer ball. R. SUP CS328, CS346-47, CS349, CS355, CS360, CS371. Jacob testified Student A was "being reckless" "running around, being obnoxious," "messing with other kids, screaming and stuff," (R. SUP CS358), and described Student A as being "pretty aggressive" and "unnecessarily rough" R. SUP CS360. Jacob testified that Student A was treating it "more like a football game," and said, "I don't see why someone would have to be that rough during a soccer game." R. SUP CS371. Student A was "getting more aggressive,…almost as if, like, the adrenaline got to him." R. SUP CS372-73. Jacob testified that he had seen students acting similar to Student A be removed from the game in the past. R. SUP CS371-372.

Riley testified, "[h]e pushed people," "[n]ot like nudging, more like a shove," and "he would like – not like a nudge. Like in soccer you bump people but he would take his arms and just push." R. CS347, CS349. Riley heard other students say things to Student A, like "Why are you pushing me?," "What did I do to you?," and "We're in the middle of a soccer game." R. SUP CS349.

About 20-30 minutes into the soccer game, Jacob observed Student A run "full speed" at Riley and "shoulder checked him into the wall." R. SUP CS355, CS359, CS360, CS371. Jacob testified Student A "blindsided" Riley and "ran over" him. R. SUP CS355, CS359-360. Jacob testified that what Student A did to Riley was not a normal part of playing soccer and was not incidental to soccer. R. SUP CS371-372. After that, Riley was laying on the ground for "a solid 30 seconds, not moving and teary eyed." R. SUP CS355. Jacob went over to see if Riley was okay. R. SUP CS355. Jacob walked Riley over to Dayhoff, who was still at his desk in the corner, and yelled at Dayhoff that Riley was crying and had been tackled out of his shoes. R. SUP CS323-324, C359. Dayhoff responded "It'll be fine, go back to class." R. SUP CS323-24. Riley suffered a severe and permanent injury to his arm as a result of the incident, resulting in partial paralysis. R. C435.

Dayhoff gives conflicting testimony about what he saw

Dayhoff testified he did not see any of the aggressive behavior from Student A that Riley and Jacob witnessed. R. SUP CS294-96 CS297, CS299. He testified that if he had seen Student A engaged in aggressive behavior or unwanted physical contact with other students, he would have removed Student A from the game, at minimum. R. SUP CS297.

At one point, Dayhoff testified that he saw Riley get hurt "from a distance," but he also later admitted, "I did not see exactly what happened," that he "didn't specifically see

what took place," and that he did not know what direction Riley fell, what happened to him to cause him to fall, or how long he was on the floor before Jacob walked him over to Dayhoff's desk. R. SUP CS298, CS299. Dayhoff confirmed he did not know Riley had been injured until Jacob walked Riley over to him. R. SUP CS285.

Student A was well-known to be physically aggressive with other students

During the 2016-17 school year alone, Student A accumulated 29 disciplinary referrals in just over six months. R. SUP CS407-08, CS411, CS458, CS650-58, CS664-67. At least 7 of those referrals were for incidents involving fighting or acts of physical aggression, including in the school gym. R. SUP CS407-08, CS650-53, CS658, CS664-67. He also received 3 referrals for fighting and physical aggression in 2014-15 and 4 such referrals in 2013-14. R. SUP CS645, CS649. Riley had seen Student A fighting during gym class at least 3 times before this occurrence, including picking up another student and throwing him against a wall and throwing a basketball at another student's head. R. SUP CS328-29. Riley had also seen Student A get into fights in the lunchroom and in the hallway and had witnessed an incident in which Student A had to be removed from class by security. R. SUP CS347. Jacob testified that Student A had a reputation for being violent, that he was "a pretty aggressive kid," that he had observed Student A slap or hit other students randomly in the hallways, and that Student A was "always running into people in the hallway." R. SUP CS370-73.

According to school principal, Charles Hensley, administration was required to inform teachers if a student has a history of physical aggression or fighting to put the teacher on notice of the issue and for the safety of the students. R. SUP CS459-460. In addition, for every five referrals a student receives, a problem-solving meeting is triggered,

after which an e-mail is supposed to be sent to teachers. R. SUP CS411-13, CS458, CS460. School guidance counselor, Sarah Lenfield, testified that she would expect that an email would be sent for every meeting at which Student A was discussed. R. SUP CS413. Student A was discussed at problem-solving meetings on October 4, 2016, November 1, 2016, and January 10, 2017. R. SUP CS661-62. The Record contains e-mails corresponding to those meetings. R. SUP CS686. Student A then received 10 additional referrals between January 24, 2017 and March 9, 2017, but the Record contains no e-mail to teachers after January 17, 2017. R. SUP CS538, CS667. Lenfield testified the emails are sent through the school's "Skyward" system "as a matter of course." R. SUP CS401. Lenfield testified that she never gave any specific instructions to teachers regarding Student A, and that no behavioral intervention plan was created for Student A. R. SUP CS416.

Dayhoff testified that he never received any information from the school about students in his class with disciplinary issues. R. SUP CS289. He testified that it would have been useful to him to have information that a student was physically aggressive or prone to fighting. R. SUP CS289. If he had that kind of information about a particular student, it would prompt him to keep a closer eye on that student. R. SUP CS290. Student A's disciplinary history for the 2016-17 school year was available to Dayhoff through the "Skyward" system, but there is no indication Dayhoff ever accessed it. R. SUP CS287-88, CS407, CS409, CS538, CS401.

The allegations of Plaintiff's operative complaint

Plaintiff's operative complaint alleges that Defendants "were utterly indifferent and/or consciously disregarded the safety of the students, including [Riley]" by failing to remove Student A from the game when it was clear Student A was engaged in a dangerous

course of physical aggression and battery toward other students. R. C436. Plaintiff alleged that Student A's "repeated course of conduct of improper and unwanted physical contact" with other students "was or should have been apparent to any supervisor of the…soccer game and/or physical education class" and created a foreseeable danger to the safety of other students. R. C435. Plaintiff alleged that Student A should have been more closely supervised because of his history of physical violence toward other students. R. C435.

Plaintiff's expert, Dr. Steven Imber's opinions

Plaintiff's Rule 213(f)(3) expert, Dr. Steven Imber, has 50 years of experience in education. R. SUP CS188, CS198. He opined that Dayhoff should have been supervising his class, and Student A in particular, given both Student A's course of conduct during the class period before Riley's injury and Student A's prior history of aggressive behavior. R. SUP CS196. Dr. Imber stated, "it was apparent that Student A's course of conduct in acting with improper aggression and physicality within the game was a danger to students such as Riley," and concluded that Dayhoff's failure to monitor the class and failure to remove Student A from the game under those circumstances showed an utter indifference to or conscious disregard for Riley. R. SUP CS196, CS555.

Dr. Imber opined that Defendants were aware, or should have been aware, of Student A's aggressive behavior and past incidents of violence. R. SUP CS194. Dr. Imber also pointed out that the school made Student A's disciplinary record available to Dayhoff, even if Dayhoff denied ever seeing that information. R. SUP CS195. Therefore, Dayhoff failed to consider additional important information available to him that would have led him to pay closer attention to Student A. R. SUP CS195. Dr. Imber also opined that, if the school did not send email updates to Student A's teachers after disciplinary meetings

after January 2017, then the school failed to properly disseminate available information about Student A, allowing a known danger to go improperly supervised. R. SUP CS197.

The trial court grants summary judgment

Defendants moved for summary judgment pursuant to §2-201. The trial court granted summary judgment on those grounds and also found "the conduct of Principal, Assistant Principal, School Counselor, and School District…did not rise to the level of extreme and outrageous conduct and did not shock the conscience and the court would not apply the willful and wanton exception [to §3-108] in this case." R. C880-885.

ARGUMENT

I. The standard of review is *de novo* plus *Pedrick*.

This Court reviews an order granting summary judgment *de novo*. *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill.2d 281, 309 (2010). Summary judgment is a drastic means of disposing of litigation and is not appropriate unless the pleadings, depositions, and affidavits in the record show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c), *Sollami v. Eaton*, 201 Ill.2d 1, 6 (2002). The court must construe the record strictly against the moving party and liberally in favor of the party opposing the motion. *Beaman v. Freesmeyer*, 2019 IL 122654, ¶22. If any facts upon which reasonable persons may disagree are identified, or if inferences may be fairly drawn from the facts leading to differing conclusions, then the motion for summary judgment must be denied and the resolution of those facts and inferences must be made at trial. *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill.2d 511, 517 (1993). Where any doubt exists as to the right of the movant to

summary judgment, the better judicial policy is to submit the issue to the trier of fact for resolution. *Zanzig v. H.P.M. Corp.*, 134 Ill.App.3d 617, 620 (1st Dist. 1985).

Pedrick v. Peoria & Eastern R.R. Co., 37 Ill.2d 494, 510 (1967) also applies to motions for summary judgment. *Jones v. Pneumo Abex, LLC*, 2019 IL 123895, ¶¶25-26 (the "identical" *Pedrick* standard applies to summary judgments, directed verdicts, and judgments *n.o.v.*). As such, summary judgment can only be allowed if the evidence, viewed in the light most favorable to the non-movant, so overwhelmingly favors the movant that "no contrary verdict based on that evidence could ever stand." *Adams v. N. Ill. Gas Co.*, 211 Ill.2d 32, 43 (2004).

Construction of the Tort Immunity Act is also reviewed *de novo*. *Barnett v. Zion Pk. Dist.*, 171 Ill.2d 378, 385 (1996). The best indicator of legislative intent is the statute's plain language. *Rojas v. Martell*, 2020 IL App (2d) 190215 ¶20. Where the language of a statute is unambiguous, the only legitimate function of the court is to enforce the law as enacted. *Henrich v. Libertyville High School*, 186 Ill.2d 381, 391 (1998). Further, the Act is in derogation of common law, so it must be strictly construed against the local public entity seeking immunity. *Andrews*, 2019 IL 124283, ¶23. Unless the public entity seeking immunity satisfies their burden to prove that a specific immunity provision applies, and that they are entitled to immunity under it, the public entity is liable in tort to the same extent as a private party. *Id*.

II. Whether Dayhoff's conduct was willful and wanton is a disputed question of material fact.

Defendants' primary argument is to ask this Court to find their conduct was not willful and wanton as a matter of law. (Def. brief pp. 15-28). However, "[o]rdinarily, the determination on whether conduct is willful and wanton is a question of fact for the jury."

Murray, 224 Ill.2d at 245. Summary judgment is "not an appropriate forum for trying a factual issue such as willful and wanton misconduct." *Hadley v. Witt Unit Sch. Dist. 66*, 123 Ill.App.3d 19, 23 (5th Dist. 1984). Only in the exceptional case should the issue of willful and wanton misconduct be taken from the jury's consideration and be ruled on as a question of law. *Prowell v. Loretto Hosp.*, 339 Ill.App.3d 817, 823 (1st Dist. 2003).

§1-210 of the Act defines willful and wanton conduct as "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property." 745 ILCS 5/1-210. This Court has found the statutory definition to be "entirely consistent" with "long-standing case law" on willful and wanton conduct. *Harris v. Thompson*, 2012 IL 112525, ¶41, *Murray*, 224 Ill.2d at 235, IPI (Civil) 14.01.

Willful and wanton conduct has been described as an "aggravated form of negligence," (*Neuhengen v. Global Experience Specialists, Inc.*, 2018 IL App (1st) 160322, ¶133, Def. brief p. 15), which does not occupy a precise point on the continuum of liability between negligence and intentional conduct. *Hill v. Galesburg Cmty. Unit Sch. Dist. 205*, 346 Ill.App.3d 515, 522 (3d Dist. 2004). It can be slightly more than negligence, slightly less than intentional conduct, or anywhere in between, depending on the circumstances. *Id*. It includes a range of mental states, from actual or deliberate intent to cause harm, to conscious disregard for the safety of others, to utter indifference for the safety of others. *Murray*, 224 Ill.2d at 235. "Whether conduct is willful and wanton depends on the circumstances of each case." *Harris*, 2012 IL 112525, ¶41.

An omission, or failure to act, may substantiate a claim of utter indifference or conscious disregard. *In re Est. of Stewart*, 2016 IL App (2d) 151117, ¶75 *citing Doe ex*

rel. Ortega-Piron v. Chicago Bd. of Educ., 213 Ill.2d 19, 28 (2004). "The language, 'utter indifference to or conscious disregard for the safety of others' contemplates conduct by omission and includes the failure to take action when that omission proximately causes injury." *Murray*, 224 Ill.2d at 243. Ill will is not a necessary element. *Brown v. Ill. Term. Co.*, 319 Ill. 326, 331 (1925)

Amicus PDRMA relies on *Loitz v. Remington Arms*, 138 Ill.2d 404, 416 (1990) for the contention that willful and wanton conduct is "meant to be a type of conduct morally akin to deliberate or intentional conduct, not negligence." (PDRMA brief p. 31). However, *Loitz* involved punitive damages, which are not at issue here. Both *amicus* and the trial court appear to have conflated the standard for willful and wanton conduct with the factors to be considered in determining whether a punitive damages award is excessive. *See* R. C885: "the conduct…did not rise to the level of extreme and outrageous conduct and did not shock the conscience...", *compare Richardson v. Chapman*, 175 Ill.2d 98, 113 (1997) (punitive damages deemed excessive if so large that it "shocks the judicial conscience"). The trial court also engrafted elements of intentional infliction of emotional distress into the willful and wanton standard. *See McGrath v. Fahey*, 126 Ill.2d 78 (1988) (requiring "extreme and outrageous conduct" for IIED claim).

Additionally, in *Ziarko v. v. Soo Line R. Co.*, 161 Ill.2d 267, 273-76 (1994), this Court addressed the "qualitative difference" concept from *Loitz* and *Burke v. 12 Rothchild's Liq. Mart*, 148 Ill.2d 429 (1992) (*See* Def. brief p. 26) and made clear that "willful and wanton misconduct may be only degrees more than ordinary negligence." *See also, Poole v. City of Rolling Meadows*, 167 Ill.2d 41, 47-48 (1995), *Mattyasovsky v. W. Towns Bus Co.*, 61 Ill.2d 31, 35 (1975) (willful and wanton conduct is "a characterization

that shades imperceptibly into simple negligence"). To the extent our courts have continued to apply the *Loitz / Burke* definition to non-intentional willful and wanton conduct, those applications are inconsistent with *Ziarko*.

Defendants contend that Dayhoff's conduct was not willful and wanton because he had no actual knowledge that his failure to supervise Student A posed a danger to fellow students. (Def. brief p. 14, 21, 29). However, actual knowledge of an impending danger is not required for a finding of willful and wanton misconduct. Rather, a triable issue of material fact exists in relation to a claim for willful and wanton conduct based on a lack of proper supervision where the evidence shows that the defendants knew *or should have known* of an unreasonable risk of danger arising from their lack of supervision. *Murray*, 224 Ill.2d 213. "[T]he actor need not subjectively appreciate the high probability of serious physical harm which his conduct poses; it is sufficient if a reasonable man in his position would be brought to such a realization by the circumstances he knows or has reason to know of." *Landers v. Sch. Dist. No. 203, O'Fallon*, 66 Ill.App.3d 78, 82 (5th Dist. 1978).

Moreover, the question of whether a defendant knew or should have known of an impending danger is a question of fact that cannot be decided as a matter of law. *Bailey v. City of Decatur*, 49 Ill.App.3d 751, 755 (4th Dist. 1977). Here, a reasonable person in Dayhoff's position would have recognized the high probability of harm posed by a student with a history of physical aggression who was repeatedly and observably disrupting a game by pushing, shoving, and running into classmates.

A. Actual knowledge of the unreasonable risk of danger is not required if defendant fails to discover a danger that could have been discovered by the exercise of ordinary care.

For over 100 years, the definition of willful and wanton misconduct in Illinois has included the failure to discover an identifiable danger through recklessness or carelessness when the danger could have been discovered by ordinary care. In 1892, in *Lake Shore & M.S. Ry. Co. v. Bodemer*, 139 Ill. 596 (1892), this Court adopted the definition of willful and wanton conduct from a Missouri case, *Harlan v. Railway Co.*, 65 Mo. 22, which stated:

> When it is said…that the company is liable if by the exercise of ordinary care it could have prevented the accident, it is to be understood that it will be so liable if by the exercise of reasonable care, after a discovery by defendant of the danger in which the injured party stood, the accident could have been prevented, ***or if the company fail to discovery the danger through the recklessness or carelessness*** of its employees, when in the exercise of ordinary care would have discovered the danger and averted the calamity. (emph. added).

21 years later, in *Heidenreich v. Bremner*, 260 Ill. 439 (1913), this Court stated, "[a]n entire absence of care for the person,…, if such as exhibits indifference to consequences, makes a case of constructive or legal willfulness, …" In *Brown*, 319 Ill. 326, this Court relied on *Bodemer* and *Heidenreich* in observing, "a failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care" can constitute willful and wanton conduct. This Court employed the same definition in *Schneiderman v. Interstate Transit Lines, Inc.*, 394 Ill. 569, 583 (1946). In *Myers v. Krajefska*, 8 Ill.2d 322, 329 (1956), the Court recognized that a defendant's consciousness of impending danger may be actual or constructive. In *Hering*, 12 Ill.2d at 562, the Court again recognized willful and wanton conduct does not require actual knowledge of the impending danger, commenting, "it is sufficient if he had notice which would alert a reasonable man that substantial danger was involved and that he failed

to take reasonable precautions under the circumstances." This Court subsequently used the same definition in *Klatt v. Commonwealth Edison Co.*, 33 Ill.2d 481, 488 (1965), *Hocking v. Rehnquist*, 44 Ill.2d 196, 201 (1969), *Lynch v. Bd. of Educ.*, 82 Ill.2d 415, 429 (1980), and *O'Brien v. Twp. High Sch. Dist. 214*, 83 Ill.2d 462, 469 (1980).

In *Ziarko*, 161 Ill.2d at 273, this Court examined non-intentional willful and wanton misconduct in detail. The issue was whether a defendant found to have engaged in an unintentional form of willful and wanton conduct could seek contribution from another defendant that was found guilty of ordinary negligence. *Id.* In answering the question in the affirmative, this Court reiterated that the standard for less than intentional willful and wanton acts includes "a failure to discovery the danger through … carelessness when it could have been discovered by the exercise of ordinary care." *Id.*

This Court applied *Ziarko* in *Poole*, 167 Ill.2d at 48 and *Am. Nat'l Bank & Trust Co. v. City of Chicago*, 192 Ill.2d 274, 285 (2000). In *Doe*, 213 Ill.2d 19, 29 (2004), this Court found plaintiff adequately pleaded allegations of willful and wanton conduct in a school board's failure to provide a bus attendant when "it should have known of the likelihood of harm…" The same definition was also applied in *Murray*, 224 Ill.2d at 239-40, and *Valfer v. Evanston Northwestern Healthcare*, 2016 IL 119220.

At least 15 of Defendants' own cases acknowledge that the failure to discover a danger through recklessness can constitute willful and wanton conduct. *See, e.g., Jackson v. Chi. Bd. Of Educ.,* 192 Ill.App.3d 1093, 1100-01 (1st Dist. 1989) (Def. brief p. 17). [1]

[1] Others include *Mancha v. Field Museum of Nat'l Hist.*, 5 Ill.App.3d 699, 703 (1st Dist. 1972) (Def. brief pp. 16-17, 24), *Lynch*, 82 Ill.2d at 429 (Def. brief pp. 13, 26, 27, 29), *Tijerina v. Evans*, 150 Ill.App.3d 288, 291 (2d. Dist. 1986) (Def. brief p. 20), *Pomrehn v. Crete-Monee High Sch. Dist.,* 101 Ill.App.3d 331, 335–36 (3d Dist.1981) (Def. brief p. 16, 22, 24), *Templar v. Decatur Pub. Sch. Dist. No. 61,* 182 Ill.App.3d 507, 511 (4th Dist.

Here, the evidence presents a question of fact regarding whether Dayhoff acted with utter indifference to and conscious disregard for the safety of his students, including Riley, when he willfully ignored his responsibility to monitor the class and sat with his feet up on a desk in the corner of the gym looking at his computer and cell phone while an increasingly aggressive student with a history of fighting repeatedly disrupted an otherwise structured soccer game by pushing, shoving, and running into other classmates. Under these facts, a jury could reasonably conclude that Dayhoff's failure to intervene, given what he knew or should have known about Student A, and more importantly, what he should have seen about Student's A's conduct during class before Riley's injury, constitutes willful and wanton conduct. As such, the appellate court correctly reversed the trial court's decision to grant summary judgment. This Court should affirm the appellate court's decision.

B. Whether Dayhoff knew or should have known Student A posed an unreasonable risk to fellow students is a question of fact.

Whether Dayhoff knew or should have known Student A posed a risk of impending danger to fellow students is itself a question of fact that cannot be decided as a matter of law. *Bailey*, 49 Ill.App.3d at 755. (whether defendant had knowledge of impending danger was question of fact that precluded entry of directed verdict), *Schellenberg*, 231 Ill.App.3d

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1989) (Def. brief pp. 16, 19, 28), *Castaneda v. Cmty Unit Sch. Dist. No. 200,* 268 Ill.App.3d 99, 103-04 (2d Dist. 1994) (Def. brief p. 21, 22, 28), *Pomaro v. Cmty Consol. Sch. Dist. 21*, 278 Ill.App.3d 266, 269 (1st Dist. 1995), *Clay v. Chicago Bd of Educ.*, 22 Ill.App.3d 437, 439, 441 (1st Dist. 1974) (Def. brief p. 18), *Montague v. Sch. Bd. of Thornton Fractional Twp. N. High Sch. Dist. 215*, 57 Ill.App.3d 828, 831 (1st Dist. 1978) (Def. brief pp. 20, 23), *Cipolla v. Bloom Twp. High Sch. Dist. No. 206*, 69 Ill.App.3d 434, 437-38 (Def. brief p. 18), *Booker v. Chicago Bd. of Ed.*, 75 Ill.App.3d 381, 385 (1st Dist. 1979) (Def. brief p. 18), *Guyton v. Roundy*, 132 Ill.App.3d 573, 578 (1st Dist. 1985) (Def. brief p. 19), *Ramos v. City of Countryside*, 137 Ill.App.3d 1028, 1038 (1st Dist. 1985) (Def. brief p. 20), *Poelker v. Warrensburg Latham Cmty. Unit Sch. Dist. No. 11*, 251 Ill.App.3d 270, 277 (4th Dist. 1993).

at 52 ("whether a defendant knew or should have known of the danger must be considered by the trier of fact"), *Kleren v. Bowman*, 15 Ill.App.2d 148, 159 (2d Dist. 1957) (whether defendant knew or should have known parking lot might attract children who could be injured was question of fact), *Ewert v. Wieboldt Stores, Inc.*, 84 Ill.App.3d 1008, 1015 (1st Dist. 1980) (evidence presented question of fact regarding whether defendant knew or in exercise of reasonable care could have discovered danger created by different sized anchors even though defendant maintained it did not know anchors used were undersized).

1. Student A's repeated physically aggressive conduct during the class period would have given a reasonable person in Dayhoff's position knowledge of an impending danger.

Given the facts of this case, a reasonable person in Dayhoff's position would have recognized Student A would inevitably injure another student if he was allowed to continue pushing, shoving, and running into them indiscriminately. Dayhoff himself recognized the type of behavior Student A was exhibiting to be dangerous when he testified that if he had seen that kind of behavior from Student A, he would have removed him from the game, at minimum. R. SUP CS297. Accordingly, a jury can infer that Dayhoff's failure to stop Student A's conduct, which would have been apparent to him had he been properly supervising his class, constitutes utter indifference to and reckless disregard for the safety of the students in the class.

Defendants claim that "Student A's interaction with Riley during the soccer game was in a way you would expect from someone playing soccer." (Def. brief p. 22, *see also* PDRMA brief p. 11, 29). However, Riley testified Student A was not even playing soccer and was not on either team that day. R. SUP CS320. Riley's and Jacob's testimony shows that throughout the class period, Student A was being physically aggressive with

classmates, pushing and shoving people at random on multiple occasions, and becoming increasingly aggressive as the class period went on. R. SUP CS320, CS346-47, CS349, CS355, CS360, R. CS372. Riley and Jacob also both confirmed Student A was not acting in a way that is expected in soccer. R. SUP CS317, CS349, CS371-372. Jacob testified Student A was "aggressive," "reckless," "unnecessarily rough," and treating it "more like a football game," and said, "I don't see why someone would have to be that rough during a soccer game." R. SUP CS371. He specifically testified that what Student A did to Riley was not a normal part of playing soccer and was not incidental to soccer. R. SUP CS371-372. Given that evidence, finding Student A's conduct was "what you would expect from someone playing soccer," (Def. brief p. 22), would impermissibly interpret the evidence in the light most favorably to the Defendants, which is impermissible on review of a summary judgment decision. *See Cirrincione v. Johnson*, 184 Ill.2d 109, 116 (1998) ("it is the province of the jury to resolve conflicts in the evidence, to pass upon the credibility of the witnesses, and to decide what weight to give a witness' testimony").

In sum, a jury could reasonably conclude that Student A's obvious, ongoing, and physically aggressive conduct throughout class would have put a reasonable person on notice of the unreasonable risk of harm to the other students in the class. At the very least, whether Student A's aggressiveness should have given Dayhoff notice of the danger is a disputed question of material fact.

2. Combined with his conduct during class, Student A's extensive history of fighting and physical aggression would also have given a reasonable person in Dayhoff's position knowledge of an impending danger.

Although Student A's conduct during the class period before Riley's injury, by itself, should have given Dayhoff notice of an ongoing danger, Dayhoff also either knew,

or should have known, that Student A had a history of fighting and a propensity to be physically aggressive with other students. This too would have given a reasonable person in his position knowledge of the impending danger and need for supervision. *See* R. SUP CS195. Dayhoff himself testified that if he had information that a student had a history of fighting and physical aggression, he would keep a closer eye on that student for the safety of the other students. R. SUP CS289-290.

Whether Dayhoff knew or should have known about Student A's history of physical aggression and fighting is a disputed question. Although Dayhoff testified that he never received notice from anyone at the school that Student A had a history of fighting or a propensity to be physically aggressive, Student A's disciplinary history for the school year was available for Dayhoff at any time through the school's "Skyward" system. R. SUP CS287-88, CS407, CS409, CS538, CS401. Had Dayhoff chosen to review it, he would have seen that Student A had been disciplined 7 times for fighting or physical aggression during the 2016-17 school year alone, among almost 30 disciplinary incidents. R. SUP CS407-08, CS650-666. Additionally, the evidence indicates e-mails were sent to all of Student A's teachers, including Dayhoff, after several of Student A's disciplinary incidents had occurred. R. SUP CS180, CS271-77, CS401, CS411-13, CS667.

Further still, according to Riley, Student A had been in at least 3 physical altercations *during gym class*, including picking up another student and throwing him against a wall, and throwing a basketball at another student's head. (R. SUP CS328-29). These incidents should have underscored the need for Dayhoff to intervene once Student A repeatedly displayed aggressive behavior throughout the class period. A jury could reasonably conclude Dayhoff ignored or failed to consider important information that

would have given him reason to closely monitor Student A on the day of the incident. Although Dayhoff testified he was unaware of Student A's disciplinary history prior to this incident, (R. SUP CS64-66), that testimony only creates a factual dispute that must be resolved by a jury.

In addition, evidence of a state of mind showing a wanton disregard for the safety of others may support a finding of willful and wanton conduct. *See Powell v. Dean Foods Co.*, 2013 IL App (1st) 082513-B, ¶108, 116. Taken together, Dayhoff's failure to read or heed emails informing him of Student A's history of physical aggression, his failure to observe or consider prior incidents of fighting involving Student A including those in his own gym class displays the same utterly indifferent mindset that Dayhoff exhibited by his conduct during the class period itself.

So too does his dismissal of Riley's injury. Riley testified that, after the injury, Dayhoff simply told him he would be "fine" and instructed him to get back to class, rather than sending him for medical attention, despite Riley crying in pain. R. SUP CS323-24. A jury should be allowed to consider this evidence in determining whether Dayhoff's course of conduct constituted an utter indifference to or conscious disregard for Riley's safety. *See Stewart*, 2016 IL App (2d) 151117, ¶97 (finding jury could draw inferences from defendant's subsequent behavior to interpret his earlier behavior because inaction after critical period "gave color" to earlier conduct).

Dr. Imber's expert opinions serve as additional evidence of Dayhoff's willful and wanton conduct. *See Protective Ins. Co. v. Coleman*, 144 Ill.App.3d 682, 687-88 (2d Dist. 1986) (expert affidavit can be considered during a summary judgment proceeding, even if opinions consist of conclusions), *Baumrucker v. Express Cab Dispatch, Inc.*, 2017 IL App

(1st) 161278, ¶ 58 (admission of expert's testimony that cab company's hiring of driver with poor driving record was willful and wanton was not error), *Grote v. Est. of Franklin*, 214 Ill.App.3d 261, 269–70 (2d Dist. 1991) (finding trial court properly considered uncontradicted opinions of expert on motion for summary judgment), Ill. R. Evid. 704.

C. Our Courts have repeatedly recognized teachers can be guilty of willful and wanton misconduct in the supervision of school students.

Defendants claim that "the breach of a duty to supervise…students in a school setting does not, as a matter of law, rise to the level of willful and wanton conduct." (Def. brief p. 16). However, there is no heightened standard for willful and wanton conduct "in a school setting." If the breach of the duty to supervise could never rise to the level of willful and wanton conduct, as Defendants surmise, it would eliminate §3-108's exception for willful and wanton conduct altogether.

Before 1998, both negligent and willful and wanton conduct were afforded immunity under §3-108. When the legislature amended §3-108 to its current form, it expressly narrowed the scope of the immunity to exclude willful and wanton conduct. *See D.M. v. Nat'l Sch. Bus Serv., Inc.*, 305 Ill.App.3d 735, 742 (2d Dist. 1999). Thus, the legislature intended to allow plaintiffs to recover for a public official's willful and wanton conduct in breaching their duty to supervise. To now hold that inadequate supervision cannot, as a matter of law, amount to willful and wanton conduct would essentially nullify the amendment. *Bonaguro v. County Officers Electoral Bd.*, 158 Ill.2d 391, 397 (1994) (primary rule of statutory interpretation is that court should ascertain and give effect to intent of legislature), *Sylvester v. Indus. Comm'n,* 197 Ill.2d 225, 232 (2001) (each word, clause, and sentence must be given reasonable meaning and not rendered superfluous, avoiding any interpretation that would render any portion of statute meaningless or void),

Haage v. Zavala, 2021 IL 124918, ¶60 (court cannot restrict or enlarge the meaning of an unambiguous statute nor depart from the statute's plain language by reading into it exceptions, limitations, or conditions that the legislature has not expressed). §3-108 does not contain an exception for supervision in a "school setting."

Contrary to Defendants' broad claims, a plaintiff can maintain an action for inadequate supervision against a school when the evidence allows a reasonable inference that defendant knew or should have known of an identifiable danger and failed to take action to remedy the danger. In *Hadley*, 123 Ill.App.3d 19, a shop teacher observed students hammering pieces of metal into an anvil, which the teacher knew or should have known was a dangerous activity. *Id.* at 23. The teacher told the students to stop, but failed to direct the students to wear goggles, then left them unsupervised. *Id.* Thus, the court found that a jury could infer a "reckless disregard for the safety of others…after knowledge of impending danger." *Id.*

In *Landers*, 66 Ill.App.3d at 82-83, where the evidence showed that defendant's physical education teacher ignored the obvious dangers posed by a student's fear, inexperience, and excessive weight when he instructed the student to practice a backward summersault on her own, without personal instruction, the court held a jury could properly find that the teacher showed an utter indifference to the safety of the student.

In *Hill*, 346 Ill.App.3d 515, plaintiff was performing an experiment in chemistry class when a glass beaker exploded, causing an injury to his right eye. *Id.* at 517. Plaintiff alleged the teacher's conduct was willful and wanton because the teacher knew plaintiff was performing the experiment without eye protection and consciously disregarded plaintiff's safety by permitting him to perform the experiment that led to the explosion. *Id.*

at 521, 522. The court found that plaintiff's allegations were sufficient for a jury to infer a "reckless disregard" for plaintiff's safety "after knowledge of impending danger." *Id.* at 522. *See also, Bernesak v. Catholic Bishop of Chicago*, 87 Ill.App.3d 681 (1st Dist. 1980) (willful and wanton conduct established where teachers stood passively by while students played risky and dangerous game of "crack-the-whip" on playground).

In short, ignoring a known or readily apparent danger in a school setting can constitute willful and wanton conduct under Illinois law. Here, Dayhoff willfully ignored his class in favor of screen time, rendering himself oblivious to an apparent and ongoing danger that he easily could, and should, have seen had he simply looked up from his devices. A jury should be allowed to decide whether Dayhoff knew or should have known that Student A posed a danger to other students, and whether his failure to intervene to stop his behavior constitutes willful and wanton misconduct.

Defendants again ask this Court to interpret the evidence in their favor by contending Dayhoff's failure to supervise encompassed only a nine-minute span. (Def. brief p. 1, 7, 21, 25). Defendants seemingly draw this inference from an accident report timing the injury as occurring at 10:45 a.m. (Def. brief p. 7). However, Riley testified his injury occurred toward the end of the class period. R. SUP CS320, 321. Jacob testified they had been playing soccer for 20 to 30 minutes before Riley was injured. R. SUP CS359. Because the evidence is in conflict, presuming Dayhoff was only failing to properly supervise his class for nine minutes is improper at this procedural posture.

D. The cases cited by Defendants do not mandate reversal.

Relying heavily on Justice Hettel's dissenting opinion, Defendants contend that the appellate court's decision in this case "directly contradicts the rulings in at least twenty-

five other appellate court cases with similar fact patterns." (Def. brief p. 16). However, all of the cases cited by Defendants are distinguishable, either factually, procedurally, or both. Significantly, none of the cases offered by Defendants involve a teacher ignoring a recognizable threat of danger ongoing in their presence.

1. Plaintiff is not alleging the general danger of children gathered.

In at least nine of Defendants' cases, no specific danger of which defendants should have been aware was identified, only the "general danger" of children gathering was alleged, which is insufficient to support a finding of willful and wanton misconduct. *Mancha*, 5 Ill.App.3d at 702, (Def. brief pp. 16-17), illustrates the distinction. There, a 12-year-old student became separated from his group while touring the Field Museum and was assaulted by other children. *Id.* Plaintiff's allegation was that the museum created a dangerous circumstance by permitting children of various ages and backgrounds to tour the field museum. *Id.* at 704. The court found that the mere fact that children of various ages and backgrounds were permitted to enter the museum was not sufficient to charge the museum with knowledge of the potential danger of assault on one of its visitors. *Id.*

The appellate court's reasoning was similar in *Pomrehn,* 101 Ill.App.3d at 333–35, (Def. brief pp. 22-23), where a high school softball team member fell off the trunk of a moving car she was riding before softball practice. *Id.* at 333. Relying on *Mancha*, the court concluded the mere fact that children were gathered was insufficient to make a reasonable person aware of the potential for injury due to falling from a moving car. *Id.* at 335-36.

In *Jackson,* 192 Ill.App.3d at 1100-01, (Def. brief p. 17), a student was injured when another student threw a chalkboard clip in an educable mentally handicapped (EMH)

classroom. The teacher had left the classroom for a scheduled 20-minute break, but left an aide, who was also monitoring another "regular" class, to monitor the EMH classroom in her stead. *Id.* at 1095-96. The aide testified that she went back and forth between the two classrooms, leaving each class unattended for only a minute at a time. *Id.* at 1096. The court found the generalized assertion that EMH students are more likely to act on immediate impulses resulting in potentially injurious consequences was insufficient to sustain a willful and wanton finding.[2] *Id.* at 1101.[3]

Here, by contrast, it was not simply that a group of children were gathered and playing that Plaintiff alleges should have given Dayhoff notice of the impending danger, but that one student in particular with a history of physical violence was repeatedly being physically aggressive and disruptive in plain view of a teacher whose admitted role was supervising class, but who instead occupied himself with screen time.

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[2]Defendant's summary of the facts of *Jackson* is misleading. In their brief, Defendants claim the student who threw the chalkboard clip was described as a "wild" person. (Def. brief p. 17). However, what the decision says is:

> Plaintiff testified that Washington had never hurt her before, and 'he wasn't that type of person.' He was a 'wild' person meaning that he played with the other boys, was macho, and was like any other boy. He was not a bully or a troublemaker."

The boy was also described as "well-mannered with no previous behavioral problems."

[3] The "general danger" analysis was similar in *Albers v. Cmty. Consul. #204 Sch.*, 155 Ill.App.3d 1083, 1085 (5th Dist. 1987), (Def. brief p. 17), *Choice v. YMCA of McHenry Co.*, 2012 IL App (1st) 102877, ¶71 (Def. brief p. 16, 24), *Knapp v. Hill*, 276 Ill.App.3d 376, 385-86 (1st Dist. 1995) (Def. brief pp. 13-14, 23), *Holsapple v. Casey Cmty. Unit Sch. Dist. C-1*, 157 Ill.App.3d 391, 393-94 (4th Dist. 1987) (Def. brief p. 23), *Ramos*, 137 Ill.App.3d 1028 (Def. brief p. 20), and *Woodman v. Litchfield Sch. Dist. No. 12*, 102 Ill.App.2d 330, 334 (5th Dist. 1968) (Def. brief p. 19).

2. Defendants took no action to remedy the danger.

Defendants also cite cases where defendants took actions to address the danger, but the actions were ineffective. In those situations, courts typically find that because some action was taken, albeit inadequate, the conduct does not rise to a willful and wanton level. In *Barr v. Cunningham*, 2017 IL 120751, ¶20, (Def. brief p. 13, 22, 26), for instance, plaintiff alleged a defendant teacher failed to require students wear safety goggles for floor hockey. *Id.* at ¶3. This Court found defendant's motion for directed verdict was properly granted because there evidence showed the teacher required students to use plastic hockey sticks and "squishy" safety balls and did not believe that a serious eye injury could occur using that equipment. *Id.* at ¶17. The teacher also imposed and enforced various rules for the specific purpose of preventing injuries. *Id.*

In *Lynch,* 82 Ill.2d at 430-31, (Def. brief p. 13, 19, 26, 29), this Court found the evidence was insufficient to prove willful and wanton conduct in connection with an injury suffered during a powderpuff football game because the teachers conducted several practice sessions, warned players that football could be "rough," and advised them to wear mouth guards. *Id.* at 430.

Similar reasoning was employed in *Geimer v. Chicago Park Dist.,* 272 Ill.App.3d 629 (1st Dist. 1995), (Def. brief p. 19, 28, 35), where a football player sued the park district for injuries suffered during a touch football game. The park district employed referees who imposed penalties for rough tactics, but plaintiff alleged those penalties were insufficient. *Id.* at 638.[4]

[4] The other cases cited by Defendants that utilized the same reasoning include *Biancorosso v. Troy Cmty. Consol. Sch. Dist. No.30C*, 2019 IL App (3d) 180613, ¶17-18, *Shwachman v. Northfield Twp. High Sch. Dist. 225,* 2016 IL App (1st) 143865-U, ¶39 (not allowed to

Here, unlike cases where defendant took some action to address the danger, Defendants did nothing to address Student A's repeatedly aggressive behavior during the gym period as his physical aggression continued to escalate. He did not even see the specific and apparent danger Plaintiff contends he was required to stop. R. SUP CS294-96 CS297, CS299. It is not as though Dayhoff tried to stop student A but was ineffective. He did nothing to address Student A's behavior because he was willfully ignoring the class in favor of screen time. Accordingly, cases where defendants took some action to address the danger but were ineffective are not applicable. Moreover, our case law does not establish a bright line rule that taking any precaution, however small, is an absolute defense in every circumstance, as willful and wanton conduct cases "always present divergent circumstances and facts, which, in most instances, are wholly dissimilar." *Myers*, 8 Ill.2d at 329.

3. This case was not decided on deficiencies in the pleadings.

Defendants also cite numerous cases that were decided on appeal from motions to dismiss, which turned largely on deficiencies in the pleadings. None of them are similar to this case. In *Brooks v. McLean Cty Unit Dist. No. 5,* 2014 IL App (4th) 130503*,* a student died after playing a game with other students involving punching each other in the abdomen. The appellate court found Plaintiff did not allege the teacher knew the extent of what the game entailed, so had no reason to know of the likelihood of injury. *See also,*

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be cited), *Castaneda,* 268 Ill.App.3d at 105-06, *Poelker*, 251 Ill.App.3d at 278, *Siegmann v. Buffington,* 237 Ill.App.3d 832 (3rd Dist. 1992), *Templar,* 182 Ill.App.3d at 512, *Montague*, 57 Ill.App.3d at 831-32, *Bielema v. River Bend Cmty. Sch. Dist. No. 2*, 2013 IL App (3d) 120808, *Toller v. Plainfield Sch. Dist. 202*, 221 Ill.App.3d 554, 558 (3d Dist. 1991), and *Grant v. Bd of Tr. of Valley View Sch. Dist. No. 365-U*, 286 Ill.App.3d 642 (3rd Dist. 1997).

Clay, 22 Ill.App.3d at 439, 441 (plaintiff alleged defendant should have known of attacker's propensity for violence without facts to support inference), *Floyd v. Rockford Park Dist.*, 355 Ill.App.3d 695, 701 (2d Dist. 2005) (finding plaintiff failed to allege a specific danger defendant should have been aware of, but noting "[i]f defendants had allowed Washington to have access to the metal golf club, knowing that Washington was *physically* violent to others, then defendants' conduct arguably may have shown an utter indifference for plaintiff's safety."), *Cipolla*, 69 Ill.App.3d at 437-38 (finding plaintiff's allegations conclusory), *Booker*, 75 Ill.App.3d at 385 (plaintiff failed to allege facts establishing defendant knew or should have known there was impending danger to plaintiff if she entered bathroom unaccompanied by teacher), *Gubbe v. Catholic Dioc. of Rockford*, 122 Ill.App.2d 71, 79 (2d. Dist. 1970) (plaintiff failed to plead facts from which it could be ascertained in what manner school authorities were violating duty), *Guyton*, 132 Ill. App. 3d at 578-79, (finding there was nothing that did or should have indicated any danger to teacher from student moving desk), *Pomaro*, 278 Ill.App.3d at 269-270 (only allegation against teacher was setting up track in area near loose and broken asphalt), *Tijerina*, 150 Ill.App.3d at 292-93 (plaintiff failed to plead facts establishing where allegedly-dangerous bleachers were located or what specific conduct made danger imminent), *Choice*, 2012 IL App (1st) 102877, ¶75 (plaintiff failed to allege basis upon which court could infer defendants knew or should have known that drain plugs had been removed from boats), *Pfister v. Shusta,* 167 Ill.2d 417, 425-26 (1995), (contact sports exception case where plaintiff did not allege willful and wanton misconduct, only alleged ordinary negligence), *Leja v. Cmty. Unit Sch. 300*, 2012 IL App (2d) 120156, ¶11 (Def. brief p. 28) (no allegation defendant had reason to be aware of danger posed by volleyball net crank).

Relatedly, to the extent Defendants and their *amici* attempt to advance an argument that a different standard should "in the context of…recreational or sports activities," it is unavailing. (*See* Def. brief p. 19-20). The contact sports exception only protects participants in sporting events from claims of ordinary negligence. Plaintiff is not seeking judgment from Student A. Thus, PDRMA's reliance on *Nabozny v. Barnhill*, 31 Ill.App.3d 212 (1st Dist. 1975) is particularly inapt. (PDRMA brief p. 29). As is IASB's discussion of soccer involving incidental contact between participants. (IASB brief p. 4). In fact, rather than shield Defendants from liability, the fact that the students were participating in a sports activity should have made Dayhoff's awareness heightened. The fact that the class was engaging an activity that sometimes involves contact is a factor that should have increased Dayhoff's level of vigilance, not one that shields him from liability.

As the first district summarized in *Davis v. Vill. of Maywood*, 2023 IL App (1st) 211373, ¶30, willful and wanton cases generally fall into one of three categories. At one extreme are circumstances that are "so benign as to clearly be, as a matter of law, below the theoretical minimum for willful and wanton conduct." *Id.* At the other extreme are circumstances "so egregious that one could say, as a matter of law," that the employee acted willfully and wantonly. *Id.* The third scenario are those "circumstances where the question of willful and wanton conduct is the subject of reasonable argument." *Id.* Where reasonable minds might draw different inferences form the same undisputed facts, it is the role of the jury to decide whether the conduct at issue crossed a line and became willful and wanton. *Id.* Here, the circumstances are not "so benign" for the issue of willful and wanton conduct to be determined as a matter of law at the summary judgment stage. The

appellate court correctly found questions of fact exist with respect to Defendants' willful and wanton conduct. This Court should affirm the appellate court's decision.

E. Riley's injury was a foreseeable consequence of Dayhoff's failure to intervene in the face of an unreasonable danger he should have been aware of.

Defendants also argue that Dayhoff owed no duty to Plaintiff because Student A's conduct in injuring Riley was "unforeseeable and unprovoked." (Def. brief p. 22). However, "every person owes to all others a duty to exercise ordinary care to guard against injury which naturally flows as a reasonably foreseeable consequence of his act." *Forsythe v. Clark USA, Inc.*, 224 Ill.2d 274, 291 (2007). The extent of the harm or the exact manner in which it occurs need not be foreseeable. *Knauerhaze v. Nelson*, 361 Ill.App.3d 538, 556 (1st Dist. 2005). What is required to be foreseeable is the general character of the event or harm, not its precise nature or manner of occurrence. *Marshall v. Burger King Corp.*, 222 Ill.2d 422, 442 (2006). A reasonable person in defendant's position need only foresee that some injury would result from the wrongful conduct. *Knauerhaze*, 361 Ill.App.3d at 554.

The fact that an injury occurs through the intervening act of a third party is not, by itself, sufficient to break the causal relationship or otherwise render the injury unforeseeable. *Neering v. Illinois Central R.R. Co.*, 383 Ill. 366 (1943). Here, given Dayhoff's self-induced obliviousness and Student A's ongoing and increasingly aggressive behavior, that Student A would eventually injure one of his classmates if he was allowed to continue aggressively pushing and shoving them at random was practically inevitable. Defendants' "no duty" argument is meritless. *See Gammon v. Edwardsville Cmty Unit School Dist. No. 7*, 82 Ill.App.3d 586, 588-59 (5th Dist. 1980) (public education system has duty to provide for physical safety of its students). Dayhoff admitted it was his duty

to supervise students and to stop physically aggressive students. R. SUP CS295. In addition, this Court has cautioned against conflating the concepts of duty and breach by using the term "duty" "to state conclusions about the facts of particular cases, not as a general standard." *Marshall*, 222 Ill.2d at 443.

Amicus IASB argues that affirmance would establish "a new avenue of strict liability," because it would "require a school district…to foresee and prevent every possible injurious contact between two students in physical education class." (IASB brief p. 4). PDRMA makes similar claims about the creation of a "zero tolerance" policy for participants in park district recreational programs. (PDRMA brief p. 7-10, 27-28). However, far from these overbroad claims, the most the appellate court's decision requires is the most basic level of supervision by teachers charged with the care of our students when an ongoing danger is making itself apparent in their midst.

III. Whether the District's conduct was willful and wanton is a question of fact.

As the appellate court noted, "[i]f Student A was in fact physically aggressive and a danger to other students, and that information was known to the District, the failure to disseminate such information to his teachers may be willful and wanton." *Haase*, 2024 IL App (3d) 230269-U, ¶31.

In *Gammon*, 82 Ill.App.3d 586, defendant's guidance counselor had knowledge of threats of physical violence by one student against another, and conducted a counseling session, but took no further action and did not report the threats to anyone else at school. *Id.* at 587-88. Later that day, plaintiff was struck in the face by the classmate, who had a known history of fighting. *Id.* at 588-90. Plaintiff alleged the school's response to a known threat of violence constituted willful and wanton conduct under the circumstances. The

appellate court found that because school officials had knowledge of the risk of harm posed by the offending student, plaintiff had demonstrated that "the supervision necessary to maintain discipline aimed at avoiding confrontation between these two pupils was not provided." *Id.* at 589. As such, summary judgment was not appropriate.

In *Doe*, 213 Ill.2d at 28, a special needs student was sexually assaulted by a fellow student on a school bus. The Court relied on plaintiff's allegation that defendant had prior knowledge of facts showing the student's propensity for assault and found that the failure to take action to protect other students against a student with such a history could constitute willful and wanton conduct. *Id.* at 22, 28. The court found that the allegations were "sufficient to present a jury question as to the knowledge of the [defendant] and the foreseeability of harm to the [plaintiff]." *Id.* at 22. So too here, the evidence presents a jury question as to Defendants' knowledge and the foreseeability of harm to Plaintiff.

The appellate court also observed that "there are numerous facts in dispute regarding Student A and defendants' actions and inactions." For instance, Student A's disciplinary record for the 2016-17 school year shows multiple referrals for insubordination and physical aggression and that Riley and Jacob knew Student A to be aggressive and had gotten into fights before this incident, but that Walz and Lenfield testified that he was not aggressive or an initiator in fights. *Haase*, 2024 IL App (3d) 230269-U at ¶31. Accordingly, whether or not Student A was, in fact, physically aggressive, is a question of fact. For summary judgment purposes, however, this Court must interpret the facts in the light most favorable to Plaintiff, and therefore, must presume Student A was aggressive.

According to the school principal, Hensley, administration was required inform teachers if a student has a history of physical aggression or fighting to put teachers on

notice of a student's dangerous propensities and for the safety of fellow students. R. SUP CS730-31. However, Walz testified that the only emails she sent to teachers regarding Student A were about his tendency to wander. *Id.* at ¶31. Additionally, no email was sent to Student A's teachers after January 17, 2017, despite 10 additional disciplinary incidents, including another fight. R. SUP CS408, CS666-67. Dayhoff testified that he never received any information about students with disciplinary issues, including Student A. R. SUP CS289.

Whether Dayhoff received emails from the school about Student A, whether he ignored those emails, and whether disregarding those emails constitutes evidence of a state of mind showing a reckless disregard for the safety of students in his gym class are all factual disputes that only a jury can resolve. If Dayhoff was sent emails informing him about Student A's disciplinary history, and he ignored them, then Dayhoff consciously disregarded a known risk, which, had he been aware of, would have prompted him to closely monitor Student A during the game. R. SUP CS290. If, on the other hand, he did not receive emails about Student A's disciplinary history, then the school violated its own policy of informing teachers about students with histories of physically aggressive behavior, which is evidence of willful and wanton conduct by the school administration. *See Hudson v. City of Chicago*, 378 Ill.App.3d 373, 405-06 (1st Dist. 2007) (although violation of internal rule or policy does not constitute willful and wanton conduct *per se*, "a jury may consider it along with other evidence in reaching a determination of willful and wanton conduct."), *Stewart*, 2016 IL App (2d) 151117, ¶88-89 (teacher failed to follow school policy and standard operating procedure by failing to call 9-1-1 immediately after student collapsed).

Defendants rely on *Mitchell v. Special Educ. Jt. Agreement Sch. Dist. 208*, 386 Ill.App.3d 106, 111-12 (1st Dist. 2008) (Def. brief p. 28), where a special needs student choked on food he took from other students during breakfast. Plaintiff alleged that stepping away even momentarily was willful and wanton conduct given that the school knew plaintiff had issues with food. *Id.* at 110. The evidence showed school staff maintained close supervision over plaintiff and had no reason to believe plaintiff would attempt to take food from other students, and when the teacher did step away, it was only a few feet and was without turning her back to plaintiff. *Id.* at 112. Additionally, multiple school employees tried to stop plaintiff, but plaintiff did not obey. *Id.* The court distinguished cases finding willful and wanton conduct to be a fact question when "school staff did absolutely nothing to protect the students in question, in that they left them completely unattended and ignored a credible threat of violence by another student." *Id.* at 112.

In *Stiff v. Eastern Ill. Area of Special Educ.*, 279 Ill.App.3d 1076, 1082 (4th Dist. 1996), (Def. brief p. 28), an epileptic student fell and broke her leg while attempting to cross a bridge on a school field trip. At least four teachers were present with the group. *Id.* The teachers cautioned students about how to conduct themselves on the trail and considered various options before deciding to cross the bridge. *Id.* Two teachers proceeded across the bridge before any of the students. *Id.* After a third teacher proceeded, plaintiff attempted to cross, with a fourth teacher behind her. *Id.* One teacher was only a few inches from plaintiff when plaintiff's knee buckled and she slipped under the handrail and off the bridge into a creek bed. *Id.*

Amicus IASB submits that privacy concerns limit the ability of Defendants to disclose school records. (IASB brief pp. 9-10). However, Defendants have not raised this

issue. Moreover, none of the provisions raised by *amicus* prohibit the type of intra-school communication about students at issue in this case. Further still, the evidence is clear that, Student A's disciplinary record was, in fact, available to teachers through the school's Skyward system. R. SUP CS287-88, CS407, CS409, CS538, CS401. Thus, it is undisputed that the information relevant to this case can be shared, and as such, IASB's argument is irrelevant.

Amicus PDRMA repeatedly attempts to broaden the issue to one of determining "eligibility" to participate in recreational activities. (PDRMA brief p. 6, 7, 8, 12, 13, 14, 16, 24, 26, 34). As PDRMA characterizes it, the "impending danger was a seventh-grade boy with past disciplinary issues," and the issue in the case is "allowing a person with this type of 'checkered past' to participate…" (PDRMA brief p. 34). This is a fundamental misinterpretation of Plaintiff's allegations. Plaintiff's claim against Dayhoff is that he should have removed Student A from the game after he repeatedly displayed actively aggressive behavior by pushing and shoving classmates in what should have been Dayhoff's plain view. R. C435-36. Plaintiff's contention against the District is that it failed to disseminate information that, by Dayhoff's admission, would have led Dayhoff to increase level of supervision over Student A during the class period at issue. R. C435-36. This case is not about determining a participant's initial eligibility to participate in a recreational activity or determining a participant's eligibility to participate in future recreational programs. This case is about removing an actively aggressive student with a history of physical aggression and fighting from a game during a class period. PDRMA's attempts to expand this case beyond the issues actually before the Court should be rejected.

In short, in addition to being liable for the conduct of Dayhoff, the District's own separate willful and wanton conduct is a disputed fact issue for the jury. Defendants are not entitled to immunity under §3-108.

IV. Defendants are not entitled to discretionary immunity under §2-201 of the Act.

Defendants also contend their conduct is shielded by the absolute immunity found in §2-201 of the act for discretionary policy decisions. §2-201 does not apply for two reasons. First, when there are two competing immunity provisions, the more specific provision applies over a general one. *Murray*, 224 Ill. 2d at 233. Here, §3-108 applies specifically to supervision, the governmental function at issue in this case, and as such, it must prevail over the more general §2-201. Second, a defendant seeking immunity under §2-201 has a burden to demonstrate that the public official made a conscious decision pertaining to the conduct alleged to have caused a plaintiff's injuries. *Andrews*, 2019 IL 124283, ¶3. "The failure to do so is fatal to the claim." *Monson*, 2018 IL 122486, ¶33. Here, Defendants have offered no evidence that Dayhoff's failure to intercede to stop Student A's unruly and aggressive behavior before it resulted in an injury to Riley was the result of a knowing choice.

A. §2-201 does not apply because it is general and the more specific immunity provision pertaining to supervision under §1-108(a) applies.

§2-201 does not apply because it is general, and a more specific immunity provision, §3-108 applies. "Where there are two statutory provisions, one of which is general and designed to apply to cases generally, and the other is particular and relates to only one subject, the particular provision must prevail." *Murray*, 224 Ill. 2d at 233. §2-201 is general and applies to all discretionary policy-making decisions, while §3-108(a) is specific to one subject – supervision of activities on municipal property, including schools.

See Bollinger v. Schneider, 64 Ill.App.3d 758, 761 (3d Dist. 1978) (referring to §2-201 as a "more general immunity"), *Capps v. Belleville Sch. Dist. No. 201*, 313 Ill.App.3d 710, 716 (5th Dist. 2000) (observing §3-108(a) "concerns a specific type of conduct"). Therefore, §2-201 cannot be applied, and §3-108 must be.

One indicator that the legislature intended §2-201 to apply more generally than §3-108 is the placement of §2-201 in Article II of the Act, entitled "General Provisions Relating to Immunity," while §3-108 is contained in the subsequent section, of the Act, entitled "Immunity from Liability for Injury Occurring in the Use of Public Property."

Further, §2-201's prefatory language, "[e]xcept as otherwise provided by Statute," indicates "that section 2-201 immunity is contingent upon whether other provisions, either within the Act or some other statute, create[ ] exceptions to or limitations on that immunity." *Murray*, 224 Ill.2d at 232. In other words, §2-201 provides discretionary immunity only in the absence of a more specific provision. §3-108 is a more specific provision, so it prevails over §2-201. *See also, Monson*, 2018 IL 122486, ¶55 (Thomas, J., specially concurring) (distinction between ministerial and discretionary functions is irrelevant to existence of supervisory immunity).

Supervision is distinct from and more specific than the exercise of discretion. *See Hill*, 346 Ill.App.3d at 521. §3-108 is not predicated on whether a teacher is exercising discretion. *Id*. Rather, "[t]eachers supervise their classes whether or not they exercise discretion." *Id.* Illinois courts have defined "supervision" to include coordination, direction, oversight, implementation, management, superintendence, and regulation. *Spangenberg v. Verner*, 321 Ill.App.3d 429, 432 (1st Dist. 2001). "[A] teacher acts as a peacekeeper and a monitor of student behavior." *Doe*, 213 Ill.2d at 227. Thus, the concept

of supervision is narrower than making a policy determination or a decision unique to one's position. Here, the allegations of Plaintiff's complaint sound in wrongful supervision, (R. SUP C434-36, R. CS43-45), and discovery focused on supervision, (*See, e.g.,* R. SUP CS475-81, R. C753-56). Dayhoff admitted that his role was to "supervise and make sure everybody is doing what they are supposed to be doing, correcting behaviors that may come up," (R. SUP CS292), and that if he saw any student fighting or being physically aggressive he was required to step in and stop it. R. SUP CS295. Defendants admitted in the court below that Dayhoff's responsibilities included supervision of students and maintaining discipline in classes. R. C65-66, C67. *See also, Gammon*, 82 Ill.App.3d at 588-59 (the duty of our public educational system to provide for the physical safety of its students), 105 ILCS 5/24-24, 34-84(a) ("Teachers… shall maintain discipline in schools, including school grounds which are owned or leased by the board and used for school purposes and activities). The gravamen of this case is Dayhoff's willful and wanton failure to supervise, which falls under §3-108. §3-108 applies in this case. §2-201 does not.

B. §2-201 does not apply because Defendants have not met their burden to show Dayhoff's failure to intervene was the result of an intentional choice.

Even absent the above, §2-201 would not apply because Defendants have not met their burden to prove that Dayhoff's failure to act was the result of a discretionary policy decision. Despite Dayhoff's admission that he did not even see Student A's repeatedly aggressive behavior during class, (R. SUP CS294-96 CS297, CS299), Defendants assert that he made a conscious decision not to stop it. (Def. brief p. 34, IASB brief p. 14). However, "if the employee was totally unaware of a condition prior to the plaintiff being injured, he or she could not possibly have exercised discretion with respect to that condition." *Monson*, 2018 IL 122486, ¶ 34-35. In this case, Dayhoff's admission that he

did not see Student A's ongoing aggressive behavior and did not know it was happening necessarily precludes the conclusion that his failure to intervene was the result of a considered choice, and renders §2-201 inapplicable. R. SUP CS295-96, CS297, CS299. Because he did not even know what was going on (through circumstances of his own making), he, necessarily, could not have made any choice with respect to whether or not to intervene. Therefore, §2-201 does not apply.

Immunity under §2-201 requires Defendants prove that the act or omission giving rise to the injuries constitutes both an exercise of discretion and a determination of policy for immunity to apply. *Andrews*, 2019 IL 124283 at ¶37. Defendants are required to established *both* elements to invoke immunity under §2-201. *Id.* Judgment as a matter of law is not appropriate when a question of fact exists as to whether a municipal defendants' conduct was a policy decision and discretionary within the meaning of §2-201. *See Van Meter v. Darien Pk. Dist.*, 207 Ill.2d 359, 380 (2003) (questions of material fact remained as to whether conduct of municipal defendants was result of policy decision and discretionary within the meaning of §2-201), *Stewart*, 2016 IL App (2d) 151117, ¶134 (trial court correctly determined at the summary judgment stage that it could not say as a matter of law that defendant's employee made a policy determination).

The exercise of discretion connotes a conscious decision. *Monson*, 2018 IL 122486 at ¶ 33. Where, as here, there is no evidence that any deliberate choice was made with respect to the wrongful conduct alleged, there is no decision-making process at all, and the failure to act cannot be said to be an exercise of discretion. *Id.* at ¶34-35. Therefore, for a local public entity to avail itself of the immunity offered by §2-201, particularly at the summary judgment stage, defendant must offer unrefuted evidence that it made a conscious

decision not to act. *See Id.* at ¶ 33. If a municipal defendant, or its employee, is unaware of the dangerous condition or activity alleged to have caused the plaintiff's injury, it cannot be said that the failure to intervene to stop it was a discretionary choice. *Id.* at ¶37. Under those circumstances, "the most that can be said is that a decision was made by default, which is insufficient to invoke discretionary immunity." *Id*.

In *Andrews*, 2019 IL 124283, ¶40, this Court found that the policy reasons for granting immunity under §2-201 are only furthered "when the government entity or its employees has engaged in actual decision making." There, plaintiff sued the Water Reclamation District after he fell to the bottom of a 29-foot sewage chamber while he was transitioning from a job-made ladder to a fiberglass ladder. *Id.* at ¶5-6. The trial court granted summary judgment based on §2-201, but the appellate court reversed, finding there was no evidence that defendant exercised any discretion with respect to the act from which plaintiff's injury resulted. *Id.* at ¶16. The court noted, "just because a party has a right to exercise discretion does not mean that it did exercise discretion." *Id.* This Court held that because defendant's resident engineer was unaware of the ladder setup that allegedly caused plaintiff's injuries, there was no evidence that he exercised judgment or skill in making decisions about the ladders. *Id.* The Court also noted that other jurisdictions are in accord the requirement that defendants present evidence of an intentional choice before a discretionary immunity provision will apply. *Id.* at ¶34 (collecting cases).

The Court in *Andrews* relied on *Monson*, 2018 IL 122486 at ¶1, 33, in which this Court held that an employee's act or omission will be deemed discretionary only where the employee has exercised "personal deliberation and judgment in deciding whether to perform a particular act, or how and in what manner that act should be performed." In

Monson, defendant claimed to be entitled to §2-201 immunity for the failure to repair a defective condition on public property, but this Court rejected that argument because the record contained no evidence of the City's decision-making process with respect to the specific site of plaintiff's accident. *Id.* at ¶28, 38.

In both *Andrews* and *Monson*, this Court cited the appellate court's decisions in *Gutstein v. City of Evanston*, 402 Ill.App.3d 610, 611-612 (1st Dist. 2010) and *Corning v. E. Oakland Twp.*, 283 Ill.App.3d 765, 768 (4th Dist. 1996). *Gutstein*, 402 Ill.App.3d at 611-612 involved a plaintiff who fell in an unimproved alley. The appellate court rejected the City's discretionary immunity defense, finding there was "nothing in the record to show that any work was done in the alley, certainly not how it was done." *Id.* at 626. Similarly, in *Corning*, 283 Ill.App.3d at 768, the court held defendants were not immune from liability for their failure to replace a missing stop sign where there was no evidence that they were aware the sign was missing or made a conscious decision to not replace it. *See also, Reyes v. Bd. of Educ. of City of Chicago*, 2019 IL App (1st) 180593, ¶54 ("we cannot see how falling asleep on the job and thus not performing any duties could be a decision where Sharp balanced competing interests and made a judgment call"). Here, ignoring an ongoing and apparent danger throughout class while sitting with one's feet up in a corner of the gym staring into laptop and phone screens cannot be fairly characterized making as any kind policy-related judgment call. Defendants have not established that Dayhoff made any decision at all, let alone a discretionary one involving policy.

Amicus PDRMA seems to contend that wherever a school administrator or principal has made any decision that could be deemed discretionary, every teacher working under them is cloaked in discretionary immunity for every subsequent action. (*See* PDRMA brief

pp. 21-24 deeming one of two "critical issues" it wished to address as whether or not "every staff member at the local public entity must exercise the same discretion in order for the employee…to receive that immunity"). However, the plain language of §2-201 belies that assertion. ("***public employee***" is not liable for "injury resulting from ***his*** act or omission in determining policy when acting in the exercise of such discretion…"). *Amicus* offers no authority for imputing an administrator's discretionary decisions to a teacher charged with direct supervision of a class. A local public entity must prove that the conduct of the public employee accused of wrongdoing was the result of a discretionary policy decision. *Andrews*, 2019 IL 124283, ¶32-33 (finding resident engineer in charge of sewage chamber admitted he was unaware of two-ladder setup, so could not have exercised discretion), *Reyes*, 2019 IL App (1st) 180593, ¶54 (finding bus aid who fell asleep could not have "balanced competing interests and made a judgment call"). It is far from onerous to require a defendant to meet its burden to prove the person actually accused of wrongdoing made a discretionary choice before their conduct can be immunized under §2-201.

Defendants and their *amici* also attempt to cloud the issue by pointing to decisions Dayhoff made that had nothing to do with the danger that caused Plaintiff's injury, such as when he "chose to institute a free day," "chose where to position himself," allowed "participation by students who did not dress," chose what equipment and facilities to use, and provided a daily grade based on participation. (Def. brief pp. 34-35, PDRMA brief p. 7, 21). *Amicus* PDRMA goes so far as to suggest that "identifying a lesson plan for that day" was a decision that entitles Dayhoff to immunity. (PDRMA brief p. 24). However, none of those things form the basis of Plaintiffs' claim against Dayhoff. The law is clear that "a municipal defendant asserting immunity under §2-201 must present evidence of a

conscious decision by its employee ***pertaining to the conduct alleged to have caused the plaintiff's injuries***." *Andrews*, 2019 IL 124283 at ¶34 (emph. added). Here, the conduct alleged to have caused Riley's injuries is Dayhoff's failure to intercede to stop an increasingly aggressive student's ongoing and obvious dangerous behavior, not any of the extraneous other things he may have done that day.

In *Monson*, this Court observed that absent a requirement to present evidence of a conscious decision on the part of the municipality, "nearly every failure to maintain public property could be described as an exercise of discretion," which would constitute an "impermissibly expansive definition of discretionary immunity." *Monson*, 2018 IL 122486. at ¶35. As Defendants' argument illustrates, the same is true with respect to supervision, particularly where the alleged wrongful conduct is a failure to act. Without requiring a municipal defendant to show it made a conscious choice with respect to the conduct at issue, nearly every failure to supervise could be miscast as an exercise of discretion.

Defendants also rely on Dayhoff's testimony that Riley's injury occurred during a "normal scrum" for the ball and posit that Dayhoff made some decision that the "scrum" did not warrant intervention. (Def. brief p. 17-18). For one, Dayhoff did not testify that way. While he did describe a "scrum" for the ball, at no point during his 80-page discovery deposition did he testify that he actively chose to let Student A's aggressive conduct continue or offer evidence that his failure to intervene was the product of conscious decision-making. R. SUP CS282-302. Defendants have offered no evidence describing any purported decision-making process by Dayhoff, what considerations he weighed, what

balance he tried to strike, or why he believed it was best to allow Student A to continue pushing and shoving classmates.

Additionally, Plaintiff alleges Dayhoff should have recognized Student A's aggressive behavior and intervened to stop it *before* the supposed "scrum" that resulted in Riley's injury. Even if Dayhoff's testimony could be accepted, (which at the summary judgment stage it cannot), by the time the "scrum" occurred, it was too late. Based on the testimony of Riley and Jacob, Student A was pushing and shoving people long before the "scrum" that resulted in Riley's injury. A reasonable person in Dayhoff's position would have recognized Student A's conduct and interceded to stop it long before the purported "scrum" Dayhoff described ever occurred. At the very least, questions of fact exist as to whether Dayhoff made a conscious decision not to intervene and whether his conduct was discretionary as defined by §2-201. *See Van Meter*, 207 Ill.2d at 380. Therefore, summary judgment was improper.

C. There is no evidence of discretionary policy decisions by the District.

Defendants also claim the District's own conduct in failing to disseminate information about a dangerous student is afforded discretionary immunity. (Def. brief pp. 22, 29-34). In support, Defendants rely on a series of bullying cases in which a school failed to take disciplinary action against a student to prevent further bullying, (Def. brief p. 22), which are not applicable, as this is not a bullying case. Bullying cases involve different considerations, typically the enforcement of an anti-bullying policy.

In each of *Mulvey v. Carl Sandberg H.S.*, 2016 IL App (1st) 151615, ¶¶1, 47-48, *Malinski v. Grayslake Cmty. High Sch. Dist. 127*, 2014 IL App (2d) 130685, ¶14, *Castillo v. Bd. of Educ. of City of Chicago,* 2018 IL App (1st) 171053, ¶4-5, 140, and *Hascall v.*

Williams, 2013 IL App (4th) 121131, ¶10, (Def. brief pp. 30-31), the appellate court found that implementation of an anti-bullying policy required the exercise of discretion by school officials. Neither *Mulvey* nor *Malinski* even mentions §3-108 of the Act. In *Hascall*, the court specifically found that there was "no provision of the [Act] directly addressing the situation giving rise to plaintiff's injuries," because "bullying is not specifically listed in any section of the Tort Immunity Act." *Id.* at ¶33. By contrast, supervision, the specific government function at issue in this case, is specifically covered by §3-108.

Plaintiff's allegations in this case do not stem from the failure to respond to complaints of bullying or the implementation of an anti-bullying policy, but from the failure to properly supervise and intervene to stop an ongoing and apparent danger occurring in Dayhoff's midst. Further, as the appellate court found, "[i]f Student A was in fact physically aggressive and a danger to other students, and that information was known to the District, the failure to disseminate such information to his teachers may be willful and wanton." *Haase*, 2024 IL App (3d) 230269-U at ¶31. Thus, Defendants' reliance dissimilar bullying cases is unpersuasive.

Defendants also rely on *Marshall v. Evanston Skokie Sch. Dist. 65,* 2015 IL App (1st) 131654-U, a pre-2021 unpublished decision that should not be cited, (Ill. S. Ct. R. 23), but is unlike this case in any event: Plaintiff claimed defendants failed to prevent a student's suicide because they were aware of prior suicide threats and did not respond.

Doe, 213 Ill.2d at 28 is more instructive. In a case involving a special needs child was sexually assaulted by another student on a school bus, this Court found plaintiff's allegation that defendant had prior knowledge of facts showing the student's propensity for assault was "sufficient to present a jury question as to the knowledge of the [defendant]

and the foreseeability of harm to the [plaintiff]" and found that the failure to take action to protect other students against a student with such a history could constitute willful and wanton conduct. *Id.* at 22, 28. So too here, the evidence presents a jury question as to Defendants' knowledge and the foreseeability of harm to Riley. *See also*, *Gammon*, 82 Ill.App.3d at 589 (§III above).

Questions of fact exist with respect to whether the District exercised discretion in failing to disseminate information regarding Student A's physical aggressiveness toward other students. Dayhoff himself admitted that if he had information that a student was physically aggressive, it would prompt a higher level of supervision over that student. R. SUP CS290. Defendants have not met their burden to establish the District made discretionary policy decisions with respect to the conduct alleged to have caused Riley's injury. At minimum, whether Defendants exercised discretion is a disputed fact question.

V. The appellate court's decision is consistent with Illinois public policy.

Both Defendants and their *amici* decry the appellate court's decision as having a "chilling effect" on teacher's abilities to do their jobs. (Def. brief p. 23). However, Illinois law *should* have a chilling effect on the kind of indifference to student safety displayed by Dayhoff in this case. As commonly used, the word, "indifference" means a "lack of interest or concern." *See* https://www.dictionary.com/browse/indifference, https://www.merriam-webster.com/dictionary/indifferent ("Indifferent" - "marked by a lack of interest, enthusiasm, or concern for something; apathetic"). It is difficult to conceive of a more apt description of Dayhoff's conduct. He displayed no interest in or concern for the safety of his students, for his responsibility to supervise them, or for his admitted duty to stop fighting and physically aggressive behavior by students. The evidence leads to the

reasonable conclusion that Dayhoff rolled some balls out onto the gym floor, then sat in the corner with his feet up staring at screens and expecting junior high school students to supervise themselves while an unruly student continued to run over, push, and shove classmates. That is not what Illinois public policy protects. Dayhoff's conduct embodies the concept of utter indifference.

Schools stand *in loco parentis*, in place of parents, and assume responsibility for the care and custody of the children entrusted to them. 105 ILCS 5/24-24. Illinois has a well-defined and dominant public policy in favor of protecting school-aged children. *Dept. of Cent. Mgmt Serv. V. AFSCME, AFL-CIO*, 245 Ill.App.3d 87, 94 (4th Dist. 1993). "[T]he welfare and protection of minors has always been considered one of the State's most fundamental interests." *AFSCME v. Dept. of Cent. Mgmt. Serv.*, 173 Ill.2d 299, 311 (1996). This policy is reflected in the legislature's 1998 amendment to the Act specifically reducing the scope of immunity (and expanding the scope of liability) for improper supervision.

Amicus IASB laments that affirmance "would expose public employees to liability for everyday decisions made in their trained professional judgment and discretion." (IASB brief p. 14). However, calling Dayhoff's conduct in this case an exercise of his trained professional judgment and discretion is farcical. In an era where threats to student safety in schools are at an all-time high, parents of this State should be able to expect the slightest modicum of vigilance for the safety the children entrusted to the care of our public schools. If even this egregious a failure to supervise can be immunized under §2-201, it would render the legislature's amendment to §3-108 meaningless.

Moreover, the appellate court's decision not only protects students, but protects teachers as well by incentivizing public schools to protect teachers from the harm that could

result to them from a lack of proper supervision over potentially dangerous students who are showing themselves to be actively aggressive in a teacher's midst. If teachers are allowed to distract themselves with devices then claim ignorance as a defense, it only increases the likelihood of additional injuries like this one.

Illinois also has a "strong public policy in favor of resolving disputes on their merits…" *Asher Farm Ltd. P'ship v. Wolsfeld*, 2022 IL App (2d) 220072, ¶39. Given the myriad factual disputes in this case, the only appropriate course is to allow the case to be decided by a jury.

VI. Summary judgment on Plaintiff's Family Expense Act claim was not appropriate.

Lastly, the trial court erred in granting summary judgment with respect to the claim of Riley's father, Kevin Haase, under the Family Expense Act. Riley was a minor at the time of his injury. Under the Act, 750 ILCS 65/15, Kevin became responsible for medical expenses for Riley's medical treatment related to the injuries he suffered in this occurrence. As such, he is entitled to recover those losses from Defendants. *See Manago v. County of Cook*, 2017 IL 121078, ¶29 ("parents have the exclusive right to seek recovery from a tortfeasor for their minor children's medical expenses"), *Graul v. Adrian*, 32 Ill.2d 345, 348 (1965) ("it is legally sound and in accordance with basic negligence principles that the burden of damages should be placed upon the tort-feasor."). Kevin has a right to recover for the expenses he incurred due to his minor son's injuries. Because granting summary judgment on Riley's willful and wanton claim was error, so too was granting summary judgment on Kevin's claims for medical expenses arising from the same occurrence.

CONCLUSION

As this Court long ago stated:

> The right to trial by jury is recognized in the Magna Carta, our declaration of Independence and both our State and Federal constitutions. It is a fundamental right in our democratic judicial system. Questions which are composed of such qualities sufficient to cause reasonable men to arrive at different results should never be determined as matters of law….To withdraw such questions from the jury is to usurp its function. *Ney v. Yellow Cab Co.,* 2 Ill.2d 74 (1954).

The appellate court was correct to reverse the trial court's grant of summary judgment in this case. This is not the "exceptional case" where Defendants' willful and wanton conduct should be decided as a matter of law, and there is no absolute immunity available to Defendants under §2-201. Accepting Defendants' arguments would require this Court to resolve factual disputes in Defendants' favor and impermissibly expand the legislatively established parameters of municipal immunity beyond the plain language of the Act. Whether Defendants' conduct amounts to willful and wanton supervision under §3-108(a) is a question of fact. This Court should affirm the decision of the appellate court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Supreme Court Rule 341(c), I certify that this brief conforms to the requirements of Rules 341(a) and (b). 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, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 50 pages.

Respectfully submitted,

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IN THE SUPREME COURT OF ILLINOIS

KEVIN HAASE and RILEY HAASE, *Plaintiffs-Appellees*, vs. KANKAKEE SCHOOL DISTRICT 111 and DARREN WILBUR DAYHOFF, *Defendants-Appellants.*	)	No. 131420

NOTICE OF FILING AND CERTIFICATE OF SERVICE

To: See attached Service List

Please take notice that on June 4, 2025 before 4:30 pm, the undersigned filed the plaintiffs-appellees' Brief, electronically via the courts' Odyssey Efile system with the Clerk of the Illinois Supreme Court, a copy of which is enclosed with this Notice of Filing.

The undersigned hereby certifies, pursuant to 735 ILCS 5/1-109, that on June 4, 2025 before 4:30 pm, that she served a copy of this Notice and the plaintiffs-appellees' Brief via the court's Odyssey Efile system and via email on the parties listed on the attached Service List, and that the information contained in this Notice is true and correct.

//Lynn D. Dowd//

One of the attorneys for the plaintiffs-appellees, Kevin Hasse and Riley Hasse

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Haase v. Kankakee School District 111, et al., No. 131420

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