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Carla Bender
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Court, IL

2017 IL App (4th) 160857-U

NO. 4-16-0857

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

HOPE FARNEY, as Independent Administratrix of the Estate of KITTY MULLINS, deceased, Plaintiff-Appellant, v. MATTHEW GEERDES, Individually; LARRY THORNDYKE, Individually; UNIVERSITY LUTHERAN MINISTRY OF BLOOMINGTON-NORMAL; ST. PAUL'S EVANGELICAL LUTHERAN CHURCH, ROBERTS, ILLINOIS, Defendants-Appellees.	)	Appeal from Circuit Court of Ford County No. 13L14 Honorable Matthew J. Fitton, Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Harris and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding the trial court did not err in granting summary judgment in favor of defendants where (1) no reasonable person could conclude defendant Geerdes was acting within the scope of his employment, and (2) no genuine issue of material fact existed as to defendant Thorndyke's alleged negligence.

¶ 2 Plaintiff, Hope Farney, independent administratrix of the estate of Kitty Mullins, filed a third amended complaint against defendants, Matthew Geerdes, Larry Thorndyke, University Lutheran Ministry of Bloomington-Normal (University Lutheran), and St. Paul's Evangelical Lutheran Church, Roberts, Illinois (St. Paul's). The claims arose from a car collision in which Geerdes's vehicle struck Mullins's vehicle, resulting in her death. The complaint alleged 10 counts of wrongful death and survival action claims on behalf of Mullins's surviving

husband and five children. Specifically, the complaint alleged, in part, (1) Geerdes, a pastor who worked part-time at both St. Paul's and University Lutheran, acted negligently by talking on his phone at the time of the accident; and (2) Thorndyke, the council president at St. Paul's, acted negligently by knowingly calling and distracting a person who was driving. The complaint alleged liability under a theory of *respondeat superior* against University Lutheran and St. Paul's based on Geerdes's alleged negligence. The complaint further alleged *respondeat superior* liability against St. Paul's based on Thorndyke's alleged negligence. Thorndyke, University Lutheran, and St. Paul's filed separate motions for summary judgment. The trial court granted all three motions and entered summary judgment in favor of Thorndyke, University Lutheran, and St. Paul's.

¶ 3 Plaintiff appeals, arguing the trial court erred in granting summary judgment in favor of St. Paul's and Thorndyke. For the following reasons, we affirm.

¶ 4 I. BACKGROUND

¶ 5 This case arises out of an October 2013 automobile accident in which Geerdes failed to yield, causing his vehicle to collide with Mullins's vehicle. The accident caused Mullins's death, and Farney, as the administrator of Mullins's estate, filed a third amended complaint against defendants.

¶ 6 A. Third Amended Complaint

¶ 7 The third amended complaint alleged various wrongful death and survival action claims on behalf of Mullins's surviving husband and five children. We summarize only those counts on which the trial court granted summary judgment that plaintiff challenges on appeal.

¶ 8 1. *Counts III and IV—Thorndyke*

¶ 9 Counts III and IV respectively alleged claims for wrongful death and a survival action based on Thorndyke's negligence. The counts alleged Thorndyke and Geerdes were engaged in a telephone conversation in the immediate moments prior to the accident and Thorndyke knew, or should have known, Geerdes was driving. The complaint further alleged Thorndyke had a duty to exercise reasonable care and caution to prevent and avoid causing injury and damage to others. Thorndyke allegedly violated this duty when he negligently (1) initiated a telephone conversation with a person he knew, or should have known, was driving; (2) participated in a telephone conversation with a person he knew, or should have known, was driving; or (3) distracted a person he knew, or should have known, was driving. The complaint alleged the negligent acts were the direct and proximate cause of the accident and Mullins's death.

¶ 10 2. *Counts VII and VIII—St. Paul's Liability for Geerdes's Conduct*

¶ 11 Counts VII and VIII respectively alleged claims for wrongful death and a survival action against St. Paul's based on vicarious liability for Geerdes's negligent actions. The counts alleged Geerdes violated his duty to exercise reasonable care and caution in the operation and control of his vehicle. Further, the complaint alleged that, at the time of the accident, Geerdes was an employee of St. Paul's and acting (1) as an agent of St. Paul's, (2) within the scope of his employment, (3) substantially within the authorized time and space limits of his employment, and (4) for the purpose of serving St. Paul's interests. At all relevant times, the complaint alleged, St. Paul's directly supervised and controlled Geerdes.

¶ 12 B. Summary Judgment

¶ 13 St. Paul's filed a motion for summary judgment, asserting, in relevant part, Geerdes was not acting within the scope of his employment with St. Paul's at the time of the

accident. Thorndyke filed a motion for summary judgment, alleging there was no evidence he knew, or should have known, Geerdes was driving when Thorndyke called him. The parties relied on Geerdes's and Thorndyke's depositions, as well as cellular phone records.

¶ 14 1. *Geerdes's Deposition*

¶ 15 Geerdes lived in a parsonage in Roberts, Illinois, owned by St. Paul's. Combined, Geerdes and his wife worked approximately 45 to 50 hours per week for St. Paul's. Other than Sunday services, the hours were flexible and Geerdes had no set schedule. Although the hours were generally during the daytime, Geerdes's schedule varied based on whether parishioners needed help, if a meeting was scheduled, or if there was a gathering for church members. The church compensated Geerdes and his wife with a salary, insurance, pension, and housing. Geerdes also worked part-time at University Lutheran in Normal, Illinois. His schedule at University Lutheran also varied, and Geerdes had nothing scheduled on the morning of the accident.

¶ 16 On the day of the accident, Geerdes was driving from the parsonage in Roberts to University Lutheran in Normal. The accident occurred at the intersection of 1300 North Road and 1100 East Road shortly after 9:15 a.m. Geerdes was approximately 5 miles into his 50-mile commute to Normal, traveling westbound on 1300 North Road. Geerdes stated, "I was driving along and felt the impact and that was—that was my primary experience of it." Geerdes did not notice anything prior to the impact or see a yield sign. He acknowledged that, although he did not see it at the time, he had a yield sign and Mullins did not.

¶ 17 At the time of the accident, Geerdes testified he was on the phone with Thorndyke. Although he was on the phone with Thorndyke, Geerdes said he did not feel he was distracted by it. Counsel asked Geerdes if he remembered what the phone call was about.

Geerdes responded, "It was just that—we had a previous discussion at other times about some plumbing issues at the parsonage. So it was just related to my house and that we had already had authorization to call out a plumber. I had spoken with the plumbing office that day. So I was just letting [Thorndyke] know the plumber was coming and what the estimate was." In response to Thorndyke's request to admit, Geerdes admitted he had not told Thorndyke where he was or what he was doing at the time of the accident.

¶ 18 2. *Thorndyke's Deposition*

¶ 19 Thorndyke stated his duties as the president of the church council at St. Paul's included organizing and calling church council meetings. On the day of the accident, Thorndyke was entering a business to buy a door handle in Gillman, Illinois, when Geerdes called his cellular phone. Because he was about to enter a store, Thorndyke thought he would call Geerdes back after he finished making his purchase. Thorndyke's first attempt to return Geerdes's call was dropped. Thorndyke's second call went through, but the men were only able to say "hello" before the call was dropped. According to Thorndyke, this occurred sometime after 9 a.m. but before 12 p.m. After Thorndyke placed the second phone call, he went home. A third attempt to return Geerdes's call went straight to voicemail. Thorndyke testified he had no idea whether he was speaking with Geerdes at the time of the collision. Thorndyke also said he was unaware Geerdes was driving at the time of the phone calls.

¶ 20 Cellular phone records show a call from Geerdes to Thorndyke at 9:12:09 a.m. The records also show Thorndyke called Geerdes at 9:13:15 a.m., and the call lasted 1 minute and 26 seconds. A second call from Thorndyke to Geerdes was placed at 9:15:04 a.m., and it appears the call was forwarded to voicemail. Another entry appears to show Geerdes calling his voicemail at 9:15:25 a.m., which is the exact time the record shows a call from Thorndyke to

Geerdes (both calls lasted 24 seconds). It is unclear whether this entry shows a new call from Thorndyke or if it shows Geerdes listened to Thorndyke's voicemail. Thorndyke's cellular phone bill shows he placed three calls to Geerdes on the day in question: one at 9:13 a.m., one at 9:14 a.m., and one at 9:49 a.m. Each of the three calls lasted two minutes.

¶ 21 In 2013, Thorndyke spoke with Geerdes approximately once a week and occasionally saw him around town. According to Thorndyke, Geerdes's schedule was consistent in that he had to preach on Sundays. Thorndyke stated that Geerdes was free to engage in other community outreach activities, but his primary responsibility was preaching on Sundays. Thorndyke was aware of Geerdes's involvement at University Lutheran but did not know any details about his schedule or time commitment there. Beyond preaching on Sundays, Thorndyke stated he had no knowledge of how Geerdes spent his time.

¶ 22 The Sunday before the accident, Geerdes told Thorndyke the washing machine at his house was not draining properly and Thorndyke recommended a plumber. The church owned Geerdes's house and paid for any repairs. When asked if Geerdes was required to get authorization to call a plumber, Thorndyke responded, "We would just like to know what's going on since it's our house. So get authorization, I'm going to say, I guess I would have to say yes." Thorndyke did not know when the plumber was going to service the house and did not discuss the cost with Geerdes. The church provided the landline phone at the house, heat, and electricity. The church did not provide Geerdes's cellular phone service or provide him with a vehicle.

¶ 23 3. *Summary Judgment Ruling*

¶ 24 The trial court found that Geerdes was not acting within the scope of his employment at the time of the car accident. Accordingly, the court granted summary judgment in favor of St. Paul's on the claim of liability under a theory of *respondeat superior* based on

Geerdes's conduct. The court also found Thorndyke did not know Geerdes was driving at the time of the phone calls and, further, he did not owe Mullins a duty. The court therefore granted summary judgment in favor of Thorndyke.

¶ 25 This appeal followed.

¶ 26 II. ANALYSIS

¶ 27 On appeal, plaintiff argues the trial court erred in granting summary judgment in favor of St. Paul's and Thorndyke. Specifically, plaintiff argues the court erred in granting St. Paul's summary judgment motion because a genuine issue of material fact exists as to whether Geerdes was acting in the scope of his employment for St. Paul's at the time of the car accident. Plaintiff further contends the court erred in granting Thorndyke's summary judgment motion because (1) Thorndyke owed Mullins a duty to exercise reasonable caution and not to distract a person—Geerdes—whom he knew, or should have known, was driving; and (2) a genuine issue of material fact exists as to whether Thorndyke knew Geerdes was driving at the time.

¶ 28 A. Standard of Review

¶ 29 In reviewing the entry of summary judgment, the issue on appeal is whether "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2016); see also *Barnett v. Zion Park District*, 171 Ill. 2d 378, 384-85, 665 N.E.2d 808, 811 (1996). Summary judgment is a drastic means of disposing of litigation and should only be allowed when the right of the moving party is clear and free from doubt. *Henry v. Panasonic Factory Automation Co.*, 396 Ill. App. 3d 321, 325, 917 N.E.2d 1086, 1091 (2009). Pleadings, depositions, admissions, and affidavits should be construed strictly against the moving party and liberally in favor of the nonmoving party. *City of*

Maroa v. Illinois Central R.R., 229 Ill. App. 3d 503, 505, 592 N.E.2d 660, 662 (1992). "Although inferences may be drawn from undisputed facts, an issue should be decided by the trier of fact and summary judgment denied where reasonable persons could draw divergent inferences from the undisputed facts." *Id.* We review *de novo* the trial court's entry of summary judgment. *Barnett*, 171 Ill. 2d at 385, 665 N.E.2d at 811.

¶ 30 B. St. Paul's Liability for Geerdes's Conduct

¶ 31 Plaintiff contends a genuine issue of material fact exists as to whether Geerdes was acting within the scope of his employment at the time of the accident. Plaintiff further asserts Geerdes's conduct was of the kind he was employed to perform. Specifically, plaintiff contends the care and upkeep of the parsonage was "unquestionably something Geerdes was expected to perform as part of his employment for St. Paul's." Because Geerdes was on the phone with Thorndyke to discuss the plumbing at the parsonage, plaintiff contends Geerdes was acting within the scope of his employment when he allegedly negligently operated his vehicle.

¶ 32 St. Paul's asserts Geerdes was hired primarily to preach on Sundays and, to a lesser degree, to provide pastoral services to church members without a set schedule—not to maintain the parsonage. St. Paul's further contends Geerdes's phone call was primarily in his own interest and not within the scope of his employment.

¶ 33 Generally, summary judgment is not appropriate when scope of employment is at issue. *Giannoble v. P&M Heating & Air Conditioning, Inc.*, 233 Ill. App. 3d 1051, 1056, 599 N.E.2d 1183, 1186 (1992). Under the theory of *respondeat superior*, an employer may be liable for an employee's torts if the torts are committed within the scope of the employment. *Garland v. Sybaris Club International., Inc.*, 2014 IL App (1st) 112615, ¶ 89, 21 N.E.3d 24. "In the context of *respondeat superior* liability, the term 'scope of employment' excludes conduct by an

employee that is solely for the benefit of the employee." *Deloney v. Board of Education of Thornton Township*, 281 Ill. App. 3d 775, 784, 666 N.E.2d 792, 798 (1996). Although "scope of employment" has no precise definition, Illinois courts rely on the following broad criteria:

> " '(1) Conduct of a servant is within the scope of employment if, but only if:
>
> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limits;
>
> (c) it is actuated, at least in part, by a purpose to serve the master, ***
>
> ***
>
> (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.' " *Pyne v. Witmer*, 129 Ill. 2d 351, 360, 543 N.E.2d 1304, 1308 (1989) (quoting Restatement (Second) of Agency § 228 (1958)).

All three criteria must be met to show an employee acted within the scope of his employment. *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 165, 862 N.E.2d 985, 992 (2007). The plaintiff bears the burden of showing a contemporaneous relationship between the tortious act and the scope of employment. *Giannoble*, 233 Ill. App. 3d at 1057, 599 N.E.2d at 1187. "Only if no reasonable person could conclude from the evidence that an employee was acting within the

course of employment should a court hold as a matter of law that the employee was not so acting." *Id.* at 1056, 599 N.E.2d at 1186.

¶ 34 Section 229 of the Second Restatement of Agency elaborates on the first criterion and directs courts to consider various factual matters in determining whether the employee's conduct is "so similar or incidental to employer-authorized conduct as to be within the scope of employment." *Bagent*, 224 Ill. 2d at 166, 862 N.E.2d at 993. Relevant factual matters include the following:

> "whether the act is one commonly done by such employees; the time, place, and purpose of the act; the previous relations between the employer and the employee; whether the act is outside the enterprise of the employer or, if within the enterprise, has not been entrusted to any employee; whether the employer has reason to expect that such an act will be done; the similarity in quality of the act done to the act authorized; whether the employer furnished to the employee the instrumentality by which the harm is done; and the extent of departure from the normal method of accomplishing an authorized result." *Id.* at 166-67, 862 N.E.2d at 993 (citing Restatement (Second) of Agency § 229(2) (1958)).

Although these factors primarily focus on an employee's physical activities, we use the phrase "scope of employment" to determine an employer's liability for an employee's conduct. *Id.* at 167, 862 N.E.2d at 993. Accordingly, "the ultimate question is whether or not the loss resulting from the employee's acts should justly be considered as one of the normal risks to be borne by the employer." *Id.*

¶ 35 While the parties focus on whether the phone call Geerdes made was conduct within the scope of his employment, we conclude this argument misses the mark. Even if Geerdes's phone call was work-related, plaintiff has not—and indeed, cannot—show Geerdes's allegedly tortious conduct was within the scope of his employment. The allegedly tortious conduct was the negligent operation of his vehicle, not making a phone call. Geerdes's use of his vehicle on the day in question was in no way related to his employment with St. Paul's. See *Lulay v. Parvin*, 359 Ill. App. 3d 653, 657, 834 N.E.2d 989, 993 (2005) (employee was not acting within the scope of employment when riding an employer-owned motorcycle, but not conducting business on behalf of the employer or performing duties as an employee). Plaintiff has failed to persuade, or even argue, that Geerdes's *driving* was within the scope of his employment with St. Paul's. See *Hargan v. Southwestern Electric Cooperative, Inc.*, 311 Ill. App. 3d 1029, 1032, 725 N.E.2d 807, 809 (2000) ("The plaintiff bears the burden of proving the relationship between the tortious act and the scope of employment.").

¶ 36 We conclude Geerdes was not acting within the scope of his employment with St. Paul's when he allegedly negligently operated his vehicle. Accordingly, we affirm the trial court's entry of summary judgment in favor of St. Paul's as to its liability for Geerdes's actions under a theory of *respondeat superior*.

¶ 37 Plaintiff relies on two cases from the appellate court of Georgia: *Clo White Co. v. Lattimore*, 590 S.E.2d 381 (2003), and *Hunter v. Modern Continental Construction Co.*, 652 S.E.2d 583 (2007). In both cases, the court held a question of fact existed as to whether employees who were or may have been on work-related phone calls while on their way to work were acting within the scope of their employment. *Clo White*, 590 S.E.2d at 383; *Hunter*, 652 S.E.2d at 584. In both cases, the court held an employer could not be held liable for a car

accident occurring while an employee is traveling to or from work unless the employee is on a "special mission" or "special circumstances" exist. *Clo White*, 590 S.E.2d at 383; *Hunter*, 652 S.E.2d at 584. In resolving the cases, the court merely stated, without elaboration, evidence that the employees who were or may have been on the phone with the employers raised a jury question as to whether the employees were acting within the scope of their employment. *Clo White*, 590 S.E.2d at 383; *Hunter*, 652 S.E.2d at 584. Neither case provides meaningful analysis applicable to the present case; therefore, we decline to follow the approach taken by the Georgia appellate court.

¶ 38 C. Thorndyke

¶ 39 The question of whether Thorndyke owed Mullins a duty of care is an issue of first impression in Illinois. Plaintiff contends Thorndyke had a duty not to call and distract a person "whom he knows or should know *** is driving and would answer [the] phone." As an initial matter, we note Thorndyke filed a motion to strike a portion of plaintiff's brief, which we ordered taken with the case. Thorndyke objects to plaintiff's citation of certain statistics in support of her public policy argument for imposing a duty on Thorndyke. According to Thorndyke, plaintiff never presented these statistics or arguments to the trial court and, thus, they should not be considered on appeal. We agree, because evidence not presented to the trial court cannot be asserted on appeal. See *Armstrong v. Hedlund Corp*, 316 Ill. App. 3d 1097, 738 N.E. 2d 163 (2000). Thus, Thorndyke's motion to strike is granted. However, even if Thorndyke owed a duty to Mullins, plaintiff has failed to show any evidence Thorndyke knew or should have known Geerdes was driving and, therefore, summary judgment in favor of Thorndyke was warranted.

¶ 40 We assume, without deciding, that Thorndyke owed a duty not to call or distract a person whom he knew or should have known was driving. Our resolution of this issue in no way holds—or lends support to a finding—that a person owes such a duty. However, in this case, even if we assume Thorndyke owed Mullins such a duty, no genuine issue of material fact exists as to whether Thorndyke knew Geerdes was driving. The evidence shows it is undisputed Thorndyke did not know Geerdes was driving at the time of the phone calls. Accordingly, summary judgment in Thorndyke's favor was appropriate.

¶ 41 Plaintiff contends it would be reasonable to infer that Geerdes told Thorndyke he was driving during one of the two phone calls and, thus, there is a genuine issue of material fact as to whether Thorndyke knew Geerdes was driving. To argue that Geerdes might have told Thorndyke he was driving during the calls is speculative. Geerdes testified he called Thorndyke to discuss the plumbing at the parsonage. Geerdes also responded to a request to admit, admitting he had not told Thorndyke what he was doing at the time of the phone calls. Although plaintiff derides this admission as "convenient," it nevertheless exists and supports the trial court's entry of summary judgment in favor of Thorndyke. Thorndyke also testified he had no idea that Geerdes was driving at the time of the phone calls. There is no evidence in the record showing Thorndyke knew or should have known Geerdes was driving and, as such, plaintiff has failed to show a genuine issue of material fact exists as to that aspect of the duty Thorndyke was alleged to have owed Mullins. Because no genuine issue of material fact exists as to Thorndyke's knowledge of Geerdes's driving, plaintiff cannot show Thorndyke knowingly breached a duty not to call and distract Geerdes. Accordingly, we affirm the trial court's entry of summary judgment in Thorndyke's favor.

¶ 42 III. CONCLUSION

¶ 43 For the reasons stated, we affirm the trial court's judgment.

¶ 44 Affirmed.