2015 IL App (1st) 142858-U

No. 1-14-2858

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SIXTH DIVISION
August 21, 2015

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DONNA STROUP,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 11 L 664
	)	
DARNELL KEEL and CITY OF HARVEY,	)	
	)	
Defendants-Appellees,	)	
	)	
(Diovonne Keel,	)	The Honorable
	)	Kathy M. Flanagan,
Defendant).	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

O R D E R

¶1 *HELD*: The circuit court did not err in granting defendant's section 2-619 motion to dismiss because defendant provided a proper affirmative matter to negate plaintiff's claim for negligent and willful and wanton entrustment. In addition, the circuit court did not err in granting summary judgment in favor of both defendants where there were no genuine issues of material fact preventing the entry of judgment on plaintiff's entrustment claims against them,

plaintiff's supervision of a police vehicle claims against them, and plaintiff's failure to notify officers of the unauthorized use of a police vehicle claim against the City of Harvey.

¶2 Plaintiff, Donna Stroup, was involved in an injury-causing car accident with an official police vehicle owned by defendant, the City of Harvey (City). The police vehicle was assigned to defendant, Darnell Keel, but was being driven at the time of the accident by Diovonne Keel,[1] Darnell's teenage son. Plaintiff appeals the circuit court's order dismissing her claims for negligent and willful and wanton entrustment against defendant Darnell pursuant to section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2010)) and its order granting summary judgment in favor of defendants on her remaining claims. On appeal, plaintiff contends the circuit court erred in: (1) dismissing her negligent and willful and wanton entrustment claims against Darnell where his affidavit was not an affirmative matter that defeated her claims; (2) granting summary judgment against defendants where genuine issues of material fact existed preventing entry of such judgment; and (3) finding that defendants were protected by section 4-102 of the Illinois Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/4-102 (West 2010)). Based on the following, we affirm in part, vacate in part, dismiss in part, and remand the case for further proceedings.

¶3 BACKGROUND

¶4 On January 2, 2011, plaintiff and Diovonne were involved in an automobile accident in Harvey, Illinois. At the time of the accident, Diovonne was driving a 2003 Ford Explorer, owned by the City and assigned to Darnell, a City police commander. Plaintiff was driving westbound on 156th Street and had a green light as she entered the intersection of 156th Street

[1] All court documents spell defendant's name as Diovonne Keel. However, defendant's legal name is Divonni Keel. We will use the spelling as reflected in the official court documents.

and Wood Street. Diovonne, with the Explorer's police lights and sirens activated, approached the intersection heading southbound on Wood Street. Diovonne did not obey the red traffic light and, as both cars entered the intersection, the front of plaintiff's vehicle collided with the driver's side of the Explorer. Diovonne was arrested and convicted of aggravated reckless driving.

¶5 City police officer Hal Bischoff was the first to arrive on the scene. Officer Bischoff testified at his deposition that he had been on patrol and observed Darnell's vehicle heading southbound on Wood Street from 154th Street at a high rate of speed with the lights activated. At the time, Officer Bischoff did not recognize the driver of the vehicle. Officer Bischoff continued on patrol northbound for another three minutes before he was alerted by patrol of the accident. Officer Bischoff then proceeded to the scene of the crash.

¶6 When Officer Bischoff arrived, he recognized the driver of the Explorer as Diovonne. Officer Bischoff testified that he knew Diovonne because he had interacted with him at previous crime scenes and stated the area was Diovonne's "stomping ground, so he's around." When Officer Bischoff approached Diovonne after the accident, he was on his cellular phone with Darnell. Diovonne acknowledged that he was driving Darnell's police vehicle and that the vehicle collided with plaintiff's vehicle. Officer Bischoff took Diovonne into custody, placing him in the back seat of his squad car.

¶7 Officer Bischoff further testified at his deposition that, while Diovonne was in his squad car, Darnell "rolled up and opened the door and began talking to [Diovonne.]" Officer Bischoff instructed Darnell to step away from the squad car and to cease speaking to Diovonne. Darnell did not immediately comply with Officer Bischoff's request. Officer Bischoff testified that, later on the day of the accident, Darnell cursed at Officer Bischoff and threatened him with a lawsuit.

Officer Bischoff stated that he was unaware of any prior occasions where Diovonne drove a City vehicle.

¶8 Plaintiff testified at her deposition that, on the date of the accident, Officer Bischoff told her that Diovonne had driven the vehicle at some time before that date to "joy ride." Plaintiff also testified that a woman named "Darlene" told her that the keys to the police vehicle were accessible to Diovonne.

¶9 Scott Stroup, plaintiff's son, stated in his deposition that he encountered Officer Bischoff after the accident in the waiting room at the hospital. Scott stated that Officer Bischoff told him, "off the record, if anybody asks me this, I'll deny it," but that, "this has happened before, he has taken the car before, only this is the first time he didn't pull over." According to Scott's deposition testimony, Officer Bischoff said the driver was related to one of the "high members of the police force, the commander's son had taken the car." Officer Bischoff further informed Scott that things like this go on all the time and that "that" family was a problem.

¶10 Darnell stated in his deposition that, on the date in question, he and his wife left their home to socialize with friends. He left the keys to his police vehicle in his bedroom on the table next to the bed. According to his deposition testimony, since acquiring the take-home police vehicle in 2003, Darnell routinely stored the keys to the vehicle in his bedroom and stated he always did so without incident.

¶11 In Darnell's affidavit, he attested that he had no reason to believe Diovonne previously drove any of his police vehicles or had any intention to do so. Darnell also attested that he never gave Diovonne permission to drive the police vehicle. Darnell attested that the first time he was informed Diovonne took the vehicle was when Diovonne called him from the scene of the accident.

¶12 At his deposition, City Police Chief Denard Eaves stated that City police command staff are all assigned take-home police vehicles because they are on-call 24 hours a day. The rules and regulations of the City police department did not require that keys for take-home police vehicles be stored in a specific manner, or that officers expressly discussed with their families that their police cars were not to be used by other family members. Rather, the rules required an officer to maintain and secure his police vehicle. Chief Eaves stated that he had no knowledge of Diovonne riding in or driving Darnell's assigned police vehicle prior to the date in question. When questioned about Officer Bischoff's reaction to observing the police vehicle traveling at a high rate of speed with its emergency lights activated and being driven by an unknown person, Chief Eaves opined that he expected Officer Bischoff would have "taken some form of action." Chief Eaves stated that Officer Bischoff "could have checked with dispatch."

¶13 Commander Charles Sampson testified at his deposition that he had no knowledge of Diovonne using Darnell's police vehicle prior to the date in question. Commander Sampson additionally testified that he encountered Darnell on one occasion before the date of the accident when he was drinking alcohol in his squad car. Commander Sampson opined that such behavior was "in violat[ion] of departmental rules." Commander Sampson further testified that there were no guidelines regarding the storage of police issued vehicle keys. Commander Sampson opined that the vehicle Officer Bischoff observed being driven by an unknown driver and traveling at a high rate of speed with its emergency lights activated should have been stopped or reported.

¶14 Officers James Brooks and Joseph Ellison also testified at their depositions that they had no knowledge of Diovonne using Darnell's police vehicle prior to the date of the accident. Officer Brooks further opined that he would "expect" an officer who observed a police vehicle being driven by an unknown driver and traveling at a high rate of speed with its emergency lights

activated to be stopped or reported. Officer Ellison stated that if he knew the driver of the vehicle was not police personnel then he would "call it in."

¶15 Plaintiff also secured the deposition of Darrell Stafford, an Illinois State police officer assigned to investigate the accident. According to Officer Stafford, his investigation did not yield any information confirming any prior use of the police vehicle by Diovonne.

¶16 The City operations manual provided that members of the department with assigned vehicles were responsible for the "proper care and maintenance of the vehicle."

¶17 On April 28, 2011, plaintiff filed her first amended complaint against Diovonne, Darnell, and the City. The first amended complaint included twelve counts: (1) negligence against Diovonne (count I); (2) willful and wanton conduct against Diovonne (count II); (3) negligent entrustment of the police vehicle to Diovonne against Darnell, individually and as an agent of the City (count III); (4) willful and wanton entrustment of the police vehicle to Diovonne against Darnell, individually and as an agent of the City (count IV); (5) negligent entrustment of the police vehicle to Darnell against the City (count V); (6) willful and wanton entrustment of the police vehicle to Darnell against the City (count VI); (7) negligent supervision of the police vehicle against Darnell, individually and as an agent of the City (count VII); (8) willful and wanton supervision of the police vehicle against Darnell, individually and as an agent of the City (count VIII); (9) negligent failure to report a police vehicle missing against Darnell, individually and as an agent of the City (count IX); (10) willful and wanton failure to report a police vehicle missing against Darnell, individually and as an agent of the City (count X); (11) negligent failure to notify officers of the unauthorized use of a police vehicle against the City (count XI); and (12) willful and wanton failure to notify officers of the unauthorized use of a police vehicle against the City (count XII).

¶18 On July 14, 2011, the court entered a default judgment against Diovonne on counts I and II.

¶19 On September 22, 2011, Darnell filed a motion to dismiss all claims against him pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615, 2-619 (West 2010)). Darnell attached his affidavit in support of his motion, attesting that Diovonne did not have permission to use the police vehicle on the date of the accident; that Diovonne had never driven the police vehicle prior to the date of the accident; that Diovonne had never asked to drive the police vehicle on a prior occasion; that Diovonne had never indicated an intent to drive the police vehicle; and that he had no reason to believe Diovonne would drive the police vehicle. On April 9, 2012, the circuit court granted Darnell's motion to dismiss the first amended complaint in its entirety pursuant to section 2-615. Plaintiff was granted leave to file a second amended complaint.

¶20 On April 30, 2012, plaintiff filed her second amended complaint, which included all counts from the first amended complaint. On May 21, 2012, Darnell filed a section 2-619 motion to dismiss all claims against him and again attached his affidavit denying that Diovonne had permission to use the police vehicle or that Diovonne had driven the police vehicle. On August 20, 2012, the circuit court granted Darnell's motion to dismiss all counts advanced against him in the second amended complaint. The circuit court dismissed counts III and IV (negligent and willful and wanton entrustment of a police vehicle) against Darnell with prejudice and granted plaintiff leave to file a third amended complaint to replead the remaining counts.

¶21 On September 10, 2012, plaintiff filed her third amended complaint, which included only counts III through X. Plaintiff did not replead her claims of negligent and wanton and willful failure to report a police vehicle missing.[2]

¶22 On September 19, 2012, plaintiff filed a petition to reconsider the circuit court's ruling on Darnell's motion to dismiss the second amended complaint, arguing that Darnell's affidavit was an insufficient affirmative matter to defeat the entrustment claims. On November 16, 2012, the circuit court denied plaintiff's motion to reconsider. The court noted that plaintiff failed, in her response to Darnell's motion to dismiss the second amended complaint or in her motion to reconsider, to provide "a counter-affidavit or any other evidence to raise a question of fact as to whether [Darnell] gave actual or implied permission to use the vehicle."

¶23 On May 27, 2014, Darnell and the City filed motions for summary judgment.

¶24 On August 18, 2014, the circuit court entered summary judgment on all remaining counts of plaintiff's third amended complaint directed at Darnell and the City, finding there were no genuine issues of material fact preventing entry of the judgment**.** The August 18, 2014, order also contained language pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010), providing that there was no just reason to delay the enforcement or appeal of the order. On September 8, 2014, the circuit court entered a subsequent order again entering a finding pursuant to Rule 304(a) that there was no just reason to delay enforcement or appeal of its August 18, 2014, order. In that order, the circuit court noted that counts I and II remained pending against Diovonne, who had failed to appear and was defaulted by order dated July 14, 2011.

¶25 Plaintiff filed a timely appeal.

[2] These claims formerly were counts IX and X in plaintiff's first and second amended complaints; however, based on plaintiff's decision not to replead them, the claims for failure to notify officers of the unauthorized use of a police vehicle against the City (formerly counts XI and XII) were renumbered as counts IX and X in plaintiff's third amended complaint.

¶26 ANALYSIS

¶27 I. Section 2-619 Motion to Dismiss

¶28 Plaintiff first contends the circuit court erred in dismissing the entrustment claims against Darnell pursuant to section 2-619(a)(9) of the Code. Specifically, plaintiff contends Darnell's affidavit did not constitute an "affirmative matter" sufficient to defeat her claims of negligent or willful and wanton entrustment of the police vehicle to Diovonne.

¶29 As a threshold matter, we must consider whether this court has jurisdiction to consider plaintiff's first contention. *In re Marriage of Baumgartner*, 2014 IL App (1st) 120552, ¶ 33 ("[e]ven if the parties fail to raise the issue, a reviewing court has the duty to consider *sua sponte* its jurisdiction to rule on the merits of an appeal"). If this court lacks jurisdiction, we must dismiss the appeal. *Id.*

¶30 On August 20, 2012, the circuit court dismissed counts III and IV of plaintiff's second amended complaint. On November 16, 2012, the circuit court denied reconsideration of its August 20, 2012, dismissal order. Neither of those orders contained language pursuant to Rule 304(a). In order for a party to appeal from an order that does not resolve all of the claims raised in the case, the circuit court must make a finding pursuant to Rule 304(a). Specifically, Rule 304(a) provides, "[i]f multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both." Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). Without Rule 304(a) language, we lack jurisdiction to consider plaintiff's contention related to the dismissal of counts III and IV of her second amended complaint. We, therefore, must dismiss plaintiff’s appeal of those counts.

¶31 II. Summary Judgment

¶32 Plaintiff next contends the circuit court erred in granting summary judgment in favor of Darnell and the City on the claims in her third amended complaint.

¶33 Summary judgment is proper where the pleadings, admissions, depositions, and affidavits on file demonstrate there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(West 2010). While reviewing a motion for summary judgment, all evidence is construed strictly against the moving party and liberally in favor of the nonmoving party. *Id*. Summary judgment is a drastic measure that should only be granted if the movant's right thereto is clear and free from doubt. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). A party that opposes a motion for summary judgment must "present a factual basis which would arguably entitle him to a judgment." *Allegro Services, Ltd. v. Metropolitan Pier & Exposition Authority*, 172 Ill. 2d 243, 256 (1996). However, if the plaintiff fails to establish any element of his claim, summary judgment is deemed appropriate. *Morris v. Margulis*, 197 Ill. 2d 28, 35 (2001). We review a circuit court's decision granting summary judgment *de novo*. *Outboard Marine Corp.*, 154 Ill. 2d at 102.

¶34 A. Counts III and IV – Entrustment of a Police Vehicle to Diovonne Against Darnell, as an agent of the City

¶35 In her third amended complaint, plaintiff brought claims for negligent and willful and wanton entrustment of the police vehicle to Diovonne against Darnell, as an agent of the City under the doctrine of *respondeat superior*. Plaintiff argues that, since the circuit court erred in granting Darnell's section 2-619 motion to dismiss the entrustment claims raised against him, individually, the court also erroneously entered summary judgment in favor of the City on those

counts. The City responds that plaintiff waived her right to review her contention because she failed to assert this argument during the summary judgment proceedings.

¶36 Generally, questions not raised in the circuit court cannot be argued for the first time on appeal. *Parks v. Kownacki*, 193 Ill. 2d 164, 180 (2000). However, the waiver rule is a limitation on the parties, not on the court. *Golden Rule Insurance, Co. v. Schwartz*, 203 Ill. 2d 456, 463 (2003). We will address the merits of plaintiff's contention.

¶37 The City moved for summary judgment asserting that it cannot be liable where its employee was not liable pursuant to section 2-109 of the Tort Immunity Act. The circuit court agreed and entered summary judgment in favor of the City on plaintiff's claims for negligent and willful and wanton entrustment of the police vehicle to Diovonne. The circuit court also provided Rule 304(a) language, making its summary judgment order final and appealable. See *Schal Bovis, Inc. v. Casualty Insurance Co.*, 314 Ill. App. 3d 562, 570 (1999) (a circuit court has discretion whether to grant Rule 304(a) language; we review whether the circuit court abused that discretion).

¶38 Section 2-109 of the Tort Immunity Act states, "[a] local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable." 745 ILCS 10/2-109 (West 2010). As stated, plaintiff's claims against the City in counts III and IV were based upon the doctrine of *respondeat superior*. Because we have found we lack jurisdiction to consider counts III and IV as related to Darnell individually, we find it would be manifestly unfair to review the causes of action as they relate to the City under the doctrine of *respondeat superior*. We, therefore, conclude the circuit court abused its discretion in granting Rule 304(a) language for counts III and IV. As a result, we vacate that finding and dismiss

plaintiff's appeal of the circuit court's August 18, 2014, and September 8, 2014, orders related to counts III and IV against the City.

¶39 B. Counts V and VI – Entrustment of a Police Vehicle to Darnell Against the City

¶40 Plaintiff next contends the circuit court erred in granting summary judgment in favor of the City on her claims for negligent (count V) and willful and wanton (count VI) entrustment of the police vehicle to Darnell.

¶41 An individual is liable for negligent entrustment of a vehicle "where that person entrusts the vehicle to one whose incompetency, inexperience, or recklessness is known or should have been known by the entrustor of the vehicle." *Watson v. Enterprise Leasing Co*., 325 Ill. App. 3d 914, 921 (2001). "Entrustment may be given by either express or implied permission. [Citation.] 'Implied permission exists when a course of conduct or relationship between the parties includes a mutual acquiescence or lack of objection under circumstances signifying permission' or the giving of consent." *Id*. at 922 (quoting *Rainey By & Through Rainey v. Pitera By & Through Pitera*, 273 Ill. App. 3d 234, 237 (1995)). With regard to entrustment of a vehicle, making the keys available does not alone create implied permission. *Rainey*, 273 Ill. App. 3d at 237. The primary considerations in a negligent-entrustment analysis are: (1) whether the owner of the vehicle entrusted the car to an incompetent or unfit driver; and (2) whether the incompetency was a proximate cause of the plaintiff's injury. *Evans v. Shannon*, 201 Ill. 2d 424, 434 (2002).

¶42 We turn first to the question of whether Darnell was a reckless driver and whether his recklessness was known or should have been known by the City. In her third amended complaint, plaintiff claimed the City knew or should have known Darnell was incompetent or reckless with the vehicle, in that he would allow Diovonne to obtain the keys and use the police vehicle or fail to safeguard the vehicle while at his home. In support of her claim, plaintiff relied

on Diovonne's past use of the vehicle, as told to her son, Scott, by Officer Bischoff, and Darnell's prior infractions as noted in his police personnel file.

¶43 Based on our review of the record, we find plaintiff failed to establish claims for negligent and willful and wanton entrustment of the police vehicle to Darnell against the City. Initially, plaintiff failed to provide evidence that Diovonne had actually driven the vehicle prior to the accident or that the City had any knowledge of Diovonne's behavior to indicate he had an intention to operate the vehicle. The speculative testimony relied upon by plaintiff merely *implied* Diovonne had driven the vehicle before. Scott's deposition testimony, however, did not establish that Officer Bischoff reported observing or having knowledge that Diovonne drove Darnell's police vehicle on a prior occasion. Instead, the "off the record" discussion between Scott and Officer Bischoff included assumptions and ambiguous references to "the commander's son['s]" past use of "the car." The testimony was speculative and did not relay actual facts regarding Officer Bischoff's knowledge of Diovonne, Darnell, and the police vehicle that could be imputed to the City. See *In re E.L.*, 152 Ill. App. 3d 25, 31 ("it is well established *** that supporting documents opposing a motion for summary judgment must recite facts and not mere conclusions or statements based on information and belief").

¶44 In addition, plaintiff failed to establish that the incidents in Darnell's police personnel file demonstrated the City knew or should have known Darnell would be reckless or negligent with his police vehicle. Plaintiff relied on the following violations in Darnell's personnel file: (1) failure to wear a seat belt; (2) failure to activate his police video camera; (3) vehicle pursuit where he almost struck a civilian; (4) involvement in an accident; (5) leaving a window in the vehicle open; (6) failure to report striking a civilian to his supervisor; and (7) failure to submit to a drug and alcohol screening after being involved in an accident. In addition, plaintiff relied on

Darnell's testimony admitting that he drove his family in the police-issued vehicle and Commander Sampson's testimony that Darnell was observed drinking in his police-issued vehicle on one occasion.

¶45 The cited incidents were not similar enough to the issue in this case to show that the City could have or should have foreseen reckless conduct on Darnell's part with regard to the supervision of his police vehicle. See *Evans v. Shannon*, 201 Ill. 2d 424, 435 (2002) (knowledge of six prior incidents involving employees did not establish negligent entrustment where those incidents were unrelated to the type of reckless vehicle operation that caused the injury at issue). Importantly, all of the incidents in Darnell's personnel file occurred prior to being assigned a take-home police vehicle. Moreover, the incidents were not closely related to the supervision and safeguarding of Darnell's vehicle while at home; rather, they were related to police activities occurring while he was on duty. With regard to the claim that Darnell drove his family in his police-issued vehicle, that admission cannot be expanded to establish Darnell permitted Diovonne to drive the vehicle himself. See *id*. at 439-40 (permission given to an employee of an auto cleaning and detailing business to retrieve a vehicle from a car company and bring it to the detailing place of business did not extend to permitting the employee to take the vehicle for a drive later that night while intoxicated, which resulted in an injury-causing accident).

¶46 Because we have concluded that plaintiff failed to establish Darnell was a reckless driver and the City knew or should have known of his recklessness, we need not determine whether the recklessness was a proximate cause of plaintiff's injuries.

¶47 In sum, we conclude plaintiff failed to establish there were genuine issues of material fact precluding the entry of summary judgment on counts V and VI of her third amended complaint.

¶48 C. Counts VII and VIII – Supervision of a Police Vehicle Against Darnell, Individually and As An Agent of and the City

¶49 Plaintiff additionally contends the circuit court erred when it found that Darnell owed no duty to protect his police vehicle from unauthorized use or access and further that, if there was such a duty, Darnell's conduct would be shielded by section 4-102 of the Tort Immunity Act (745 ILCS 10/4-102 (West 2010)). Counts VII and VIII alleged that Darnell breached his duty to protect police property in his care and custody and that he was acting within the scope of his employment at the time of the breach, thereby imputing vicarious liability to the City.

¶50 Our supreme court has emphasized that a court first must determine if any duty of care by a public entity exists before deciding whether a governmental unit or employee is immune from negligence liability based on willful and wanton acts or omissions. *Albert v. Board of Education of City of Chicago*, 2014 IL App (1st) 123544, ¶ 29. Whether a local public entity owed a duty of care and whether that entity enjoyed immunity are distinct issues. *Id*. If there is no duty owed by the defendant, it is axiomatic that the plaintiff cannot recover from the defendant. *Id*. If a duty is found, we turn to the Tort Immunity Act to determine whether the entity in question is immune from a breach of that duty. *Id*. Whether a duty on the part of the public entity exists is a question of law that we review *de novo*. *Id*. ¶ 30. In addition, the interpretation of the Tort Immunity Act is a matter of law reviewed *de novo*. *Id*.

¶51 "The existence of a duty depends on whether the plaintiff and the defendant stood in such a relationship to each other that the law will impose upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff." *Bajwa v. Metropolitan Life Insurance Co.*, 208 Ill. 2d 414, 421-22 (2004). Generally, one does not owe a duty of care to protect another from criminal acts of third persons. *MacDonald v. Hinton*, 361 Ill. App. 3d 378, 382 (2005).

¶52 To demonstrate that Darnell owed her a duty, plaintiff cited the City's police operations manual requiring an officer to remove the keys from his vehicle's ignition and secure the vehicle. Moreover, plaintiff relied on deposition testimony from Darnell, Chief Eaves, and Commander Sampson to establish that officers were duty bound to safeguard their city-issued vehicles. Plaintiff additionally relied on the affidavit of Ken Katsaris, a purported police procedures expert. Katsaris' affidavit, however, was struck by the circuit court for failing to comply with Illinois Supreme Court Rule 19(a). We agree with that finding and will not consider the affidavit.

¶53 We similarly find the generalized duty alleged by plaintiff failed to establish a standard of care under which Darnell was obligated to secure his keys. There was no evidence to support such a duty. At best, Darnell was required to remove his keys from the ignition of the police vehicle and secure the vehicle. There is no dispute that Darnell satisfied that duty where his vehicle keys routinely were kept on the table next to his bed. Moreover, Chief Eaves and Commander Sampson both testified at their depositions that there was no specified manner in which the officers were required to store their police-issued vehicle keys.

¶54 In addition, plaintiff cannot establish that Darnell owed a duty to protect her from Diovonni's criminal acts where a special relationship did not exist between them and the harm was not foreseeable. *Aidroos v. Vance Uniformed Protection Services, Inc.*, 386 Ill. App. 3d 167, 172 (2008) (citing the exceptions to the general rule against a duty of care to protect another from the criminal acts of a third person). As stated repeatedly, Darnell had no reason to believe Diovonni would take his keys and drive his police vehicle without permission. The harm, therefore, was not foreseeable. See also *Cwiklinski v. Jennings*, 267 Ill. App. 3d 598, 601 ("[i]n order to impose a duty upon an owner, it is insufficient to allege simply that the owner left the

car keys easily accessible to a thief, without alleging any other special circumstances giving the car owner reason to believe that there was an unreasonable risk that the car would be stolen").

¶55 Because we conclude that Darnell did not have a duty to protect his police vehicle from unauthorized use or access, we need not address whether the Tort Immunity Act would protect him from liability.

¶56 In sum, we conclude there were no genuine issues of material fact precluding the entry of summary judgment in favor of Darnell and the City on counts VII and VIII.

¶57 D. Counts IX and X – Failure to Notify Officers of the Unauthorized Use of a Police Vehicle Against the City

¶58 Plaintiff finally contends the circuit court erred in granting summary judgment in favor of the City on counts IX and X, where she alleged failure to notify officers of the unauthorized use of a police vehicle. Plaintiff argues that section 4-102 of the Tort Immunity Act did not shield the City from liability.

¶59 As stated, in order to determine whether the Tort Immunity Act applies, we first must ascertain whether the City had a duty to notify officers that Diovonne was driving Darnell's police vehicle. "The Tort Immunity Act grants only immunities and defenses; it does not create duties. Rather, the Tort Immunity Act merely codifies existing common-law duties, to which the delineated immunities apply." *In re Marriage of Murray*, 2014 IL App (2d) 121253, ¶ 36**.**

¶60 As discussed above, in order to establish a duty, a plaintiff must demonstrate he and the defendant stood in such a relationship with one another that the law imposes an obligation of reasonable conduct on the defendant for the benefit of the plaintiff. *Bajwa*, 208 Ill. 2d at 421-22. Ordinarily a party does not owe a duty of care to protect another from harmful or criminal acts of third persons. *MacDonald*, 361 Ill. App. 3d at 382. However, the law recognizes four

exceptions to the general rule. *Id*. The exception relevant to this case provides that the general rule is excepted when the parties are in a special relationship and the harm is foreseeable. *Id*.

¶61 Plaintiff relied on the deposition testimony of City police officers as evidence that the City owed her a duty and breached that duty, including deposition testimony from Chief Eaves, Commander Sampson, and Officers Brooks and Ellison. The City responds that plaintiff waived her right to contest that the conduct alleged was shielded by section 4-102 of the Tort Immunity Act where she failed to raise such an argument during the summary judgment proceedings.

¶62 Despite plaintiff's failure to raise her argument before the circuit court during the summary judgment proceedings, we are not limited by the waiver rule and will address the merits of plaintiff's contention despite waiver. *Parks*, 193 Ill. 2d at 180; *Golden Rule Insurance, Co.*, 203 Ill. 2d at 463.

¶63 In the deposition testimony relied upon by plaintiff, Chief Eaves opined that, under the circumstances presented, he wished Officer Bischoff had taken some action to report the situation prior to the accident**.** The other officers added their opinions that Officer Bischoff should have either stopped the speeding vehicle or reported it to dispatch. The record, however, is devoid of any policy requiring an officer to notify the City and, in turn, requiring the City to notify other officers, of the unauthorized use of a police vehicle. Furthermore, plaintiff failed to demonstrate that the exception to the general prohibition against imposing a duty to protect from the crimes of third persons applied in this case. More specifically, plaintiff failed to establish she had a special relationship with the City. In addition, it cannot be said that the harm was foreseeable to Officer Bischoff where he only testified that he did not recognize the driver of the police vehicle. In his report, Officer Bischoff provided that the driver was unknown and not police personnel. The police vehicle, however, could have been driven by someone unknown to

Officer Bischoff, but whom was authorized to do so. We, therefore, conclude that plaintiff failed to establish the City had a duty to notify officers that Diovonne was driving Darnell's police vehicle.

¶64 In light of our conclusion, we need not address whether the Tort Immunity Act applies.

¶65 CONCLUSION

¶66 We affirm the judgment of the circuit court as to counts V, VI, VII, VIII, IX, and X. We dismiss plaintiff's appeal from the dismissal of counts III and IV as against Darnell Keel. We vacate the circuit court's Rule 304(a) finding as to summary judgment entered in favor of the City on counts III and IV and dismiss the appeal from the summary judgment ruling in favor of the City on counts III and IV. We remand the case to the circuit court.

¶67 Affirmed in part; vacated in part; dismissed in part; and remanded.