2017 IL App (1st) 160745-U

THIRD DIVISION
May 3, 2017

No. 1-16-0745

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

JENNIFER E. GARLAND, Independent Administrator of the Estate of SCOTT A. GARLAND, Deceased, Plaintiff-Appellant, v. SYBARIS CLUBS INTERNAITONAL, INC., a corporation, SYBARIS VENTURES ONE, LLC, a corporation, H.K. GOLDEN EAGLE, INC., a corporation, RANDALL D. REPKE, Independent Executor of the Estate of KENNETH C. KNUDSON, Deceased, HOWARD D. LEVINSON and HARK CORPORATION, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County No. 15L3633 The Honorable Irwin J. Solganick, Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Cobbs and Pucinski concur in the judgment.

ORDER

¶ 1 Held: Doctrine of law of the case inapplicable where issue was not previously determined; summary judgment reversed where issues of material fact remain. Reversed and remanded.

¶ 2 Plaintiff-appellant Jennifer E. Garland, Independent Administrator of the Estate of Scott A. Garland, Deceased (Garland) appeals from the trial court's grant of summary judgment against her and in favor of defendants-appellees Sybaris Club International, Inc., and Sybaris Ventures One, LLC (Sybaris), in a suit based in negligence. On appeal, Plaintiff contends the trial court erred in granting summary judgment where this court's prior ruling on the case bound the trial court as law of the case such that the trial court should have been precluded from entering summary judgment; and, regardless of this court's prior ruling, summary judgment was inappropriate in this cause where there are genuine issues of material fact. For the following reasons, we reverse and remand this cause for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 This is the fourth time this case has come before this court. We will, accordingly, give but a brief recitation of the facts, which can also be found in the previous appeals: *Waugh v. Morgan Stanley and Co., Inc*., 2012 IL App (1st) 102653; *Garland v. Morgan Stanley and Co., Inc.*, 2013 IL App (1st) 112121; *Garland v. Sybaris Clubs, International, Inc., et al*, 2014 IL App (1st) 112615 (*Garland I*). The appeals all stemmed from a fatal airplane crash which resulted in the deaths of all four individuals onboard the aircraft. On January 30, 2006, Mark Turek, the pilot in command of a Cessna 421B aircraft, and three passengers, Kenneth Knudson, Scott Garland, and Michael Waugh, were en route from a Kansas airport to the Palwaukee Municipal Airport in Wheeling, Illinois, following a business trip. As Turek piloted the Cessna 421B for landing at the airport, the aircraft crashed, killing all four occupants onboard.

¶ 5 Briefly, Turek, Garland, and Waugh were onboard for a Morgan Stanley business trip and Knudson had a prospective business customer in Kansas with whom he wanted to meet. Turek was interested in possibly becoming a part owner of the subject aircraft. The accident aircraft

was owned, operated, and maintained by HK Golden Eagle, Inc. Decedent Knudson and Howard Levinson co-owned HK Golden Eagle. Sybaris had purchased the accident aircraft in August 2004. In May 2005, the airplane registration was transferred to HK Golden Eagle, Inc., a corporation formed by Knudson and Levinson to own the aircraft. Hark Corporation, an entity owned by Levinson and his wife and created for the purpose of owning the aircraft, was a co-owner of the accident aircraft, along with Knudson, as shareholders of HK Golden Eagle. On the day of the crash, Knudson and Levinson were the owners of the accident aircraft through HK Golden Eagle. They were considering new partners, and Turek was interested in purchasing a partial ownership in the aircraft. Turek arranged with Knudson to fly Garland and Waugh to Kansas in the accident aircraft for the purpose of engaging in a test and demonstration flight that would allow Knudson, who was an experienced pilot, to evaluate whether he wanted to bring Turek in as a partner in the aircraft.[1] Turek received flight training tailored specifically to a Cessna 421B aircraft at Recurrent Training Center.

¶ 6 The estates of each decedent filed wrongful death and survival actions, including the three cases this court has previously ruled upon, *Waugh*, 2012 IL App (1st) 102653; *Garland v. Morgan Stanley & Co.*, 2013 IL App (1st) 112121; and *Garland I*, 2014 IL App (1st) 112615. In *Waugh*, appellant Morgan Stanley, the estate of Scott Garland, and the estate of Mark Turek appealed from orders of the trial court granting partial summary judgment in favor of appellees Howard Levinson and Hark Corporation on all claims alleging educational malpractice. *Waugh*, 2012 IL App (1st) 102653, ¶ 1. On appeal, appellants contended that the trial court erred by characterizing their claim as sounding in the tort of educational malpractice rather than in

[1] As in the prior appeal, the parties agree that Knudson was evaluating Turek to determine whether he should be brought in as a partner in ownership of the aircraft, but disagree as to whether that evaluation was specific to Turek's flying capabilities in a Cessna 421B aircraft, or as to his personality and whether he would be a good "fit" in the aircraft partnership.

ordinary negligence. *Waugh*, 2012 IL App (1st) 102653, ¶ 1. Counterdefendant-appellee Recurrent Training Center, Inc., challenged this court's jurisdiction of the cause and asked that this court dismiss the cross-appeal filed against it as untimely. *Waugh*, 2012 IL App (1st) 102653, ¶ 1. We affirmed the decision of the trial court, finding that the claims at issue did, in fact, sound in educational malpractice, which is a noncognizable tort in the state of Illinois. *Waugh*, 2012 IL App (1st) 102653, ¶ 48. We also found that this court had proper jurisdiction over the cause. *Waugh*, 2012 IL App (1st) 102653, ¶ 54.

¶ 7 The second case, *Garland v. Morgan Stanley & Co.*, 2013 IL App (1st) 112121, involved claims filed by plaintiff Jennifer Garland, the widow and administrator of the estate of decedent Garland, seeking recovery from decedent Garland's employer, Morgan Stanley & Co., Inc., as well as Garland's co-employee and the estate of the deceased pilot of the aircraft at the time of the accident, Mark Turek. *Garland*, 2013 IL App (1st) 112121, ¶ 1. Morgan Stanley and Donna Turek, Mark Turek's widow and the administrator of the estate of Mark Turek, sought dismissal of Garland's common law tort claims based on the exclusive remedy provision of the Illinois Workers' Compensation Act (820 ILCS 305/1 *et seq.* (West 2010)). *Garland*, 2013 IL App (1st) 112121, ¶ 2. The circuit court granted partial summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1005) (West 2010)) as to her claims against the estate of Turek, as well as a motion to dismiss pursuant to section 2-619 of the Code (735 ILCS 5/2-615 (West 2010)) on the claim seeking recovery from decedent Garland's employer, Morgan Stanley & Co., Inc. *Garland*, 2013 IL App (1st) 112121, ¶ 2. On appeal, this court affirmed the trial court's ruling, holding that the application of the exclusive remedy provision of the Workers' Compensation Act was appropriate where the death was accidental and the

employer, Morgan Stanley, was not acting in a dual capacity at the time of the aircraft crash. *Garland*, 2013 IL App (1st) 112121, ¶ ¶ 31, 48, 50.

¶ 8 The third case before this court, *Garland I*, 2014 IL App (1st) 112615[2], also arose from the death of Scott Garland. Garland's surviving spouse, plaintiff Jennifer Garland, filed a complaint[3] against numerous persons and entities following Garlands' death. By her complaint, plaintiff sought recovery for Garland's death on a number of grounds. As to the Levinson defendants, plaintiff alleged that Levinson had been negligent in entrusting the aircraft to Turek, whom she alleged was not qualified to fly that particular type of aircraft. As to Knudson, plaintiff alleged both negligent entrustment of the aircraft and negligent supervision, alleging that Knudson, who was onboard the doomed flight, failed to properly supervise Turek during the flight itself. As to HK, owner of the aircraft, plaintiff alleged it was vicariously liable for its agents, Levinson and Knudson.

¶ 9 Plaintiff also sued Sybaris, a group of hotels whose president and founder was Knudson, who conducted the doomed flight in the course of Sybaris business and who was, allegedly, a *de facto* owner of the aircraft. Plaintiff alleged that Sybaris was liable for injuries caused to decedent Garland, that Sybaris was vicariously liable for the acts and omissions of its alleged agent, Knudson, and that Sybaris is directly liable for its own actions related to the accident flight. Sybaris filed a motion to dismiss pursuant to section 2-619 of the Code arguing, in pertinent part, that there was no evidence that Sybaris was or could be vicariously liable for Knudson's actions; and that Sybaris could not be liable for negligent entrustment because it did not own the subject aircraft.

[2] We refer to this case herein, at times, as "the prior appeal".
[3] Eventually, the complaint heard by the court was plaintiff's ninth amended complaint. For ease and clarity, we refer to the ninth amended complaint herein as "the complaint".

¶ 10 The circuit court dismissed plaintiff's ninth amended complaint pursuant to section 2-619 of the Code. *Garland I*, 2014 IL App (1st) 112615. On appeal, this court affirmed in part and reversed in part. *Garland I*, 2014 IL App (1st) 112615, ¶ 104. Most important to the case at bar, Garland successfully challenged the dismissal of the negligent entrustment claims, and this court reversed that issue in October 2014. *Garland I*, 2014 IL App (1st) 112615, ¶ 104. We also held that Garland's claims were sufficient to withstand a section 2-619 motion to dismiss regarding negligent entrustment as to Knudson and reversed as to that issue; that Sybaris was not a *de facto* owner of the aircraft; and that there was insufficient evidence in the record regarding "whether and to what extent Knudson was traveling on Sybaris business" for the issue of vicarious liability against Sybaris for Knudson's alleged negligence to be dismissed by a section 2-619 motion. *Garland I*, 2014 IL App (1st) 112615, ¶¶ 94,103.

¶ 11 In September 2015, Sybaris filed a motion for summary judgment pursuant to section 2-1005 of the Code (735 ILCS 5/2-1005 (West 2014)). By that motion, which motion is the subject of the instant cause, Sybaris argued that summary judgment was appropriate where: the law of the case precludes judgment for Garland; and Sybaris could not be held liable for negligent entrustment because it had no legal ownership interest in the aircraft at the time of the accident. It relied on the following statement in this court's previous opinion in support:

> "Plaintiff attempts to stretch the theories espoused in these [previously discussed] cases to encompass airplanes that have legally changed owners and to, inexplicably and without further citation to authority, require these previous and now *de facto* owners to be responsible for aircraft that is no longer theirs. Where there is no support for this in the case law, plaintiff is unable to withstand a motion to dismiss pursuant to section 2-619 of

the Code, and we find no error in the trial court's dismissal of this issue." *Garland I*, 2014 IL App (1st) 112615, ¶ 99.

Then, having established the fact that it was neither an official owner nor a *de facto* owner of the aircraft, Sybaris argues that, with discovery closed, there will "never be any contrary discovery on [the] issue of aircraft ownership." Therefore, this issue was ripe for summary judgment where there was no question of fact because "Sybaris had no right of legal control of the subject aircraft, could not consent to Mark Turek's use of the aircraft, and could not entrust the aircraft as a matter of law."

¶ 12 In February 2016, the court granted defendant Sybaris' motion for summary judgment.[4] Plaintiff appeals.

¶ 13 II. ANALYSIS

¶ 14 i. Law of the Case

¶ 15 Plaintiff first asserts that the trial court erred in granting summary judgment against her and in favor of Sybaris because it violated the doctrine of law of the case. She claims that, because we reversed the granting of a section 2-619 motion to dismiss in our prior opinion and remanded the issue of Sybaris' vicarious liability for negligent entrustment to the trial court, the law of the case doctrine now bars Sybaris' motion for summary judgment. We disagree.

¶ 16 The law of the case doctrine states that, " 'where an issue has been litigated and decided, a court's unreversed decision on that question of law or fact settles that question "for all subsequent

[4] Plaintiff notes in her appellate brief:

> "The same order that granted Sybaris' motion for summary judgment, also granted partial summary judgment to all the other Defendants with respect to the survival counts for Garland's own pain and suffering, which had been brought as a companion to the wrongful death count as to each defendant. The Plaintiff's Notice of Appeal includes all the orders entered that day, but subsequently, after reviewing the case, determined to dismiss the survival count appeals. Accordingly, only the appeal with respect to the summary judgment in favor [of] Sybaris remains. In the event of the reversal of the summary judgment in favor of Sybaris, the survival count relating to it will not be prosecuted and can be dealt with by agreement."

stages of the suit." ' " *Alwin v. Village of Wheeling*, 371 Ill. App. 3d 898, 909 (2007) (quoting *Pekin Ins. Co. v. Pulte Home Corp.*, 344 Ill. App. 3d 64, 69 (2003), and *Norton v. City of Chicago*, 293 Ill. App. 3d 620, 624 (1997)); accord *Radwill v. Manor Care of Westmont, IL, LLC*, 2013 IL App (2d) 120957, ¶ 8 (questions of law decided in previous appeal are binding on trial court upon remand as well as upon appellate court in subsequent appeals). This includes a reviewing court's " 'explicit decisions, as well as those issues decided by necessary implication.' " *Aardvark Art, Inc. v. Lehigh/Steck-Warlick, Inc.*, 284 Ill. App. 3d 627, 632-33 (1996) (quoting *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987).

¶ 17 "The law-of-the-case doctrine protects the parties' settled expectations, ensures uniformity of decisions, maintains consistency during the course of a single case, effectuates proper administration of justice, and brings litigation to an end." *Radwill*, 2013 IL App (2d) 120957, ¶ 8. "[M]atters concerning the merits of the controversy between the parties which were presented to but not decided by the appellate court can be relitigated upon remand[.]" *Zokoych v. Spalding*, 84 Ill. App. 3d 661, 667 (1980). The doctrine generally prohibits the relitigation of any issues which this court decided on a previous appeal. *People v. Hopkins*, 235 Ill. 2d 453, 469 (2009). Application of the law of the case doctrine is a question of law, which we review *de novo*. *Rommel v. Illinois State Toll Highway Authority*, 2013 IL App (2d) 120273, ¶ 15.

¶ 18 In support of her law of the case argument, plaintiff relies on our prior opinion in which, upon considering a section 2-619 motion to dismiss, we remanded the issue of Sybaris' vicarious liability for negligent entrustment to the trial court. The prior opinion was a consolidated opinion in which four cases were consolidated on appeal to this court. Some of the issues were joined in by multiple parties, and some of the issues stood alone. The section upon which plaintiff relies is the section in which we considered the section 2-619 motion to dismiss as to Sybaris, and is a

discussion regarding defendant Knudson, Knudson's actions, and "whether and to what extent he was traveling on Sybaris business[.]" In that section, this court was addressing the activity and purpose of the subject flight, rather than the entrustment of the aircraft. In that prior opinion, we noted, in pertinent part:

> "Plaintiff next contends the trial court erred in granting the motion to dismiss pursuant to section 2-619 of the code where Knudson, who was Sybaris' employee and agent, was acting in that capacity and in furtherance of the business of Sybaris during the fatal flight. While so acting, alleges plaintiff, Knudson was negligent in both his supervision of Turek and in his entrustment of the airplane to Turek. Plaintiff maintains that, as a matter of law, Sybaris is vicariously liable for the actions of Knudson. Sybaris, on the other hand, responds that it is not, as a matter of law, vicariously liable for the actions of Knudson when the flight in question was taken for a dual purpose rather than solely for a business purpose, and that his activities in connection with this flight were too remotely related to Sybaris business to impose liability upon it." *Garland*, 2014 IL App (1st) 112615, ¶ 87.

¶ 19 We then reviewed the law regarding the theory of *respondeat superior*, vicarious liability, and when an employee is acting within the scope of employment, including a discussion of the dual purpose theory. *Garland I,* 2014 IL App (1st) 112615, ¶ 88-90. We reviewed the arguments:

> "Here, Sybaris urges us to find there was no error in this dismissal, as, according to Sybaris, it is not liable under the dual purpose theory because Knudson would have gone to Kansas with Turek whether he had Sybaris business to attend to or not. It also argues that there is no liability under a *respondeat superior* theory because: (1) Knudson's alleged tortious conduct was not actuated, even in part, by a purpose to serve Sybaris

("Sybaris is solely in the business of hotel ownership and operation. Observing the in-flight skills of a pilot is clearly outside the scope of hotel ownership and management."); and (2) even assuming Knudson's conduct was actuated in part by a purpose to serve Sybaris, any such conduct was too little actuated by such purpose. Plaintiff, on the other hand, argues that this is a question of fact, precluding a motion to dismiss, which should be presented to the trier of fact. We agree with plaintiff, and take note:

> ' "Whether the employee's conduct was so unreasonable as to make his act an independent act of his own, rather than a mere detour or one incidental to employment, is a question of degree which depends upon the facts of the case. [Citation.] It is therefore axiomatic that this question should be decided by a jury " 'unless the deviation is so great, or the conduct so extreme, as to take the servant outside the scope of his employment and make his conduct a complete departure from the business of the [Citation.] master.' "[Citation.]' *Rodman [v. CSX Intermodal, Inc.*, 405 Ill. App. 3d 332, 338 (2010)]." *Garland I*, 2014 IL App (1st) 112615, ¶ 91.

¶ 20 We then considered these facts within the context of a section 2-619 motion to dismiss, stating:

"Here, the record shows that Knudson was the founder and president of Sybaris. Sybaris is in the hotel business and has a number of hotels in the Midwest. The accident aircraft had recently been purchased from Sybaris. On the day of the accident, the four men on the aircraft had overlapping reasons for going to Kansas together. Turek, Garland, and Waugh met with a prospective Morgan Stanley client in Kansas; Knudson met with McGuinn regarding a new hotel location; Turek was interested in becoming a

partner in the Cessna 421B, and Knudson was observing his flying of the aircraft. According to Randell Repke, who at the time of the accident was the vice president of Sybaris, Knudson often flew private aircraft on Sybaris business to visit hotel locations. He explained that, regarding the time period when Sybaris owned the Cessna 421B, Sybaris had purchased the aircraft because "[i]t was anticipated in our growth, and we were having, you know, and expansion program in place that we had anticipated at the very minimum that [Knudson] could use to go to some of the outer properties in Indiana and Wisconsin, and as we expanded, if there was other cities and states that we needed to go to, he would have the ability to do that. Be much more convenient to use your own aircraft than to try to make arrangements for commercial flights."

William McGuinn, Knudson's business associate, testified that Knudson met with him in Kansas on the day of the airplane crash. They drove together to a property approximately 30 minutes away that McGuinn thought would make a good hotel property. McGuinn testified that Knudson had been looking for a property near Kansas City to develop into a hotel for some time. Knudson and McGuinn then went to lunch, where they continued to talk about Sybaris business. McGuinn also testified, however, that the January visit was less planned than usual. He testified that, generally, Knudson would come to town and McGuinn would pick him up at the airport and drive around looking for properties with another agent. This time, however, Knudson contacted him a few days before the visit, expressing that he wanted to see the possible hotel site, but explaining he was not sure if he would have time to do so. He told him he had some business to do in Kansas City and, if time permitted, he would like to see the potential

property. Time did permit, and they did see the property together." *Garland I*, 2014 IL App (1st) 112615, ¶ 92-93.

¶ 21 Then, pursuant specifically to the strictures of a section 2-619 motion to dismiss, that is, acknowledging that a "section 2-619 motion to dismiss admits the sufficiency of the complaint, but asserts an affirmative matter that acts to defeat the claim" (*Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31), and "constru[ing] the pleadings and supporting documents in the light most favorable to the nonmoving party and accept[ing] as true all well-pleaded facts in the complaint and all inferences that may reasonably be drawn in the plaintiff's favor" (*Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55), we denied the motion to dismiss, holding:

> "We think this factual scenario is not appropriate for a motion to dismiss. Construing all evidence and reasonable inferences in plaintiff's favor, as we must on a motion to dismiss, whether and to what extent Knudson was traveling on Sybaris business remains a question of fact, which should be presented to the trier of fact. Vicarious liability against Sybaris for Knudson's negligence is sufficiently alleged to defeat a motion to dismiss." *Garland I*, 2014 IL App (1st) 112615, ¶ 94.

¶ 22 According to plaintiff, this reasoning constitutes the law of the case such that summary judgment is now foreclosed. Plaintiff argues: "this Court's finding [in the prior opinion] that whether Knudson was traveling on Sybaris business was a question of fact relates as much to these summary judgment proceedings as it did to the Section 2-619 proceedings, precluding the trial court from determining the issue differently, just as it precluded the trial court from determining that Knudson was not Sybaris' agent, or that, as a matter of law, he had not been negligent in entrusting the Cessna to Turek." Therefore, argues plaintiff, the prior reversal which

was "predicated upon these factual findings" now binds the circuit court at all subsequent proceedings, and summary judgment with respect to Sybaris' vicarious liability is no longer a possibility.

¶ 23 Plaintiff also argues that rulings on summary judgment are very similar to rulings on motions to dismiss pursuant to section 2-619 because section 2-619 motions "are not restricted to the allegations of the complaint, but specifically exist to accommodate extrinsic factual matter which may prove to be dispositive." According to plaintiff, if we were to affirm summary judgment now, we would be "effectively review[ing] and revers[ing]" our prior opinion, which was based on a section 2-619 motion.

¶ 24 We note that plaintiff in the prior appeal argued that this court should consider her motion for relief under section 2-619 of the Code as a summary judgment motion. *Garland I*, 2014 IL App (1st) 112615, ¶ 43. In that appeal, we said:

> "Plaintiff acknowledges that the defendants all sought relief under section 2-619 of the Code rather than pursuant to a motion for summary judgment, but she argues that such an election is a "distinction without a difference." However, defendants elected to seek relief under section 2-619 of the Code, the trial court considered and ruled upon those motions under section 2-619 of the Code, and we, too, review this cause under section 2-619 of the Code." *Garland I*, 2014 IL App (1st) 112615, ¶ 43.

¶ 25 We think plaintiff's current argument regarding a summary judgment ruling precluded by a prior section 2-619 ruling is remarkably similar in spirit to her prior argument urging this court to treat a ruling on her section 2-619 motion as a summary judgment ruling because such an election is a "distinction without a difference." Again, summary judgment motions are distinct from section 2-619 motions to dismiss, and, as such, the two motions are not interchangeable.

¶ 26 Moreover, we reject plaintiff's reliance on the doctrine of the law of the case because, in order for that doctrine to apply to an issue, the specific issue must have previously been decided. See, *e.g.*, *Hopkins*, 235 Ill. 2d at 469 (the law of the case doctrine generally prohibits the relitigation of any issues which this court decided on a previous appeal); *Alwin*, 371 Ill. App. 3d at 909 (quoting *Pekin Ins. Co.*, 344 Ill. App. 3d at 69, and *Norton*, 293 Ill. App. 3d at 624) (the law of the case doctrine states that, " 'where an issue has been litigated and decided, a court's unreversed decision on that question of law or fact settles that question "for all subsequent stages of the suit.' "). Here, this issue was not decided. As noted above, what was previously decided was a motion to dismiss pursuant to section 2-619 of the Code. The issue now before us is a summary judgment pursuant to section 2-1005 of the Code. As noted, these are distinct motions and one does not preclude the other. In our prior decision, we ruled, in part, that, "[v]icarious liability against Sybaris for Knudson's negligence is sufficiently alleged to defeat a motion to dismiss" and we stated, "[the] factual scenario is not appropriate for a motion to dismiss." *Garland I*, 2014 IL App (1st) 112615, ¶ 94. This court did not determine whether Knudson was traveling on business, but, rather, we determined that the question of whether Knudson was traveling on business and to what extent he may have been so, remained an open issue that was sufficiently pled for purposes of a section 2-619 motion to dismiss. We remanded the claims for negligent entrustment against all defendants. We did not decide the issue of whether any particular defendant had negligently entrusted the aircraft. The current summary judgment issue, then, based on the claims that survived the section 2-619 motion to dismiss, had never before been tested by a section 2-1005 motion for summary judgment and is not precluded as law of the case by our prior decision regarding the section 2-619 ruling.

¶ 27 ii. Summary Judgment

¶ 28 Next, plaintiff contends the trial court erred in granting summary judgment in favor of Sybaris where the record was essentially the same as it was when the previous section 2-619 motion to dismiss was presented and this court reversed, and there remains a question of fact that Sybaris was vicariously liable for the negligent conduct of Knudson for entrusting the aircraft to Turek, resulting in the fatal crash. Sybaris responds that summary judgment was appropriate where plaintiff has no evidence to establish entrustment or negligent entrustment of the aircraft by Sybaris, which neither owned nor controlled the aircraft. To that end, plaintiff argues that whether or not Sybaris owned or controlled the aircraft is irrelevant because "a principal can be vicariously liable for any kind of tort committed by its agent so long as it was done in the course of employment." Sybaris also responds that plaintiff's claim regarding vicarious liability is not relevant, as she first must show negligent entrustment before considering the issue of vicarious liability.

¶ 29 Summary judgment is proper when the pleadings, affidavits, depositions and admissions of record, construed strictly against the moving party, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Morris v. Margulis*, 197 Ill. 2d 28, 35 (2001); 735 ILCS 5/2-1005 (West 2014). This relief is an appropriate tool to employ in the expeditious disposition of a lawsuit in which " 'the right of the moving party is clear and free from doubt.' " *Morris*, 197 Ill. 2d at 35 (quoting *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986)). In ruling on a motion for summary judgment, the circuit court is to determine whether a genuine issue of material fact exists, not try a question of fact. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). Although the burden is on the moving party to establish that summary judgment is appropriate, the nonmoving party must present a *bona fide* factual issue and not merely general conclusions of law. *Caponi v. Larry's 66*, 236 Ill. App. 3d 660, 670

(1992). A party opposing 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). While he need not prove his case at this preliminary stage, the nonmoving party must, nevertheless, present some factual basis to support his claim, and he is not simply entitled to rely on the allegations in his pleading in order to raise a genuine issue of material fact. See *Rucker v. Rucker*, 2014 IL App (1st) 132834, ¶ 49, and *CitiMortgage, Inc. v. Bukowski*, 2015 IL App (1st) 140780, ¶ 19. This basis must recite facts and not mere conclusions or statements based on information and belief. See *In Interest of E.L.*, 152 Ill. App. 3d 25, 31 (1987); see also *Morrissey v. Arlington Park Racecourse, LLC*, 404 Ill. App. 3d 711, 724 (2010) ("nonmoving party must present a *bona fide* factual issue and not merely general conclusions of law"). If the plaintiff fails to establish even one element of the cause of action, summary judgment in favor of the defendant is wholly proper. See *Bagent v. Blessing Care Corp*., 224 Ill. 2d 154, 163 (2007); *Governmental Interinsurance Exchange v. Judge*, 221 Ill. 2d 195, 215 (2006).

¶ 30 When determining whether a genuine issue of material fact exists, courts construe the pleadings liberally in favor of the nonmoving party. *Williams*, 228 Ill. 2d at 417. "Summary judgment is to be encouraged in the interest of prompt disposition of lawsuits, but as a drastic measure it should be allowed only when a moving party's right to it is clear and free from doubt." *Pyne v. Witmer*, 129 Ill. 2d 351, 358 (1989). We review summary judgment rulings *de novo* (*Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 113 (1995)) and we will only disturb the decision of the trial court where we find that a genuine issue of material fact exists. *Addison v. Whittenberg*, 124 Ill. 2d 287, 294 (1988). A genuine issue of material fact exists where the facts are in dispute or where reasonable minds could draw different inferences from

the undisputed facts. *Morrissey*, 404 Ill. App. 3d at 724; see also *In re Estate of Ciesiolkiewicz*, 243 Ill. App. 3d 506, 510 (1993). In our review, we may affirm on any basis found in the record regardless of whether the trial court relied on those grounds or whether its reasoning was correct. *Illinois State Bar Ass'n Mutual Insurance Co. v. Coregis Insurance Co.*, 355 Ill. App. 3d 156, 163 (2004); see also *Pepper Construction Co. v. Transcontinental Insurance Co.*, 285 Ill. App. 3d 573, 576 (1996).

¶ 31 Under the theory of *respondeat superior*, "an employer can be liable for the torts of his employee when those torts are committed within the scope of the employment." *Adames v. Sheahan*, 233 Ill. 2d 276, 298 (2009). An employer's vicarious liability extends to the negligent, willful, malicious, or criminal acts of its employees when those acts are committed within the scope of employment. *Adames*, 233 Ill. 2d at 298. "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*, 281 Ill. App. 3d 775, 784 (1996). In Illinois, we use the following criteria to determine whether an act is within the scope of employment:

> " '(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*, 129 Ill. 2d at

359-60, quoting Restatement (Second) of Agency § 228 (1958)" *Davila v. Yellow Cab Co*., 333 Ill. App. 3d 592, 600 (2002).

¶ 32 The "frolic vs. detour" analysis is the rubric through which we determine whether an employee is serving his employer's purpose. *Rodman*, 405 Ill. Ap. 3d at 338. " 'A detour occurs where the employee's deviation for personal reasons is seen as sufficiently related to the employment. [Citation.] In contract, '[a] frolic occurs where the employee's personal business is seen as unrelated to employment. [Citation.]' " *Rodman*, 405 Ill. App. 3d at 338.

¶ 33 An employee can also have a dual purpose. " ' "[W]hen a trip serves both business and personal purposes, it is a personal trip if the trip would have been made in spite of the failure or absence of the business purpose and would have been dropped in the event of failure of the private purpose, though the business errand remained undone; it is a business trip if a trip of this kind would have been made in spite of the failure or absence of the private purpose, because the service to be performed for the employer would have caused the journey to be made by someone even if it had not coincided with the employee's personal journey." (1 A. Larson, Workmen's Compensation sec. 18.12. at 4-218 (1978), citing, at 4-221, *Boyer Chemical Laboratory Co. v. Industrial Com.* (1937), 366 Ill. 635, 641 [10 N.E.2d 389], and *Irwin-Neisler & Co. v. Industrial Com.* (1931), 346 Ill. 89, 94-95 [178 N.E. 357].)' *Gemelich v. Industrial Comm*., 81 Ill. 2d 44, 48, 39 Ill. Dec. 807, 405 N.E.2d 786 (1980)." *Garland I*, 2014 IL App (1st) 112615, ¶ 91.

¶ 34 To prove negligent entrustment, a party must show that "the defendant gave another express or implied permission to use or possess a dangerous article or instrumentality that the defendant knew, or should have known, would likely be used in a manner involving an unreasonable risk of harm." *Northcutt v. Chapman*, 353 Ill. App. 3d 970, 974 (2004); *Zedella v. Gibson*, 165 Ill. 2d 181, 186 (1995) (in Illinois, negligent entrustment is defined as "entrusting a

dangerous article to another whom the lender knows, or should know, is likely to use it in a manner involving an unreasonable risk of harm to others"(internal quotation marks omitted)).

¶ 35 In *Garland I*, we discussed *Evans v. Shannon*, in which our supreme court considered a case in which the parents of a driver killed in a collision with an intoxicated employee of a car detailer brought wrongful-death and survivor actions against the detailer, its employee, and the car dealer who hired the detailer to clean the car. *Evans v. Shannon*, 201 Ill. 2d 424, 427 (2002), noting:

> "The plaintiffs' action against the defendant dealer, Vogler Motor Company, which had contracted with the detailer whose employee removed the car without permission and caused the fatal crash, was based, in pertinent part, on a theory of negligent entrustment. *Evans*, 201 Ill. 2d at 427. A jury found all three defendants liable, and Vogler appealed his liability finding. *Evans*, 201 Ill. 2d at 427. Finding that Vogler's motions for directed verdict and judgment notwithstanding the verdict were improperly denied, our supreme court reversed the judgment of the circuit court as it pertained to Vogler. *Evans*, 201 Ill. 2d at 427. In so doing, the court explained:
>
> > ' "In order to prove negligent entrustment, plaintiffs must show that Vogler gave another express or implied permission to use or possess a dangerous article or instrumentality which Vogler knew, or should have known, would likely be used in a manner involving an unreasonable risk of harm to others. See *Norskog v. Pfiel*, 197 Ill. 2d 60, 84-85 (2001); *Zedella v. Gibson*, 165 Ill. 2d 181, 186 (1995); see Restatement (Second) of Torts § 308 (1965). Although an automobile is not a dangerous instrumentality *per se*, it may become one if it is operated by someone who is incompetent,

inexperienced or reckless. *Eyrich v. Estate of Waldemar*, 327 Ill. App. 3d 1095, 1098 (2002).

There are two primary considerations in negligent-entrustment analysis: (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 a plaintiff's injury. *Taitt v. Robinson*, 266 Ill. App. 3d 130, 132 (1994). In turn, proximate cause consists of two distinct elements: cause in fact and legal cause. *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 257-58 (1999); see *Watson v. Enterprise Leasing Co.*, 325 Ill. App. 3d 914, 922 (2001). As this court stated in *First Springfield Bank & Trust*:

> 'Cause in fact exists where there is a reasonable certainty that a defendant's acts caused the injury or damage. [Citation.] A defendant's conduct is a cause in fact of the plaintiff's injury only if that conduct is a material element and a substantial factor in bringing about the injury. [Citation.] A defendant's conduct is a material element and a substantial factor in bringing about an injury if, absent that conduct, the injury would not have occurred. [Citation.] 'Legal cause,' by contrast, is essentially a question of foreseeability. [Citation.] The relevant inquiry here is whether the injury is of a type that a reasonable person would see as a likely result of his or her conduct.' " *First Springfield Bank & Trust*, 188 Ill. 2d at 258.' *Evans*, 201 Ill. 2d at 434-35.

Our supreme court then went on to analyze whether the Vogler personnel knew, or should have known, that the driver for the detailer was an unlicensed or incompetent driver, and determined that Vogler neither knew nor had reason to know. *Evans*, 201 Ill. 2d at 435. The court rejected plaintiffs' argument that Vogler had an additional duty to check on the employee's driver's license status, stating: "We hold, unless a customer knows, or has reason to know, that an employee of the contractor is unlicensed, incompetent or reckless, the customer has no duty of further inquiry." *Evans*, 201 Ill. 2d at 437.

Like an automobile, an airplane is not inherently dangerous, but may become so if operated by a pilot who is incompetent, inexperienced, or reckless. See *Evans*, 201 Ill. 2d at 434. Although the *Evans* case revolves around an automobile accident, there is a dearth of negligent entrustment cases involving airplanes in Illinois, and we find the reasoning in *Evans* persuasive here." *Garland I*, 2014 IL App (1st) 112615, ¶¶ 54-59.

¶ 36 We then considered the facts in *Garland I*, within the matrix of a section 2-619 motion to dismiss, and found, in pertinent part, that negligent entrustment was sufficiently alleged to withstand a motion to dismiss. *Garland I*, 2014 IL App (1st) 112615, ¶ 70. As to the question of whether any negligent acts or omissions on the part of Knudson could be imputed from Knudson to his alleged principal, Sybaris, we noted:

"Plaintiff's ninth amended complaint alleged that Knudson failed to plan, utilize and engage in proper communications and coordination of responsibilities between co-pilots; failed to properly and safely operate the aircraft so as to ensure a safe landing; failed to engage in and execute safe approach and landing maneuvers; failed to maintain proper control over the aircraft so as to maintain its flight path; failed to properly monitor

engine and aircraft performance during the flight so as to prevent a crash of the aircraft; failed to provide and utilize proper instructions and communications between co-pilots to ensure a safe flight; failed to properly respond to and compensate for engine failure and malfunction of the aircraft so as to avoid a crash; failed to engage in and execute proper emergency maneuvers so as to prevent a crash of the aircraft; failed to engage in proper communications with Mark Turek to ensure safe flight; failed to properly and timely assist Turek in the safe operation of the aircraft; failed to properly and timely inform Turek of the icing conditions; failed to take over control of the aircraft during emergency circumstances; failed to safely land the aircraft; failed to properly execute the duties of pilot in command; failed to properly evaluate adverse weather conditions; attempted to land the aircraft when weather and flight conditions rendered it unsafe to do so; permitted Turek to attempt to land the aircraft when weather and flight conditions rendered it unsafe to do so; and was otherwise negligent.

The record established that Knudson and Howard Levinson owned the Cessna 421B aircraft via their interest in HK Golden Eagle. Sybaris had purchased the aircraft in August 2004, and in May 2005, the airplane registration was transferred to HK Golden Eagle. At the time of the fatal fight, Knudson and Levinson were considering bringing Turek in as a partner in the aircraft.

In addition to all of the facts we discussed above regarding negligent entrustment, Knudson was onboard the flight the night of the crash. Deposition testimony from William McGuinn, with whom Knudson met when the plane landed in Kansas, shows that Knudson was uncomfortable with Turek's flying. Specifically, McGuinn testified that Knudson told him he brought Turek on the flight so that Knudson could evaluate Turek's

flying and make sure he was competent to fly the aircraft. Knudson did not like how Turek had flown the aircraft on takeoff from Chicago that day. McGuinn testified that Knudson described to him a disagreement Turek and Knudson had when Knudson thought Turek was piloting the airplane to climb too steeply after takeoff, saying that Turek 'rotated and climbed out steeply without accelerating to a speed that would have allowed them to climb out safely.' In addition, Knudson told McGuinn that, partway between Chicago and Kansas, they had discovered that Turek had inadvertently left the landing gear down. McGuinn testified that Knudson said he thought Turek's flying skills were not up to par. Additionally, Knudson was at the airport in Kansas and likely knew about the weather, and yet he allowed Turek, a pilot whose flying skills he did not think were up to par, to fly passengers in his plane on a dark, wintry night. Plaintiff alleged that Knudson should have known Turek was not competent to fly this particular flight on this particular night, and should not have entrusted the plan to him. All of this, in addition to the reasons outlined in our discussion of negligent entrustment as to the other parties, is enough to withstand a motion to dismiss pursuant to section 2-619 of the Code." *Garland I*, 2014 IL App (1st) 112615, ¶¶ 68-70.

¶ 37 Then, we considered the question of whether plaintiff had sufficiently alleged for purposes of a section 2-619 motion that Sybaris could be held vicariously liable for the actions of its agent, Knudson. Specifically, plaintiff had argued that Knudson, who was Sybaris' employee and agent, was acting in that capacity and in furtherance of Sybaris business during the fatal flight, and was negligent in his entrustment of the airplane to Turek. We specifically noted:

" 'Whether the employee's conduct was so unreasonable as to make his act an independent act of his own, rather than a mere detour or one incidental to employment is

> a question of degree which depends upon the facts of the case. [Citation.] It is therefore axiomatic that this question should be decided by a jury ' "unless the deviation is so great, or the conduct so extreme, as to take the servant outside the scope of his employment and make his conduct a complete departure from the business of the master." ' [Citation.] *Rodman*, 405 Ill. App. 3d at 338, 345 Ill. Dec. 215, 938 N.E.2d 1136." *Garland I*, 2014 IL App (1st) 112615, ¶ 92.

And we found:

> "Here, the record shows that Knudson was the founder and president of Sybaris, Sybaris is in the hotel business and has a number of hotels in the Midwest. The accident aircraft had recently been purchased from Sybaris. On the day of the accident, the four men on the aircraft had overlapping reasons for going to Kansas together. Turek, Garland, and Waugh met with a prospective Morgan Stanley client in Kansas; Knudson met with McGuinn regarding a new hotel location; Turek was interested in becoming a partner in the Cessna 421B, and Knudson was observing his flying of the aircraft. According to Randell Repke, who at the time of the accident was the vice president of Sybaris, Knudson often flew private aircraft on Sybaris business to visit hotel locations. He explained that, regarding the time period when Sybaris owned the Cessna 421B, Sybaris had purchased the aircraft because '[i]t was anticipated in our growth, and we were having, you know, an expansion program in place that we had anticipated at the very minimum that [Knudson] could use to go to some of the outer properties in Indiana and Wisconsin, and as we expanded, if there was other cities and states that we needed to go to, he would have the ability to do that. Be much more convenient to use your own aircraft than to try to make arrangements for commercial flights.'

William McGuinn, Knudson's business associate, testified that Knudson met with him in Kansas on the day of the airplane crash. They drove together to a property approximately 30 minutes away that McGuinn thought would make a good hotel property. McGuinn testified that Knudson had been looking for a property near Kansas City to develop into a hotel for some time. Knudson and McGuinn then went to lunch, where they continued to talk about Sybaris business. McGuinn also testified however, that the January visit was less planned than usual. He testified that, generally, Knudson would come to town and McGuinn would pick him up at the airport and drive around looking for properties with another agent. This time, however, Knudson contacted him a few days before the visit, expressing that he wanted to see the possible hotel site, but explaining he was not sure if he would have time to do so. He told him he had some business to do in Kansas City and, if time permitted, he would like to see the potential property. Time did permit, and they did see the property together.

We think this factual scenario is not appropriate for a motion to dismiss. Construing all evidence and reasonable inferences in plaintiff's favor, as we must on a motion to dismiss, whether and to what extent Knudson was traveling on Sybaris business remains a question of fact, which should be presented to the trier of fact. Vicarious liability against Sybaris for Knudson's negligence is sufficiently alleged to defeat a motion to dismiss." *Garland I*, 2014 IL App (1st) 112615, ¶¶ 93-95.

¶ 38 Here, as noted above, the law of the case doctrine does not drive our decision in this cause, as a motion to dismiss pursuant to section 2-619 of the Code and a motion for summary judgment pursuant to section 2-1005 of the Code are distinct motions, and the issue before us now has not been previously determined.

¶ 39 Nonetheless, the reasoning behind our prior decision remains instructive. At this stage in the proceedings, we have the benefit of the issue of *de facto* ownership having been decided, and various other claims having been dismissed. What we have before us now is the more narrow question of whether an issue of fact remains regarding whether Sybaris can be held liable for its alleged agent, Knudson's, alleged negligent entrustment of the aircraft to Turek. We have the same concerns about this question now as we had in the prior appeal, that is, we think that whether and to what extent Knudson was traveling on Sybaris business, and whether it was negligent for Knudson to entrust the aircraft to Turek on that particular flight remain unanswered questions of material fact more appropriate for the trier of fact.

¶ 40 Sybaris repeatedly urges us to decide that it cannot be vicariously liable for negligently entrusting something it did not own or control, but fails to cite case law to that effect. The two considerations in a negligent entrustment analysis are: " '(1) whether the owner of the vehicle entrusted the [instrumentality] to an incompetent or unfit driver, and (2) whether the incompetency was a proximate cause of a plaintiff's injury.' " *Garland I*, 2014 IL App (1st) 112615, ¶ 54 (quoting *Evans*, 201 Ill. 2d at 434-35 (citing *Taitt*, 266 Ill. App. 3d at 132)). As noted above, an employer may be held vicariously liable for the torts of its employee "when those torts are committed within the scope of the employment." *Adames*, 233 Ill. 2d at 298. Vicarious liability is, in fact, quite broad, and extends to the "negligent, willful, malicious, or criminal acts of its employees when those acts are committed within the scope of employment." *Adames*, 233 Ill. 2d at 298. Sybaris' argument, then, is unconvincing where, pursuant to the theory of *respondeat superior*, an employer's liability for its employee's negligent entrustment while that employee is acting within the scope of employment flows not from the employer owning the entrusted instrumentality, but from the employer-employee relationship itself.

¶ 41 In addition, we note that, when this court found in *Garland I* there was a question of fact within the context of a section 2-619 motion to dismiss as to whether Sybaris would be vicariously liable for Knudson's negligent entrustment of the aircraft to Turek, we were fully aware that Sybaris had no ownership interest in the airplane as we had, in the same opinion, recognized that Sybaris was neither an owner nor a *de facto* owner of the airplane.

¶ 42 Because we find genuine issues of material fact precluding summary judgment, we reverse the decision of the trial court and remand for further proceedings.

¶ 43 III. CONCLUSION

¶ 44 For all of the foregoing reasons, the decision of the circuit court of Cook County is reversed, and the cause is remanded for further proceedings.

¶ 45 Reversed; remanded.