Tsatsos v. Northwest Home Care, Inc.

Appellate Court of Illinois, First District, Sixth Division

April 5, 2019, Decided

No. 1-18-0583

Reporter
2019 IL App (1st) 180583-U *; 2019 Ill. App. Unpub. LEXIS 612 **

SMA TSATSOS, Plaintiff-Appellant, v. NORTHWEST HOME CARE, INC. d/b/a ABCOR HOME HEALTH, INC., Defendant-Appellee.

Notice: THIS ORDER WAS FILED UNDER SUPREME COURT RULE 23 AND MAY NOT BE CITED AS PRECEDENT BY ANY PARTY EXCEPT IN THE LIMITED CIRCUMSTANCES ALLOWED UNDER RULE 23(e)(1).

Prior History: **[**1]** Appeal from the Circuit Court of Cook County. 15 L 11533. Honorable John H. Ehrlich, Judge Presiding.

Disposition: Affirmed.

Judges: JUSTICE CONNORS delivered the judgment of the court. Presiding Justice Delort and Justice Cunningham concurred in the judgment.

Opinion by: CONNORS

Opinion

JUSTICE CONNORS delivered the judgment of the court.

Presiding Justice Delort and Justice Cunningham concurred in the judgment.

ORDER

[*P1] *Held:* Although the trial court improperly deemed testimony double hearsay that was actually non-hearsay, it properly granted summary judgment where plaintiff failed to present any evidence supporting her allegations that defendant breached its duty of reasonable care; affirmed.

[*P2] This appeal stems from alleged negligence committed by defendant, Northwest Care, Inc., against plaintiff, Sma Tsatsos, that resulted in personal injury. Specifically, plaintiff's operative complaint alleged that on multiple occasions she fell due to defendant's negligence. Defendant filed a motion for summary judgment that was granted by the circuit court. Plaintiff appeals from that order, arguing that the court below refused to consider evidence that it incorrectly determined to be hearsay when it found that no genuine issue of material **[**2]** fact existed. Plaintiff also argues that a factual issue exists regarding the extent of defendant's employees' obligations. For the reasons that follow, we affirm.

[*P3] I. BACKGROUND

[*P4] In 2015, when the events at issue occurred, plaintiff was a 92-year old woman who lived alone in Glen St. Andrew Village in Niles, a facility that provided both assisted and independent living. That facility is not a party to this case. Defendant is a corporation that provides home care services to the elderly. Plaintiff received defendant's services through the Community Care Program, which was implemented by the Illinois Department on Aging and aims to assist seniors who might otherwise need nursing home care to remain in their own homes.

[*P5] In July 2013, plaintiff became eligible for Community Care services, and a plan of care was created to address her needs. According to the

"Community Care Program Plan of Care Notification Form" (plan of care form), which was created by the Community Care Program, plaintiff was to receive 25 hours of care per week. However, according to the "Client Information Summary: Tsatsos, Sma" (client information summary), which was created by defendant, she was approved to receive **[**3]** assistance 6 hours per day, 5 days per week, for a total of 30 hours per week. Plaintiff's plan of care form and client information summary stated that she needed assistance with the following: eating, bathing, grooming, dressing, transferring, continence, telephoning, preparing meals, laundry, housework, being outside the home, routine health, special health, and being alone. The client information summary additionally stated that plaintiff needed assistance with "meal prep, errands and housework," she liked to play Bingo and watch soap operas on TV, and there were no pets or smoking in her home. The plan of care form also differed from the client information summary in that for each item for which plaintiff needed assistance, the plan of care also included a short description explaining why she needed assistance. For example, where it stated that plaintiff needed assistance with continence, the plan of care form stated "lacks control." Most relevantly, where it stated that plaintiff needed assistance with transferring, the plan of care form stated "unsteady."

[*P6] On two separate occasions in 2015 while under defendant's care, plaintiff fell and suffered injury, which resulted in the **[**4]** lawsuit underlying this appeal. On November 12, 2015, plaintiff filed her original complaint. On February 2, 2016, she was granted leave to file her first amended complaint. Plaintiff's first amended complaint contained three counts. Count I for negligence was brought against defendant under the theory of *respondeat superior* based on allegations that defendant's employee, Marika McPherson[1], breached her duty to plaintiff. Count I specifically alleged as follows:

> "7. Defendant, at all times relevant owed a duty of reasonable care to the Plaintiff.
>
> 8. On or about April 14, 2015, Defendant's agent, [McPherson], was driving Plaintiff to Plaintiff's residence. At the time and place in question, [McPherson], knowing that Plaintiff's gait was unsteady, carelessly and negligently forced Plaintiff out of the vehicle approximately one city block from Plaintiff's residence instead of driving Plaintiff to the front door of Plaintiff's residence.
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> 9. As a proximate result of the foregoing, Plaintiff, while attempting to walk home, fell, was injured and treated in an emergency room.
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> 10. At all times relevant, [McPherson]'s foregoing acts were of the kind Defendant employed her to perform; occurred substantially **[**5]** within Defendant's authorized time and space limits; and were actuated, at least in part[,] by a purpose to serve Defendant."

[*P7] Count II also alleged negligence against defendant under the theory of *respondeat superior*, based on the conduct of defendant's employee, Shirley Smith[2]. Count II incorporated the duty allegation from count I, and included the following allegations:

> "8. At a time after April 14, 2015 to be determined in discovery, Plaintiff was in her residence with [Smith]. At the time and place in question, [Smith], knowing that Plaintiff required ongoing monitoring, carelessly and negligently exited Plaintiff's residence or totally ignored the Plaintiff.
>
> 9. As a proximate result of the foregoing, Plaintiff in an attempt to access her bathroom on her own, fell and broke her hip.

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[1] Plaintiff's first amended complaint actually refers to McPherson as "Marika LNU." However, because it appears from the record and defendant's brief that Marika's last name is McPherson, we refer to her as such.

[2] Count II of plaintiff's first amended complaint referred to "a presently-unidentified employee of Defendant." However, it is clear from the record and the parties' briefs that name of the employee at issue in count II is Shirley Smith, and thus we refer to her as such.

> 10. At all times relevant, the foregoing acts or omissions of [Smith] were of the kind Defendant employed her to perform; occurred substantially within Defendant's authorized time and space limits; and were actuated, at least in part[,] by a purpose to serve Defendant."

[*P8] The plan of care form, client information summary, and a copy of defendant's patient bill of rights were attached as exhibits to plaintiff's first amended **[**6]** complaint. Plaintiff's first amended complaint also contained a third count for negligence under the theory of *respondeat superior*, alleging that McPherson violated defendant's patient bills of rights by "engaging in conduct that was physically and verbally inconsiderate and disrespectful of the Plaintiff." Count III was subsequently dismissed by agreement of the parties, and thus we do not address it any further in this order.

[*P9] On October 19, 2016, Dr. George Tsatsos, plaintiff's son and a podiatrist, testified at a deposition. George testified that prior to her fall in April 2015, plaintiff was "[m]obile and cognitive," but after the fall where she hit her head, she was not the same. George testified that prior to falling, plaintiff was living an independent life with the exception of defendant's services, and that besides defendant's services, plaintiff did not receive any other assistance. George stated that plaintiff needed some assistance with walking and used a walker, but she could walk limited distances without a walker. When asked what type of services defendant was to provide, George responded as follows:

> "Assist in ambulation, assist in grooming and provide car [*sic*] services, **[**7]** I think, within three miles or less. It was a certain amount because they knew that her daughter lived less than a mile, and that was part of it. To get her there, or to get her to CVS to get whatever she may need.

So basically to help her to be independent and possibly take her out to lunch." George also testified that defendant's services were used to assist with plaintiff's mobility. He further explained that he did not have occasion to observe the assistance that defendant's employees provided because he was not there during the week but his sister, Theodora, was.

[*P10] Regarding plaintiff's first fall on April 14, 2015, which forms the basis of count I in plaintiff's first amended complaint, George testified that he did not know what time of day the fall occurred and that he learned of her fall because he got a phone call from the hospital around 4 p.m. George spoke with plaintiff about her fall when he picked her up from the hospital that night, but testified that she "was a bit confused" and did not tell him about the circumstances of her fall. George stated that plaintiff had the "normal forgetfulness of a [senior]" and that plaintiff "started to tell the details [of the fall] to **[**8]** my sister the next day." George testified that plaintiff's first fall caused a gash to her head, stitches, and abrasions to her body, such as a scraped elbow and knee. Later in the deposition, when George was asked if he knew what time the April 14, 2015, fall occurred, he responded, "No. Approximately 2 o'clock." And when asked how he came to find out it was approximately 2 o'clock, George responded, "I think from medical records."

[*P11] George testified that he did not know exactly when plaintiff's second fall, *i.e.*, the basis of count II, occurred, but that it was sometime during the day in August 2015. George stated that he came to learn of the second fall because Smith called him and said, "'Your mother fell and can't move.'" George told Smith to get help because he was not there and wanted someone to evaluate plaintiff. George testified that the only witnesses to plaintiff's second fall were plaintiff and Smith and that the fall occurred in plaintiff's room, which he described as a small apartment. George further testified that he believed that plaintiff fell while attempting "[t]o travel to the bathroom," but he did not know exactly where she fell in her room. George subsequently **[**9]** clarified that he did not think Smith had told him that plaintiff fell on her way to the bathroom, and instead only told him that plaintiff fell. George testified that it was actually plaintiff who told him that she was on her way to the bathroom when she fell. As a result of the

second fall, plaintiff suffered a fractured hip and had surgery.

[*P12] Theodora Tsatsos, plaintiff's daughter, was also deposed on October 19, 2016. Theodora testified that prior to her first fall on April 14, 2015, plaintiff "had her faculties" and was able to exercise and engage in various activities. Theodora stated that at that time, plaintiff needed assistance with bathing, ambulation, and remembering to take her medications at the proper times. The family had decided that plaintiff needed home health care services after observing that she was unsteady and after plaintiff said she was unable to bathe on her own. Theodora testified that defendant provided services five hours per day, five days per week, but that no other health care service provided care for plaintiff during that time. She also stated that when defendant's employees were not present, plaintiff would not have assistance and would have to move **[**10]** around by herself, including to go to the bathroom, dress herself, and get to the cafeteria for meals.

[*P13] Theodora testified that she was not present when plaintiff fell on April 14, 2015, but that the following day, plaintiff told her "that she was by herself at the curb on the walker, and that her walker got stuck by the curb, and that toppled -- that she toppled over and hit her head on a stone." When asked if plaintiff told her anything else about the circumstances of the first fall, Theodora responded, "It was confusing at the time. I questioned her what happened, and she said that she was at CVS, and that she walked home." Theodora stated that plaintiff did not tell her that she had walked to CVS, but that she told her she walked home from there. Theodora testified that plaintiff did not tell her how she got to CVS right away, but that a few days later, plaintiff "relayed that McPherson took her to CVS, and that McPherson had to -- was running late to get her son from daycare" and that McPherson dropped her off on Newark Street," which is the street where St. Andrew's is located. Theodora testified that she spoke with McPherson the day after plaintiff's fall, and that McPherson **[**11]** told her that plaintiff went to CVS by herself to get chocolate. Later in her deposition, in response to an unrelated question, Theodora stated that she remembered something with McPherson regarding CVS "because the stories kept changing." Specifically, Theodora testified, "Actually, she -- later on [McPherson] did say that she did take my mom to CVS, but I don't recall -- she didn't say that she brought her back from CVS." Theodora stated that taking plaintiff to CVS was within the normal course of duties that the caregivers performed. Additionally, Theodora stated that plaintiff never told her that McPherson physically forced her out of the vehicle and that it was unclear whether plaintiff was just told to get out of the vehicle or whether there was a physical component to the force.

[*P14] Theodora testified that she believed plaintiff's second fall occurred sometime in August 2015, and that she came to learn of this fall when George called her and told her to go examine the situation. Theodora testified that when she arrived at plaintiff's residence, she found plaintiff on the floor, with Smith "not really doing anything." She further testified that plaintiff was in tremendous pain and **[**12]** was disoriented. Theodora testified, "[Smith] told me that she was coming from the bathroom or going to the bathroom and that she fell."

[*P15] On June 5, 2017, Elena Rom, defendant's former CEO, testified at her deposition that she did not have any company documents because she had been "frozen" out of the company since November 1. Rom testified that she had no personal knowledge regarding plaintiff's falls. Rom also testified that she did not know McPherson personally, but that she knew the name and that McPherson was defendant's former employee. Rom stated that there were two departments in defendant's company, one consisted of medical personnel and the other consisted of nonmedical personnel who administered home care services, *i.e.*, caregivers. Rom stated that caregivers were required to be 18 years or older and have a high school diploma. Rom specifically explained as follows:

"This is not patient care. We're not treating anybody. We're not doing any patient care here. There is no patient care. There is client services for assistance of daily living, which is bathing, grooming, dressing, meal preparation, no treatment, no patient care. They are not CNAs. None of these caregivers are **[**13]** CNAs, so they are not even certified nursing aides."

[*P16] Rom also stated, "[w]e don't know diagnosis of clients because there is no medical care provided, so it has to be given from a family or from a social service organization." Rom further clarified that defendant does not create the plan of care for clients, but that its caregivers "try to adhere to the plan of care as close as possible." Rom testified that once the defendant's caregiver leaves, then the client or their family becomes responsible for themselves. Further, Rom testified that she had pending a lawsuit against two of her former partners, one of whom owned Arstar Home Health, Inc. (Arstar). Rom stated that her lawsuit alleged that from approximately 2013 through 2015, Arstar was used to pay defendant's employees to avoid having to pay them overtime. Rom testified that, as a result, defendant's employee records as to the times worked were not accurate because some of the time worked would be reflected in Arstar's records.

[*P17] In an email dated July 11, 2017, plaintiff's counsel stated that plaintiff would not be produced for a deposition.

[*P18] On September 18, 2017, defendant filed its motion for summary judgment. As to count I, **[**14]** defendant argued that plaintiff failed to present any admissible evidence in support of her allegations that she was forced from McPherson's vehicle and caused to fall. Defendant pointed out that the only two witnesses that plaintiff produced were her son and daughter, George Tsatsos and Theodora Tsatsos, neither of whom were present when plaintiff fell. Defendant argued that George's testimony consisted of inadmissible hearsay statements from plaintiff, McPherson, and another individual named John Herr, none of whom testified at a deposition. Defendant asserted that although Theodora offered testimony regarding the circumstances of the fall, her testimony was based on inadmissible hearsay from plaintiff and McPherson. Defendant noted that according to George's testimony, the fall allegedly occurred around 2 p.m., but McPherson was only scheduled to work from 8:30 a.m. to 12:30 p.m. Additionally, defendant argued that there was no admissible evidence that any duty was owed or that any breach thereof occurred.

[*P19] As to count II, defendant argued that plaintiff provided no evidence that would support her allegations that defendant's negligent conduct caused her to fall and break her hip. **[**15]** Similar to count I, neither George nor Theodora witnessed this fall. Defendant argues that George's testimony regarding the circumstances of the fall was based on hearsay statements from plaintiff and Smith. Theodora testified she was notified by George that plaintiff had fallen, and that when she arrived at plaintiff's home, she observed plaintiff on the floor with Smith. Defendant asserted that Theodora's testimony only established that while plaintiff was walking of her own accord in her own apartment, she fell and fractured her hip. There was no admissible evidence regarding the circumstances of the fall. Defendant asserted that "[t]he mere fact that an elderly woman, who lived independently in an apartment, fell does not establish negligence on the part of a part time (25 hours per week) non-medical caregiver." Defendant argued that there was no evidence that defendant was negligent, let alone reasonable certainty that plaintiff's injury was caused by defendant's act or omission. In support of its motion, defendant attached, *inter alia*, the depositions of George, Theodora, and Rom, and a report from the Niles fire department, titled "Advocate Lutheran General EMSS," which stated **[**16]** that the chief complaint was a head laceration and the onset date/time was 3:45 p.m. on April 14, 2015.

[*P20] On October 18, 2017, plaintiff filed her response to defendant's motion for summary judgment, arguing that as to count I, McPherson's statement to Theodora that she took plaintiff to CVS was not hearsay. Plaintiff also argued that when

McPherson took plaintiff to CVS, McPherson owed plaintiff a duty of reasonable care as a result of her voluntarily undertaking the responsibility of taking plaintiff to and from CVS. Plaintiff's motion stated that, "[n]othing in the record, however, reflects that [McPherson] took Plaintiff home" and that instead of being brought home, plaintiff ended up injured alongside the road. Plaintiff attached a timesheet detail report for employee McPherson for April 2015, which reflected that on April 14, 2015, McPherson worked from 8:30 a.m. to 2:30 p.m. Also attached to plaintiff's response was a printout from plaintiff's PNC bank account, showing that plaintiff charged a transaction in the amount of $15.91 at CVS in Niles on April 14, 2015.

[*P21] As to count II, plaintiff's response pointed to a report signed by Shirley that stated that on August 28, 2015, Shirley **[**17]** provided certain services to plaintiff. Plaintiff contended that Shirley's report was "falsified" because it was prepared and dated on August 21, 2015, which was seven days before plaintiff fell. Plaintiff also argued that Theodora's testimony that Shirley told her that plaintiff fell "going to or coming from" the bathroom was not hearsay. Plaintiff argued that Shirley had the duty to assist plaintiff in her use of the washroom, use reasonable care while doing so, and not abandon plaintiff. Thus, a question of fact existed. Plaintiff also argued that eyewitness testimony was not needed to resolve this case and circumstantial evidence could be considered.

[*P22] On November 7, 2017, defendant filed its reply in support of its motion for summary judgment, asserting that plaintiff failed to present any evidence that a duty was owed or that the duty was breached. Specifically, as to count I, there was no evidence that McPherson was working or that plaintiff was otherwise receiving defendant's services at the time of her fall. Defendant noted that plaintiff had only produced evidence showing that McPherson worked until either 12:30 p.m. or 2:30 p.m., but the fall occurred around 3:45 p.m. Similarly, **[**18]** defendant argued that plaintiff presented no evidence of a breach of duty because there was no evidence that McPherson "forced" plaintiff from her car, as alleged in count I. Defendant further asserted that no evidence supported plaintiff's count II allegation that Shirley exited plaintiff's residence or totally ignored her. Defendant argued that the patient bill of rights did not impose a legal duty on defendant and could not constitute evidence of negligence. Defendant again emphasized that plaintiff relied solely on inadmissible hearsay statements by Shirley. Defendant asserted that plaintiff's evidence only proved that on August 28, 2015, Smith provided services to plaintiff, and that plaintiff fell and fractured her hip while going to or from the bathroom. Defendant characterized plaintiff's complaint as being premised on the idea that because plaintiff fell, defendant must be negligent, which was not accurate. Defendant also pointed out that although plaintiff's response seemingly argued that a duty was owed pursuant to a voluntary undertaking, no such theory was pled as a basis for any of the counts in plaintiff's first amended complaint, and thus cannot create a question of material fact. **[**19]**

[*P23] On December 11, 2017, the trial court entered an order that granted defendant's motion for summary judgment as to count I and denied it as to count II.

[*P24] On December 22, 2017, plaintiff filed her motion to reconsider the court's grant of summary judgment on count I. On January 10, 2018, defendant filed its own motion to reconsider, seeking to reverse the court's denial of summary judgment on count II. On January 18, 2018, plaintiff filed an amended motion to reconsider the court's grant of summary judgment on count I. On February 13, 2018, plaintiff filed her response to defendant's motion to reconsider denial of summary judgment on count II.

[*P25] On February 22, 2018, the court heard argument on the parties' cross-motions to reconsider. On plaintiff's motion to reconsider, specifically as to the issue of whether McPherson's statement to Theodora was hearsay, the court determined that because Theodora was not a party to this appeal, her testimony as to what McPherson said was inadmissible double hearsay and could not be

considered. The court explained that, "the fact that [McPherson] *** was never deposed, you can't get a statement, actually, as to what [McPherson] said. So, that's hearsay. **[**20]** It [would not] be coming in at trial, I can tell you that."

[*P26] The court next addressed defendant's motion to reconsider and began by noting that it had been under the mistaken belief that discovery was not yet closed in this case. Defendant's counsel confirmed that discovery was closed, and that defendant had provided plaintiff with the addresses of former employees, such as McPherson, but that plaintiff did not take any action to depose her or any other witnesses. The court stated that because discovery was closed, the issues with plaintiff's case could no longer be corrected though a deposition. It found that "[there is] no testimony supporting anything [that is] in plaintiff's complaint from any live witnesses." Plaintiff's counsel argued that there were two bases for negligence: that plaintiff fell and that she was left on the floor for 30 minutes without the caregiver seeking assistance. The following exchange then occurred:

> "THE COURT: She's living in a -- she's not living in a facility where she is getting assisted living. She's an independent living person. They can't touch somebody who's fallen on the floor. They're not permitted to. I mean, we don't know how she fell. She's **[**21]** -- there's no indication that she requested service, and if there was something that happened when the service provider, you know, failed to do something when the woman was walking to the bathroom. You can't. You can't establish any proximate causation.
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> MR. ORMAN [(PLAINTIFF'S ATTORNEY)]: The agent of the defendant was present while the plaintiff was laying on the floor, with a broken hip, for 30 minutes, and didn't call 911.
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> THE COURT: How do we know any of that?
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> MR. ORMAN: Because nobody came.
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> THE COURT: You don't have anybody to testify to that. Where's the evidence to support that?
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> MR. ORMAN: I've said everything I can say, Judge.
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> MR. TRAVIS [(DEFENDANT'S ATTORNEY)]: Your Honor, I would just add that that issue isn't before the [c]ourt. It hasn't even been pled.
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> THE COURT: Correct, it hasn't even been pled. And there's no evidence. One has been deposed in this case, and the plaintiff won't be deposed in this case. So, I don't understand how there's --
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> There's simply no facts to support any of the allegations that have been made.
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> And plaintiff is making an assumption that there are other facts that are in issue, which aren't in issue, because there's no -- there's no evidence to support **[**22]** them."

[*P27] Also on that date, the court entered an order that denied plaintiff's motion to reconsider the grant of summary judgment as to count I, granted defendant's motion to reconsider the denial of summary judgment as to count II, and entered summary judgment in favor of defendant on counts I and II and dismissed the matter with prejudice.

[*P28] Plaintiff filed her timely notice of appeal on March 20, 2018.

[*P29] II. ANALYSIS

[*P30] On appeal, plaintiff asserts that the trial court erred when it granted summary judgment in favor of defendant on counts I and II of plaintiff's first amended complaint. We disagree.

[*P31] Summary judgment is appropriate only where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2016). We

construe these materials strictly against the movant and liberally as to the opponent. *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49, 981 N.E.2d 951, 367 Ill. Dec. 223. We review *de novo* a ruling on a motion for summary judgment. *Clark Investments, Inc. v. Airstream, Inc.*, 399 Ill. App. 3d 209, 213, 926 N.E.2d 408, 339 Ill. Dec. 176 (2010).

[*P32] In this case, plaintiff's complaint alleged two counts of negligence against defendant based on the theory of *respondeat superior*, arising from the alleged conduct of defendant's **[**23]** employees, McPherson and Smith. "In order to state a cause of action for negligence, a plaintiff must plead the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, an injury proximately caused by the breach, and damages." *Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188, 194-95, 652 N.E.2d 267, 209 Ill. Dec. 727 (1995). Although a plaintiff is not required to prove her case at the summary judgment stage, she is required to present evidentiary facts to support each element of her cause of action. *Strutz v. Vicere*, 389 Ill. App. 3d 676, 678, 906 N.E.2d 1261, 329 Ill. Dec. 650 (2009).

[*P33] Typically, when a person is injured by the negligence of another, she must seek her remedy from the person who caused the injury. *Adames v. Sheahan*, 233 Ill. 2d 276, 298, 909 N.E.2d 742, 330 Ill. Dec. 720 (2009). However, under the doctrine of *respondeat superior*, an employer may be held vicariously liable for the torts of an employee acting within the scope of employment. *Papadakis v. Fitness 19 IL 116, LLC*, 2018 IL App (1st) 170388, ¶ 15. Liability will attach for an employee's conduct if: "(1) an employer/employee relationship existed, (2) the principal controlled or had the right to control the employee's conduct, and (3) the employee's conduct fell within the scope of the agency or employment." *Id.* ¶ 16. Our supreme court has explained that for guidance when determining whether an employee's acts are within the scope of employment, Illinois courts look to the Second Restatement of Agency, which **[**24]** provides:

> "(1) Conduct of a servant is within the scope of employment if, but only if:
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> (a) it is of the kind he is employed to perform;
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> (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 ***[.]
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> * * *
>
> (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." (Internal quotation marks omitted.) *Adames*, 233 Ill. 2d at 298-99 (quoting Restatement (2d) of Agency § 228 (1958)).

[*P34] A. Count I

[*P35] 1. Trial Court's Exclusion of Hearsay

[*P36] Plaintiff argues that the trial court's refusal to consider Theodora's testimony, *i.e.*, that McPherson "did say that she did take my mom to CVS, but I don't recall -- she didn't say that she brought her back from CVS," was improper because Theodora's testimony was not double hearsay as the trial court had found.

[*P37] It is axiomatic that "hearsay evidence consists of an out-of-court statement offered to prove the truth of the matter asserted, and, due to its lack of reliability, is generally inadmissible unless it satisfies an exception." *DeMarzo v. Harris (In re Estate of DeMarzo)*, 2015 IL App (1st) 141766, ¶ 19, 395 Ill. Dec. 788, 39 N.E.3d 255. Illinois Rule of Evidence 801(d)(2)(D) (eff. Oct. **[**25]** 15, 2015) provides, "A statement is not hearsay if [t]he statement is offered against a party and is a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." A determination that a statement was hearsay is a question of law that we review *de novo*. *Melamed v. Melamed*, 2016 IL App (1st) 141453, ¶

26, 401 Ill. Dec. 527, 50 N.E.3d 669.

[*P38] Here, the statement at issue is being offered against defendant and was made by McPherson, defendant's agent, concerning whether McPherson took plaintiff to CVS, a matter within the scope of McPherson's employment. However, there is no evidence of when McPherson made this statement to Theodora. During her deposition while being questioned on a different aspect of this case, Theodora stated that she remembered "something now with [McPherson] with the CVS because the stories kept changing." Specifically, Theodora testified, "later on [McPherson] did say that she did take my mom to CVS, but I don't recall -- she didn't say that she brought her back from CVS." Theodora did not testify when "later on" was, and there is no evidence establishing when McPherson made this statement to Theodora. This is significant because Rom testified that McPherson **[**26]** "was" defendant's employee. Further, the record does not contain any evidence of the specific dates of McPherson's employment and neither party has suggested a time range. Thus, it is unclear whether McPherson's statement to Theodora was made during the existence of her employment relationship with defendant. As a result, we find plaintiff has failed to meet the requirements that would render McPherson's statement to Theodora nonhearsay under Rule 801(d)(2)(D) because plaintiff has not shown that the statement was made during her employment with defendant.

[*P39] Nonetheless, we find it prudent to assume *arguendo* that McPherson's statement to Theodora was made during the time she was employed by defendant. See *Melamed*, 2016 IL App (1st) 141453, ¶ 27 ("Courts generally grant wide latitude in construing statements as admissions."). We make this assumption because, as the following analysis shows, even if Theodora's testimony about McPherson's statement is treated as admissible non-hearsay, summary judgment was still proper. Thus, for purposes of our analysis, we treat Theodora's testimony regarding McPherson's statement as admissible non-hearsay for the remainder of this order. Even doing so, we find there is a fatal lack of evidence to support **[**27]** plaintiff's claims. We find pertinent to briefly point out that plaintiff does not argue that any of plaintiff's own statements to either Theodora or George are admissible, and did not raise such an argument below. The only statement that was argued to be non-hearsay was McPherson's statement to Theodora.

[*P40] 2. Factual Basis for Count I

[*P41] Plaintiff contends that if McPherson's statement is admissible, then "a factual issue emerges as to whether both [McPherson] and [d]efendant (*via respondeat superior*) breached the duty they owed to [p]laintiff pursuant to the Restatement of Torts (Second) 1965 at section 324[.]" Defendant responds that plaintiff's argument is misplaced because plaintiff's first amended complaint did not plead negligence based on a voluntary undertaking. We agree with defendant.

[*P42] Count I includes the following relevant allegations of negligence:

> "4. In or about July of 2013, Plaintiff became eligible to participate in Community Care. Shortly thereafter, a Plan of Care was created that identified and addressed Plaintiff's needs to enable her to maintain her independence. That Plan of Care stated that Plaintiff needed assistance with 'transferring,' which included transportation. That Plan of Care specifically stated **[**28]** that Plaintiff was 'unsteady.' ***
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> 5. On or about August 1, 2013, the responsibility for providing those services listed in Plaintiff's Plan of Care was transferred to Defendant. ***
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> * * *
>
> 7. Defendant, at all times relevant owed a duty of reasonable care to the Plaintiff.
>
> 8. On or about April 14, 2015, Defendant's agent, [McPherson], was driving Plaintiff to Plaintiff's residence. At the time and place in

question, [McPherson], knowing that Plaintiff's gait was unsteady, carelessly and negligently forced Plaintiff out of the vehicle approximately one city block from Plaintiff's residence instead of driving Plaintiff to the front door of Plaintiff's residence.

9. As a proximate result of the foregoing, Plaintiff, while attempting to walk home, fell, was injured and treated in an emergency room.

10. At all times relevant, [McPherson]'s foregoing acts were of the kind Defendant employed her to perform; occurred substantially within Defendant's authorized time and space limits; and were actuated, at least in part[,] by a purpose to serve Defendant."

[*P43] Section 324 of the Restatement (Second) of Torts states:

"One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability **[**29]** to the other for any bodily harm caused to him by

(a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge, or

(b) the actor's discontinuing his aid or protection, if by doing so he leaves the other in a worse position than when the actor took charge of him." Restatement (Second) of Torts § 324 (1965).

[*P44] The allegations of count I indicate that plaintiff did not plead that a duty existed pursuant to a voluntary undertaking. "[A] plaintiff cannot defend against a motion for summary judgment by presenting evidence on issues which are not pleaded in his complaint." *Bauer v. Hubbard*, 228 Ill. App. 3d 780, 786, 593 N.E.2d 569, 170 Ill. Dec. 680 (1992). The reasoning behind such a rule is explained as follows:

"A plaintiff fixes the issues in controversy and the theories upon which recovery is sought by the allegations in his complaint. The very purpose of a complaint is to advise the defendant of the claim it is called upon to meet. [Citation.] In ruling on a motion for summary judgment, the court looks to the pleadings to determine the issues in controversy. If the defendant is entitled to judgment as a matter of law on the claims as pled by the plaintiff, the motion will be granted without regard to the presence of evidentiary material which **[**30]** might create a right of recovery against the moving defendant on some unpled claim or theory. Under the Code of Civil Procedure, a plaintiff's remedy in such a circumstance is to move to file an amended complaint before the summary judgment is granted under section 2-616(a) or after under section 2-1005(g). [Citation.] Having failed to seek relief under either section, the plaintiff will not be heard to complain that summary judgment was inappropriately granted because of the existence of evidence supporting a theory of recovery that he never pled in his complaint." *Pagano v. Occidental Chemical Corp.*, 257 Ill. App. 3d 905, 911, 629 N.E.2d 569, 196 Ill. Dec. 24 (1994).

[*P45] Here, plaintiff alleges that defendant was responsible for providing the services listed on plaintiff's plan of care form and owed her "a duty of reasonable care." There is no allegation that defendant or its agent undertook a duty when one did not exist, as is required by section 324. Instead, plaintiff alleges that defendant had a general duty of reasonable care pursuant to its assumption of the responsibility to provide the services listed in the plan of care form. Plaintiff never sought leave to amend its complaint to add a count seeking relief pursuant to a voluntary undertaking and cannot now defend against summary judgment as if such a count was pled. Thus, **[**31]** we reject plaintiff's contention on this point.

[*P46] Defendant argues that although plaintiff may have pled that it had a duty of reasonable care, plaintiff has failed to present any evidence to support

her allegations because McPherson was not on duty when plaintiff fell on April 14, 2015. Defendant relies on the timesheet presented at Rom's deposition, which showed that McPherson only worked from 8:30 a.m. to 2:30 p.m. on the date at issue, and the paramedics' EMSS report indicated an "onset time" of 3:45 p.m. Thus, defendant asserts no duty existed.

[*P47] It is well-settled that "'[a] defendant in a negligence suit is entitled to summary judgment if he can demonstrate that the plaintiff has failed to establish a factual basis for one of the required elements of a cause of action for negligence.'" *Argueta v. Krivickas*, 2011 IL App (1st) 102166, ¶ 10, 952 N.E.2d 1238, 352 Ill. Dec. 12 (quoting *Smith v. Tri-R Vending*, 249 Ill. App. 3d 654, 658, 619 N.E.2d 172, 188 Ill. Dec. 808 (1993)). Although we agree that summary judgment was ultimately proper here, we premise our holding on plaintiff's failure to present any evidence that would establish a factual basis for defendant's alleged breach, not its duty. "At the summary judgment stage, the mere allegations in the pleadings are not enough to create a material issue of fact." *Richter v. Burton Investment Properties, Inc.*, 240 Ill. App. 3d 998, 1002, 608 N.E.2d 1254, 181 Ill. Dec. 780 (1993). In this case, plaintiff's first amended complaint **[**32]** contains allegations of negligence, but plaintiff has failed to present evidence supporting a factual basis to substantiate those allegations.

[*P48] As a brief aside, we reject defendant's argument that no duty existed because the EMSS report indicated an "onset time" of 3:45 p.m. and McPherson's shift ended at 2:30 p.m. Our review of the record indicates that there is no evidence explaining what the term "onset time" means. Defendant's argument hinges on plaintiff's April 14, 2015, fall occurring at 3:45 p.m., over an hour after McPherson ended her shift. However, the EMSS report merely uses the term "onset time." No one has testified what this term means. Specifically, no one from the Niles fire department testified, and no one who did testify knew what time the fall occurred. "Onset time" could be the time the paramedics were called, the time they arrived, the time the incident occurred, or some other unknown time. To make a determination regarding whether plaintiff fell during McPherson's April 14, 2015, shift would be entirely speculative. Thus, an issue of fact exists, albeit non-material. A material question of fact has been defined as "'an ultimate fact upon which the rights of the **[**33]** parties depend.'" *Simmons v. Garces*, 319 Ill. App. 3d 308, 318, 745 N.E.2d 569, 253 Ill. Dec. 446 (2001) (quoting *Meister v. Henson*, 253 Ill. App. 3d 619, 628, 625 N.E.2d 404, 192 Ill. Dec. 444 (1993)).

[*P49] In this case, the question of the exact timing of plaintiff's fall on April 14, 2015, is nonmaterial for two related reasons. First, plaintiff has failed to establish a factual basis supporting her allegations of breach because there is no evidence that McPherson drove plaintiff home from CVS, let alone that she "forced" plaintiff out of the vehicle. Therefore, even if McPherson was on-duty when plaintiff fell, plaintiff has failed provide a factual basis for a requisite element of her cause of action. Second, if McPherson was not on duty, then the timing of plaintiff's fall would still not be material because plaintiff's first amended complaint does not allege that McPherson owed her a duty pursuant to a voluntary undertaking. In other words, no genuine issue of material fact exists if the fall occurred during McPherson's shift and, similarly, no genuine issue of material fact exists if the fall occurred after McPherson's shift was over. The timing of plaintiff's fall lacks materiality where plaintiff has only sued under a theory of *respondeat superior*, which allows an employer to be held vicariously liable for the torts of an employee acting within the **[**34]** scope of employment. *Papadakis*, 2018 IL App (1st) 170388, ¶ 15. Plaintiff did not plead a voluntary undertaking theory, and thus if McPherson was not acting within the scope of her employment and she has not been sued in her individual capacity, it is unclear what genuine issue of material fact could exist.

[*P50] We find that summary judgment was still proper because no genuine issue of material fact exists, where even if we assume *arguendo* that plaintiff adequately presented some evidence establishing the existence of a duty of reasonable care, she has not presented any evidence supporting her allegation that

defendant breached its duty. *Gadson v. Among Friends Adult Day Care, Inc.*, 2015 IL App (1st) 141967, ¶ 15, 395 Ill. Dec. 701, 39 N.E.3d 168 ("We may affirm the judgment of the circuit court on any basis appearing in the record, even if it was not the grounds on which the circuit court relied, and even if the trial court's basis for dismissal was incorrect."). We note that whether a defendant breached its duty is generally a factual matter for a jury to decide, as long as there is a genuine issue of material fact regarding this issue. *Marshall v. Burger King, Corp.*, 222 Ill. 2d 422, 430, 856 N.E.2d 1048, 305 Ill. Dec. 897 (2006). However, we ultimately find that summary judgment on count I was proper because plaintiff has failed to provide a factual basis for her allegation that defendant breached its duty of reasonable care. **[**35]** In other words, the evidence in this case does not create a genuine issue of material fact regarding defendant's alleged breach of duty because there is no evidence that defendant, through McPherson's conduct, acted in an unreasonable manner under the circumstances. Plaintiff's complaint alleges that defendant breached its duty of reasonable care to plaintiff when McPherson "carelessly and negligently forced Plaintiff out of the vehicle approximately one city block from Plaintiff's residence instead of driving Plaintiff to the front door of Plaintiff's residence." However, the evidence before this court does not establish a factual basis for that allegation.

[*P51] Count I of plaintiff's first amended complaint alleged that defendant breached its duty when McPherson, "knowing that Plaintiff's gait was unsteady, carelessly and negligently forced Plaintiff out of the vehicle approximately one city block from Plaintiff's residence instead of driving Plaintiff to the front door of Plaintiff's residence." In her reply brief, plaintiff contends that the following is sufficient circumstantial evidence to create a material factual issue: McPherson drove plaintiff to CVS, McPherson was the last person **[**36]** to see plaintiff before she was found bleeding one-and-half blocks from her residence, plaintiff could not have walked to where she was found, and plaintiff could not have driven to where she was found. We disagree.

[*P52] We recognize that "[t]he law is well-established that a party may establish a defendant's negligence through the use of circumstantial evidence." *Wrobel v. City of Chicago*, 318 Ill. App. 3d 390, 397, 742 N.E.2d 401, 252 Ill. Dec. 151 (2000). Although circumstantial evidence may be used to establish a factual basis for a claim, it is sufficient only when it shows the probability of the existence of the fact. *Id.* at 398. "The circumstantial facts must be of such a nature and so related as to make the conclusion reached the more probable, as opposed to possible, one." *Id.*

[*P53] The aforementioned circumstantial evidence presented by plaintiff does not establish the probability, rather than the possibility, that McPherson "carelessly and negligently forced Plaintiff out of the vehicle." In fact, there is no evidence that McPherson drove plaintiff home from CVS at all or that plaintiff was forced out of the vehicle. Theodora's testimony merely established that McPherson drove her to CVS, not that she took her home. Plaintiff is asking this court to assume that plaintiff got into the **[**37]** vehicle with McPherson to ride home from CVS and that McPherson forced plaintiff out of the vehicle, which is entirely speculative. No one has testified as to the circumstances surrounding plaintiff's fall. There is simply no evidence that would establish a factual basis that McPherson breached her duty of care or acted in a negligent manner. This is because there is no evidence as to manner in which McPherson acted. Neither George nor Theodora nor Rom, the only three deponents in this case, were present when plaintiff fell on April 14, 2015. "Mere speculation is not enough to create a genuine issue of material fact sufficient to survive a motion for summary judgment." *Judge-Zeit v. General Parking Corp.*, 376 Ill. App. 3d 573, 584, 875 N.E.2d 1209, 314 Ill. Dec. 922 (2007). As such, we find that plaintiff has failed to present a factual basis that would create a genuine issue of material fact as to whether defendant breached a duty to plaintiff, rendering summary judgment on count I proper.

[*P54] B. Count II

[*P55] Count II of plaintiff's first amended complaint refers to "a time after April 14, 2015" and "a presently-unidentified employee." We note that the parties appear to agree that the date of plaintiff's second fall was August 28, 2015, and the previously-unknown employee is Shirley Smith. Count **[**38]** II further alleges that defendant breached its duty of reasonable care to plaintiff when its agent Smith, "knowing that Plaintiff required ongoing monitoring, carelessly and negligently exited Plaintiff's residence or totally ignored the Plaintiff."

[*P56] Plaintiff points to defendant's contention in response to its motion for summary judgment that Smith had no obligation to assist plaintiff in transferring unless plaintiff first requested assistance, and argues that there is a factual issue as to the extent of Smith's job obligations. We disagree for the same reasoning set forth above. Even assuming *arguendo* that plaintiff adequately presented a factual basis to support the existence of a duty to assist plaintiff while transferring, there is simply no evidence supporting plaintiff's allegation that defendant breached such a duty. Again, neither George nor Theodora nor Rom, *i.e.* the only testifying witnesses, were present when plaintiff fell. Even more fatal to plaintiff's count II is the lack of evidence indicating that Smith was present when plaintiff went to or from the bathroom. There is no evidence regarding how or why plaintiff fell, who was present when she fell, or that Smith did **[**39]** or failed to do something. Similar to count I, plaintiff's allegation in count II that Smith "negligently exited Plaintiff's residence or totally ignored the Plaintiff" is based on pure speculation, and thus cannot create a genuine issue of material fact.

[*P57] Further, plaintiff points to some forms filled out by Smith as apparently "falsified." Plaintiff argues that based on this alleged falsification, we should infer negligence. While it is true that "[a] triable issue of fact exists *** where, although the facts are not in dispute, reasonable minds might differ in drawing inferences from those facts," (*Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill. 2d 17, 31, 719 N.E.2d 756, 241 Ill. Dec. 627 (1999)), we do not believe that this principle applies here. Plaintiff contends that Smith falsified her Task Verification Form by failing to indicate that plaintiff fell on the date in question and broke or fractured her hip. However, George testified that he came to learn of plaintiff's second fall because Smith called him and said "'Your mother fell and can't move.'" Thus, it is unclear what inference plaintiff is asking this court to draw. Plaintiff seems to indicate that Smith was trying to hide the fact that plaintiff fell, but such a position is perplexing because there is no dispute that **[**40]** plaintiff fell and Smith called George to inform him of the fall. We do not find that any reasonable inferences indicating negligence can be drawn from the evidence plaintiff presented. As such, we find the trial court properly granted summary judgment on count II.

[*P58] III. CONCLUSION

[*P59] Based on the foregoing, we affirm the trial court's decision to grant defendant's motion for summary judgment.

[*P60] Affirmed.

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