

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

JOHN WAYNE JARRETT, as Independent Administrator of the Estate of Rose Jarrett,
Deceased, Plaintiff-Appellant,

v.

JULIE MCGHEE, N.P., Defendant-Appellee.

Appeal from the Circuit Court of De Kalb County.
Honorable Bradley J. Waller, Judge, Presiding.
No. 23-LA-44

JUSTICE MULLEN delivered the judgment of the court, with opinion.
Justices Schostok and Birkett concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff, John Wayne Jarrett, appeals an order of the circuit court of De Kalb County dismissing his medical negligence action against defendant, Julie McGhee. The trial court determined that defendant was immune from suit in accordance with section 21(c) of the Illinois Emergency Management Agency Act (Act) (20 ILCS 3305/21(c) (West 2020)). For the reasons that follow, we reverse and remand.

¶ 2 I. BACKGROUND

¶ 3 This case arises out of the death of Rose Jarrett (decedent), who was in the care of defendant in July 2021. Plaintiff's amended complaint alleges that decedent underwent a surgical procedure on June 21, 2021, and subsequently developed an intestinal leak. The procedure took place at Kishwaukee Community Hospital (Kishwaukee Hospital) in De Kalb. On June 30, 2021, decedent

was discharged from Kishwaukee Hospital, but subsequently readmitted on July 3, 2021, complaining of weakness and difficulty moving. A CT scan was performed, and, after two surgeons provided consultations, decedent was discharged from Kishwaukee Hospital and admitted to Generations at Neighbors, LLC (Neighbors), a rehabilitation facility in Byron, on July 8, 2021. Defendant was a nurse practitioner at Neighbors. While at Neighbors, decedent's blood work showed high white blood cell counts. On July 15, decedent was transferred by ambulance to Swedish Covenant Hospital in Rockford. She underwent exploratory surgery, and a "massive intraabdominal abscess with fecal peritonitis was found and removed." The amended complaint further alleged that as a result of the abscess, decedent became septic, her chemotherapy for colon cancer was delayed, other complications developed, and she died on May 10, 2022. It alleged that defendant's negligence was a proximate cause of decedent's death.

¶ 4 Defendant responded with a combined motion to dismiss plaintiff's complaint and for summary judgment. See 735 ILCS 5/2-619, 2-1005 (West 2020). She argued that she was immune from liability in accordance with section 21(c) of the Act. Section 21(c) provides immunity as follows:

"Any private person, firm or corporation, and any employee or agent of such person, firm or corporation, who renders assistance or advice at the request of the State, or any political subdivision of the State under this Act during an actual or impending disaster, shall not be civilly liable for causing the death of, or injury to, any person or damage to any property except in the event of willful misconduct." 20 ILCS 3305/21(c) (West 2020).

The governor issued a series of disaster proclamations, beginning on March 9, 2020, in response to the COVID-19 pandemic. One such proclamation was in effect in July 2021 during the period in which defendant cared for decedent.

¶ 5 The governor also issued a series of executive orders pertaining to the pandemic. The first, issued on April 1, 2020, was designated Executive Order No. 2020-19. See Exec. Order No. 2020-19, 44 Ill. Reg. 6,192 (Apr. 1, 2020), <https://www.illinois.gov/content/dam/soi/en/web/illinois/documents/government/executive-orders/2020/executiveorder-2020-19.pdf> [https://perma.cc/EMA8-7DXS]. Pertinent here, it directed “all Health Care Facilities, Health Care Professionals, and Health Care Volunteers *** to render assistance in support of the State’s response to the disaster recognized by the Gubernatorial Disaster Proclamations (COVID-19 outbreak).” *Id.* § 2, 44 Ill. Reg. at 6,195. It defined “rendering assistance” to include “cancelling or postponing elective surgeries and procedures”; “increasing the number of beds, preserving personal protective equipment, or taking necessary steps to treat patients with COVID-19”; or providing services in response to the COVID-19 outbreak. *Id.* Executive Order No. 2020-19 further provided that, pursuant to section 21(c) of the Act,

“Health Care Professionals *** shall be immune from civil liability for any injury or death alleged to have been caused by any act or omission by the Health Care Professional, which injury or death occurred at a time when a Health Care Professional was engaged in the course of rendering assistance to the State by providing health care services in response to the COVID-19 outbreak,”

unless it was the result of willful misconduct. *Id.* § 4, 44 Ill. Reg. at 6,195. This order also defined the terms “Health Care Professional,” “Health Care Volunteer,” and “Health Care Facilities.” See *id.* § 1, 44 Ill. Reg. at 6,194. Executive Order No. 2020-19 further stated that it was “effective April 1, 2020 and for the remainder of the duration of the Gubernatorial Disaster Proclamations, which currently extends through April 30, 2020.” Exec. Order No. 2020-19, 44 Ill. Reg. at 6,193-94.

¶ 6 On April 30, 2020, the governor issued Executive Order No. 2020-33. See Exec. Order No. 2020-33, 44 Ill. Reg. 8,425 (Apr. 30, 2020), <https://www.illinois.gov/content/dam/soi/en/web/illinois/documents/government/executive-orders/2020/executiveorder-2020-33.pdf> [https://perma.cc/PAM6-Y8CR]. In it, he expressly reissued Executive Order No. 2020-19. Executive Order No. 2020-33 amended some of the definitions set forth in the earlier order and altered, in ways not relevant to this case, what was necessary to be deemed to be rendering assistance. It also stated, “Executive Order 2020-19, as amended below, is re-issued in its entirety and extended through *May 29, 2020*.” (Emphasis in original.) *Id.*, 44 Ill. Reg. at 8,429.

¶ 7 Executive Order No. 2020-37, issued May 13, 2020, again invoked the immunity set forth in section 21(c) of the Act. See Exec. Order No. 2020-37, 44 Ill. Reg. 9,295 (May 13, 2020), <https://www.illinois.gov/content/dam/soi/en/web/illinois/documents/government/executive-orders/2020/executiveorder-2020-37.pdf> [https://perma.cc/C4ZX-EB4C]. This order also provided additional definitions of some terms not pertinent here. It did not expressly mention Executive Order Nos. 2020-19 or 2020-33. Executive Order No. 2020-37 delineated immunity for hospitals and medical professionals providing service in hospitals, depending on whether the hospital was postponing or conducting elective surgery. Hospitals postponing elective surgeries were granted broad immunity of the sort set forth in Executive Order No. 2020-19. Hospitals conducting elective surgeries on or after May 11, 2020, were immunized only for “injury or death relating to the diagnosis, transmission, or treatment of COVID-19.” *Id.* § 4, 44 Ill. Reg. at 9,300. As for “Health Care Facilities” and “Health Care Professionals” providing services therein, the order stated that they

“shall be immune from civil liability for any injury or death relating to the diagnosis, transmission, or treatment of COVID-19 alleged to have been caused by any act or

omission by the Health Care Facility or the Health Care Professional, which injury or death occurred at a time when a Health Care Facility or Health Care Professional was rendering assistance to the State in response to the COVID-19 outbreak by providing health care services consistent with the current guidance issued by the [Illinois Department of Public Health (IDPH)].” *Id.* § 5, 44 Ill. Reg. at 9,301.

¶ 8 On May 29, 2020, the governor issued Executive Order No. 2020-39. See Exec. Order No. 2020-39, 44 Ill. Reg. 10,275 (May 29, 2020), <https://www.illinois.gov/content/dam/soi/en/web/illinois/documents/government/executive-orders/2020/executiveorder-2020-39.pdf> [<https://perma.cc/6V9J-CP3V>]. This order extended Executive Order No. 2020-37 through June 27, 2020. It did not mention Executive Order No. 2020-19. No changes were made to Executive Order No. 2020-37. This order stated, “Executive Order 2020-37, which superseded Executive Order 2020-19 as of its effective date May 13, 2020, is re-issued in its entirety and extended through June 27, 2020.” (Emphasis in original.) *Id.*, 44 Ill. Reg. at 10,280.

¶ 9 On June 26, 2020, Executive Order No. 2020-44 was issued. See Exec. Order No. 2020-44, 44 Ill. Reg. 11,713 (June 26, 2020), <https://www.illinois.gov/content/dam/soi/en/web/illinois/documents/government/executive-orders/2020/executiveorder-2020-44.pdf> [<https://perma.cc/3UXF-NAPL>]. This order reissued a number of executive orders; however, it did not mention Executive Order No. 2020-19, Executive Order Nos. 2020-33, 2020-37, or 2020-39. It made no other mention of the immunity described in section 21(c) of the Act. See 20 ILCS 3305/21(c) (West 2020).

¶ 10 At the time of the events that form the basis of plaintiff’s cause of action, Executive Order No. 2021-14 was in effect. See Exec. Order No. 2021-14, 45 Ill. Reg. 8,570 (June 25, 2021), <https://www.illinois.gov/content/dam/soi/en/web/illinois/documents/government/executive->

orders/2021/executiveorder-2021-14.pdf [https://perma.cc/XM9G-YKYQ]. It extended numerous executive orders, but did not mention Executive Order Nos. 2020-19, 2020-33, 2020-37, or 2020-39. No mention was made of immunity for healthcare workers.

¶ 11 The trial court granted plaintiff's combined motion. In its written order, the trial court stated,

“Defendant McGHEE’s hybrid motion to Dismiss is GRANTED, the Court granting the Motion on both grounds upon which relief was sought, granting dismissal pursuant to 735 ILCS 5/2-619 and summary judgment pursuant to 735 ILCS 5/2-1005, for reasons stated on the record, and all counts against Defendant McGHEE are dismissed with prejudice.”

The order contained findings made in accordance with Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016). On the record, the trial court acknowledged that, while there was a declared disaster, the executive order in effect at the time defendant treated decedent “did not contain the provision for immunity that’s addressed at 20 ILCS 3305/21(c).” It distinguished *James v. Geneva Nursing & Rehabilitation Center, LLC*, 2024 IL 130042 (*James II*), noting that the supreme court confined its analysis to an executive order (Executive Order No. 2020-19) in effect at the time of the events at issue in that case and never addressed immunity under section 21(c) of the Act directly. It then asserted that the governor does not have the power to unilaterally determine whether the provisions set forth in section 21(c) were in effect. The trial court held that the immunity set forth in that section was triggered by the governor’s disaster proclamation. Thus, applying the terms of the statute, the trial court first found that defendant was rendering assistance to the State. It next found that defendant’s actions were “clearly *** at the request of the State,” but did not specify what it believed constituted that request. Accordingly, the trial court concluded that defendant was entitled

to immunity under section 21(c), and it granted “the motion to dismiss and the motion for summary judgment.” This appeal followed.

¶ 12

II. ANALYSIS

¶ 13 On appeal, plaintiff argues that the immunity referenced in the governor’s executive orders expired prior to the time when defendant performed the acts at issue in this case. Defendant counters that she has satisfied the requirements for immunity under section 21(c) (20 ILCS 3305/21(c) (West 2020)), the governor’s executive orders notwithstanding. Because this case comes to us following the trial court’s grant of defendant’s motion to dismiss (735 ILCS 5/2-619 (West 2020)) and for summary judgment (*id.* § 2-1005), review is *de novo*. *Khan v. Fur Keeps Animal Rescue, Inc.*, 2021 IL App (1st) 182694, ¶ 34 (dismissal); *Filliung v. Adams*, 387 Ill. App. 3d 40, 53 (2008) (summary judgment). The construction of a statute also presents a question of law that we review *de novo*. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). Applying the *de novo* standard of review, we owe no deference to the ruling of the trial court and are free to disregard it and substitute our own judgment in its place. *Miller v. Hecox*, 2012 IL App (2d) 110546, ¶ 29.

¶ 14 A motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2020)) admits the legal sufficiency of the complaint and asserts an affirmative defense or other matter that defeats or avoids a plaintiff’s claim. *DeLuna*, 223 Ill. 2d at 59. The motion may assert that a claim fails as a matter of law or “based on an easily proved issue of fact.” *Walworth Investments-LG, LLC v. Mu Sigma, Inc.*, 2022 IL 127177, ¶ 38; *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003) (“The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of litigation.”). An “affirmative matter” is any issue beyond a negation of an element of a plaintiff’s complaint. *Walworth Investments-LG*, 2022 IL 127177, ¶ 40. If the affirmative matter asserted is not apparent

on the face of the complaint, the movant must support the motion with an affidavit. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993). If the movant presents sufficient affidavits to support the defense, the burden shifts to the plaintiff to show that the defense is unfounded or that an issue of fact requires resolution. *Id.* When ruling on a section 2-619 motion to dismiss, a court must interpret all pleadings and supporting documents in the light most favorable to the opponent of the motion. *Van Meter*, 207 Ill. 2d at 367-68. Immunity is an affirmative defense properly raised in a section 2-619 motion to dismiss. *Id.* at 367.

¶ 15 Similarly, summary judgment is appropriate where “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” 735 ILCS 5/2-1005(c) (West 2020). A court considering a motion for summary judgment must construe “the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in the opponent’s favor.” *Hinton-Goodwin v. City of Harvey*, 2026 IL App (1st) 241320, ¶ 16. Summary judgment is a drastic means of resolving a case, so it should be granted only where the movant’s entitlement to judgment is clear and free from doubt. *AEB Merger, LLC v. Azari*, 2024 IL App (1st) 230975, ¶ 14. The movant bears the initial burden of production, which may be met “by introducing evidence that, if uncontroverted, would entitle the movant to judgment as a matter of law” or “by establishing that the nonmovant lacks sufficient evidence to prove an essential element of the cause of action.” *Williams v. Covenant Medical Center*, 316 Ill. App. 3d 682, 688 (2000). If the movant satisfies this burden, the burden shifts to the opponent of the motion to “present some factual basis that would arguably entitle them to a judgment under the applicable law.” *Id.* at 689.

¶ 16 Here, defendant’s entitlement to prevail depends on the applicability of section 21(c) of the Act (20 ILCS 3305/21(c) (West 2020)), which provides, in pertinent part, as follows:

“Any private person, firm or corporation, and any employee or agent of such person, firm or corporation, who renders assistance or advice at the request of the State, or any political subdivision of the State under this Act during an actual or impending disaster, shall not be civilly liable for causing the death of, or injury to, any person or damage to any property except in the event of willful misconduct.”

Thus, defendants seeking to invoke this immunity must establish four elements: (1) that they are among the entities entitled to such protection (that is, a private person, firm, corporation, or employee of one of those entities); (2) that they rendered assistance or advice; (3) that they were acting at the request of the State; and (4) that the assistance or advice was rendered during an actual or impending disaster.

¶ 17 In this case, the first and fourth elements are not at issue. It is undisputed that defendant was an employee of a specified entity. Moreover, the governor issued a disaster proclamation covering the relevant period. See Gubernatorial Disaster Proclamation No. 2021-122, 45 Ill. Reg. 8,576 (June 25, 2021), <https://www.illinois.gov/content/dam/soi/en/web/illinois/documents/government/disaster-proclamations/coronavirus/coronavirus-disaster-proc-06-25-2021.pdf> [https://perma.cc/2H4Z-C8WJ]. See *James II*, 2024 IL 130042, ¶ 5. Furthermore, that plaintiff and her employer were rendering assistance is not seriously disputed (in *James II*, 2024 IL 130042, ¶ 35, the supreme court held that immunity was not limited to negligence relating to providing treatment for COVID-19). This leaves only the question of whether the assistance was rendered at the request of the State. Defendant contends that plaintiff forfeited this final question, an assertion with which we disagree and will address later.

¶ 18 Section 21(c) of the Act was addressed by this court in *James v. Geneva Nursing & Rehabilitation Center, LLC*, 2023 IL App (2d) 220180 (*James I*), and by the supreme court, on

review, in *James II*, 2024 IL 130042. We will examine both to better understand how section 21(c) functions. The facts, of course, are the same. The case involved a certified question in accordance with Illinois Supreme Court Rule 308 (eff. Oct. 1, 2019). It originated from “several consolidated wrongful-death suits against a nursing home where each decedent passed from COVID-19 complications during the opening weeks of the pandemic.” *James I*, 2023 IL App (2d) 220180, ¶ 1. They alleged, generally, that the nursing home negligently failed to control the spread of COVID at the facility. The nursing home sought immunity under Executive Order No. 2020-19 (and its successor that reissued it).

¶ 19 The appellate court observed that Executive Order No. 2020-19 invoked the governor’s authority under section 21(c) of the Act “to extend ordinary governmental tort immunity (see 745 ILCS 10/1-101 *et seq.* (West 2020)) to nursing homes and health care facilities that ‘render[ed] assistance or advice at the request of the State’ during the governor’s disaster declaration.” *Id.* ¶ 7 (quoting Exec. Order No. 2020-19, 44 Ill. Reg. at 6,193). It noted the language of the order, which tracked the language set forth in section 21(c). See *id.* On this basis, the defendant argued before the trial court that, “as long as it took such steps to address the pandemic, it was immune from negligence claims regardless of how they arose.” *Id.* ¶ 8. The defendant supported its claim of immunity with affidavits stating that, in response to the pandemic and at the request of the State, the defendant took various actions, including storing personal protective equipment, making beds available to incoming patients, and training its staff in protective measures. *Id.* ¶ 9. The trial court initially granted a motion to dismiss by the defendant but then granted the plaintiff’s motion to reconsider. *Id.* The defendant then submitted the following question to the trial court for certification: “ ‘Does Executive Order 2020-19 provide blanket immunity for ordinary negligence to healthcare facilities that rendered assistance to the State during the COVID-19 pandemic?’ ” *Id.*

The trial court granted the defendant's request for certification, and this court granted leave to appeal.

¶ 20 On appeal, this court first determined that the certified question, as phrased, “misstate[d] the relevant issue in th[e] case.” *Id.* ¶ 13. We observed that “blanket immunity” exceeds the immunity described in section 21(c) and the governor’s executive orders and that the certified question misconceived the source of the immunity as the governor’s order rather than the Act. *Id.* ¶¶ 15-17. Accordingly, we modified it as follows: “ ‘Does Executive Order No. 2020-19, which triggered the immunity provided in 20 ILCS 3305/21(c), grant immunity for ordinary negligence claims to healthcare facilities that rendered assistance to the State during the COVID-19 pandemic?’ ” *Id.* ¶ 21. We answered the revised question affirmatively. *Id.* In so deciding, we stated that the governor’s orders triggered “preexisting, potential statutory immunity for health care facilities under the Act.” *Id.* ¶ 17. Accordingly, we believed, “the question is not what the executive order says but rather what the relevant *statute* that the executive order invokes says.” (Emphasis in original.) *Id.* ¶ 19.

¶ 21 On review, the supreme court concurred with our ultimate disposition, though it did not embrace all of our reasoning. Initially, it agreed with our reformulation of the certified question. *James II*, 2024 IL 130042, ¶ 21. However, it clarified,

“While we agree with the appellate court that the statutory immunity that derives from section 21(c) of the Act was triggered by the Governor issuing Executive Order No. 2020-19, we part ways with the appellate court where it analyzed the language of section 21(c) of the Act [citation], instead of Executive Order No. 2020-19.” *Id.* ¶ 27.

It explained:

“Section 7 of the Act gives the Governor the authority to declare that a disaster exists and to issue executive orders during a declared disaster. [20 ILCS 3305/7 (West 2020).] As a result, while the disaster proclamation was in effect, the Governor used the immunity provided in section 21(c) of the Act (*id.* § 21(c)) to issue Executive Order No. 2020-19, which specifically related to the COVID-19 pandemic. See Exec. Order No. 2020-19, § 3, 44 Ill. Reg. at 6195. Accordingly, the certified question, as modified, requires us to construe the language of Executive Order No. 2020-19 *to determine whether it grants immunity* for ordinary negligence claims to health care facilities that rendered assistance to the State during the COVID-19 pandemic.” (Emphasis added.) *Id.* ¶ 28.

Notably, the supreme court spoke in terms of the executive order itself granting immunity rather than section 21(c). Thus, it construed the language of Executive Order No. 2020-19, observing that “[w]hen construing the language of an executive order and determining the Governor’s intent, we are guided by the same principles utilized in statutory construction.” *Id.* ¶ 29. It determined that the order provided the defendant with immunity under the circumstances of that case. See *id.* ¶¶ 30-36.

¶ 22 The salient point of *James II*, for our purposes, is that immunity is granted by the governor’s order, which derives its authority from section 21(c), rather than directly by the statute itself. See *id.* ¶¶ 27-28 (“we agree with the appellate court that the statutory immunity that derives from section 21(c) of the Act was triggered by the Governor issuing Executive Order No. 2020-19”; “the certified question, as modified, requires us to construe the language of Executive Order No. 2020-19 to determine whether it grants immunity for ordinary negligence claims to health care facilities that rendered assistance to the State during the COVID-19 pandemic”). Moreover, it is the order, rather than the statute, that defines the scope of that immunity. See *id.* ¶ 35 (“In analyzing

the plain language [of Executive Order No. 2020-19], it is clear the governor chose to limit immunity to ordinary negligence claims where the language explicitly excluded willful misconduct.”)

¶ 23 Defendant attempts to distinguish *James II* by arguing that it construed Executive Order No. 2020-19 rather than section 21(c). She asserts, “*James [III]* does not hold that immunity exists only while a healthcare-specific [executive order] is active.” While true, the discussion in *James II* of the relationship between Executive Order No. 2020-19 and section 21(c) provides guidance here. *James II* teaches that the immunity set forth in that section requires a trigger. See *id.* ¶ 27. By its own terms, section 21(c) is not self-executing but requires a “request of the State” to be effective. See 20 ILCS 3305/21(c) (West 2020).

¶ 24 Thus, we must first look to the governor’s executive orders to determine whether defendant can assert the immunity set forth in section 21(c) of the Act. The main problem for defendant is that the executive orders that grant this immunity all expired long before the events that form the basis for plaintiff’s suit. Executive Order No. 2020-33 reissued Executive Order No. 2020-19 and stated that it “is re-issued in its entirety and extended through *May 29, 2020*.” (Emphasis in original.) Exec. Order No. 2020-33, 44 Ill. Reg. at 8,429. Similarly, Executive Order No. 2020-39 reissued Executive Order No. 2020-37 (which addressed immunity) but expressly stated that it was “extended through *June 27, 2020*.” (Emphasis in original.) Exec. Order No. 2020-39, 44 Ill. Reg. at 10,280. Moreover, Executive Order No. 2021-14, the order addressing the pandemic that was in effect at the time of these events, contained no provision granting this immunity. See Exec. Order No. 2021-14, 45 Ill. Reg. 8,570. Clearly, none of the governor’s executive orders provide defendant with immunity in this case.

¶ 25 Defendant argues that she is nevertheless entitled to invoke the protection of section 21(c), the lack of a triggering executive order notwithstanding. Defendant asserts that she met the requirements set forth in section 21(c) for immunity. As noted above (*supra* ¶ 17), the only element that is disputed is whether the assistance rendered by plaintiff or her employer was at the request of the State. As a threshold matter, defendant contends that plaintiff forfeited any claim that it did not satisfy this element by not addressing it before the trial court. It is true that arguments raised for the first time on appeal are generally deemed forfeited. *Vantage Hospitality Group, Inc. v. Q Ill Development, LLC*, 2016 IL App (4th) 160271, ¶ 49. But, as Justice Steigmann noted in *Essig v. Advocate BroMenn Medical Center*, 2015 IL App (4th) 140546, ¶ 54, “on review of a trial court’s summary judgment determination, we are to perform the appropriate analysis *de novo*, without deferring to the trial court’s judgment or reasoning.”

¶ 26 In any event, forfeiture is a prerogative of the court, and we decline to apply the forfeiture rule here. See *In re Commitment of Sandry*, 367 Ill. App. 3d 949, 963 (2006). We note that plaintiff’s alleged forfeiture occurred within the context of its purported failure to address an element of an affirmative defense, which defendant bore the burden of establishing. See *Albers v. Breen*, 346 Ill. App. 3d 799, 806 (2004) (“Because governmental immunity is an affirmative defense, the defendant bears the burden of properly proving that the immunity applies to defeat the plaintiff’s claim.”). In *Village of South Elgin v. Waste Management of Illinois, Inc.*, 348 Ill. App. 3d 929, 934 (2004), we found that it would have been proper to relax the forfeiture rule in similar circumstances even if we “deem[ed] inadequate [the] plaintiff’s response to the argument in the trial court.” There, we noted that “[h]aving raised the [affirmative defense], [the] defendant was surely aware of it and should have been aware of its obligation to establish the premises of its argument. Defendant does not explain what it would have done differently in the action below had

plaintiff argued the issue more vigorously.” *Id.* In this case, by raising the immunity defense, defendant placed section 21(c) before the trial court, and it was defendant’s burden to establish its elements, including whether any assistance rendered by her was at the request of the State. In short, assuming, *arguendo*, that plaintiff did not adequately address whether defendant was acting at the request of the State before the trial court, we would nevertheless decline to apply the forfeiture rule here.

¶ 27 Turning to the merits of this issue, defendant asserts that she “argued that she was rendering assistance at the request of the State throughout her trial court briefing and at the hearing on her hybrid motion.” Of course, mere argument is insufficient to support a motion to dismiss or for summary judgment. See *Waterford Executive Group, Ltd. v. Clark/Bardes, Inc.*, 261 Ill. App. 3d 338, 343 (1994) (While reviewing a section 2-619 motion to dismiss, the court stated, “A trial court may not consider arguments and matters unsupported by affidavit.”); *South Side Trust & Savings Bank of Peoria v. Mitsubishi Heavy Industries, Ltd.*, 401 Ill. App. 3d 424, 435 (2010) (holding a “cursory assertion” was insufficient support for summary judgment motion and thus allowed the plaintiff to stand on its complaint to establish a genuine issue of material fact). Thus, the arguments to which defendant calls our attention are not germane as to whether she established facts sufficient to support her entitlement to immunity such that the trial court properly granted her motion to dismiss.

¶ 28 Defendant also argues that plaintiff “failed to controvert [her] evidence establishing the assistance she rendered [was] at the request of the State while treating [decedent] in July 2021.” In support, defendant cites her affidavit and her deposition. In her affidavit, she made one averment potentially relevant to this question:

“I attended and was involved in many meetings *** regarding the disaster response, stocking of PPE, reporting of COVID cases to State Agencies, implementing the recommendations of the IDPH and [Illinois Emergency Management Agency], and other aspects of working with the State of Illinois in response to the COVID pandemic and disaster.”

In another paragraph of her affidavit, plaintiff states that she was acting “in accordance with hospital and health system policy.” However, she does not identify any communications with specificity where she was requested by the State to “implement[] the recommendations” of a state agency. Moreover, she offers no argument (much less supporting authority) as to why simply following an agency’s policy guidelines would be sufficient to satisfy the requirement that assistance rendered be at the request of the State.

¶ 29 She also cites as evidence an entire 15-page block of her deposition, which we have reviewed and note the majority of which is not relevant to the proposition for which she cites it. Nevertheless, we believe we have identified the passages upon which plaintiff intended to rely. Defendant clarified that in her affidavit, when she stated she was acting pursuant to “hospital and health system policy,” she was referring to the Illinois Department of Public Health (IDPH) guidelines. She added that these guidelines were “given specifically to” her employer. She explained that her employment of social distancing and other similar measures was due to “policies that were in effect through the IDPH’s policies.” She took part in staff meetings where they discussed, among other things, “implementing the recommendations of the IDPH and Illinois Emergency Management Agency (IEMA) and other aspects of working with the State of Illinois in response to the COVID pandemic and disaster.” Regarding the “aspects of working with the State,” she explained: “Well, in general, I would say it’s just a summary of all the directives we

were given: social distancing, the treat in place, isolation protocols, [and] monitoring signs and symptoms of COVID.” Some of these meetings occurred in July 2021.

¶ 30 Defendant recalled the governor making statements requesting that healthcare employees continue to show up for their jobs during the pandemic. She opined that her continuing to perform her job constituted rendering assistance to the State. Plaintiff’s counsel interposed a foundational objection during the deposition. Defendant testified that her job changed considerably during the pandemic as a result of guidance received from the IDPH. She stated that there were “requests” by state and federal agencies, including the governor’s office and the IEMA; however, she agreed that she did not “remember those specific governor’s orders or guidelines from the CDC, the governor’s office or the Illinois Emergency Management Agency.”

¶ 31 Notably, at no point does defendant identify any communication with any degree of specificity. Moreover, while she speaks of guidelines, she does not explain what they were except in the most general terms, whether they were mandatory, or how they constituted a request—much less provide any supporting authority indicating that they did.

¶ 32 Rather, after calling our attention to defendant’s affidavit and deposition testimony, defendant concludes: “Plaintiff’s insistence that the State could only request assistance from health care providers via an active [executive order] [citation] is belied by this uncontroverted factual record and bereft of supporting legal authority. It should be rejected by this Court.” But again, immunity is an affirmative defense (*Van Meter*, 207 Ill. 2d at 367) and the initial burden was on defendant to demonstrate that it applied (*Albers*, 346 Ill. App. 3d at 806). This is true both in the context of a section 2-619 motion to dismiss (*Kedzie & 103rd Currency Exchange*, 156 Ill. 2d at 116) and a motion for summary judgment (*Winnetka Bank v. Mandas*, 202 Ill. App. 3d 373, 387 (1990)). Thus, the burden shifts to the plaintiff when defendants meet their initial burden of

production as movant, not before. See *Sciarrone v. Village of Island Lake*, 2025 IL App (2d) 240153, ¶ 12, *pet. for leave to appeal denied*, Nos. 132564 & 132569 (Ill. Mar. 25, 2026).

¶ 33 Generally, conclusory allegations are insufficient for a defendant to prevail in such circumstances. Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013) provides, in pertinent part:

“Affidavits in support of and in opposition to a motion for summary judgment under section 2-1005 of the Code of Civil Procedure [and] affidavits submitted in connection with a motion for involuntary dismissal under section 2-619 of the Code of Civil Procedure *** shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto.”

Conclusory assertions offered in a deposition are insufficient to remedy a failure to meet the standards set forth in Rule 191(a). See *Larson v. Decatur Memorial Hospital*, 236 Ill. App. 3d 796, 802 (1992) (“Unsupported assertions, opinions, and self-serving or conclusory statements made in deposition testimony are not admissible evidence upon review of a summary judgment motion.” (citing *Reuben H. Donnelley Corp. v. Krasny Supply Co.*, 227 Ill. App. 3d 414, 420-21 (1991))).

¶ 34 As defendant has offered nothing beyond general, conclusory assertions regarding the existence of a request for assistance by the State, we have nothing to evaluate—outside of the executive orders, which were no longer in effect—to determine if something other than the executive orders might satisfy the requirements set forth in section 21(c) of the Act. Further, defendant has offered no supporting legal authority for the proposition that the promulgation of policy guidelines could constitute such a request; she thus forfeits the issue. See *Palm v. 2800 Lake*

Shore Drive Condominium Ass’n, 401 Ill. App. 3d 868, 882 (2010). We further note defendant’s argument that plaintiff failed to “controvert [her] evidence establishing the assistance she rendered at the request of the State while treating [decedent] in July 2021.” Since we have concluded that defendant offered nothing beyond conclusory assertions in support of her claim of immunity, the burden never shifted to plaintiff to controvert defendant’s purported evidence. See *Kedzie & 103rd Currency Exchange*, 156 Ill. 2d at 116.

¶ 35 Defendant suggests that the Governor’s Disaster Proclamations were sufficient to trigger her immunity under the Act. While these proclamations certainly satisfy the final element set forth in section 21(c)—that the assistance is rendered “during an actual or impending disaster” (20 ILCS 3305/21(c) (West 2020))—their relevance as to whether the advice was rendered at the request of the State is unclear. Quite simply, defendant identifies no language in the proclamations similar to the language in the four executive orders that invoke the immunity set forth in the Act. See Gubernatorial Disaster Proclamation No. 2021-122, 45 Ill. Reg. 8,576.

¶ 36 Defendant also points out that Executive Order No. 2020-19 stated that the immunities set forth in the Act were effective “for the remainder of the duration of the Gubernatorial Disaster Proclamations.” Defendant observes that the term “Proclamations” in the order is plural. We note that Executive Order No. 2020-33 reissued Executive Order No. 2020-19 and expressly stated, “Executive Order 2020-19, as amended below, is re-issued in its entirety and extended through May 29, 2020.” (Emphasis in original.) Exec. Order No. 2020-33, 44 Ill. Reg. at 8,429. Had the governor intended Executive Order No. 2020-19 to continue indefinitely through the pendency of his disaster proclamations, there would have been no need to reissue it in a subsequent executive order. Further, Executive Order Nos. 2020-37 and 2020-39 contained similar provisions, with a termination date of June 27, 2020. Executive Order No. 2020-39 also expressly recognized that

Executive Order No. 2020-19 had been superseded by Executive Order No. 2020-37. See Exec. Order No. 2020-39, 44 Ill. Reg. at 10,280. Of course, “ ‘It is a well-settled principle of construction that specific terms covering the given subject-matter will prevail over general language of the same or another statute which might otherwise prove controlling.’ ” *People v. Bohannon*, 403 Ill. App. 3d 1074, 1077 (2010) (quoting *Kepner v. United States*, 195 U.S. 100, 125 (1904)). As such, we find defendant’s reliance on the general statement contained in Executive Order No. 2020-19 misplaced.

¶ 37 In sum, defendant has not established that she is entitled to immunity under section 21(c) of the Act. *James II*, 2024 IL 130042, ¶ 27, teaches that this immunity requires a “trigger[].” There, the supreme court concluded that it was triggered by Executive Order No. 2020-19. *Id.* That and other executive orders triggering section 21(c) immunity were no longer in effect at the time of the events that form the basis of plaintiff’s complaint. Defendant has identified no other trigger that would entitle her to immunity. Accordingly, the trial court erred in concluding otherwise and dismissing plaintiff’s case.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we reverse the judgment of the circuit court of De Kalb County and remand for further proceedings.

¶ 40 Reversed and remanded.

Jarrett v. McGhee, 2026 IL App (2d) 250474

Decision Under Review: Appeal from the Circuit Court of De Kalb County, No. 23-LA-44; the Hon. Bradley J. Waller, Judge, presiding.

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